

CASE SCENARIO Spring 2014

Tobin Dufour

V.

CANADA
(Attorney General)

*This OJEN Charter Challenge Case Scenario has been adapted from the Official Problem used at the **2013 Wilson Moot**. The Wilson Moot was conceived to honour the outstanding contribution to Canadian law made by the late Honourable Bertha Wilson and, in the spirit of this contribution, to promote justice for those disempowered within the legal system. The goal of The Wilson Moot is to explore legal issues concerning women and minorities, and thereby promote the education of students and the legal profession in these areas of pressing concern. OJEN would like to thank the organizers of the Wilson Moot for letting it adapt this law school resource for a high school audience.*

Ontario Superior Court of Justice**Date: 20141703****Court File No: 20537-14****BETWEEN:****ATTORNEY GENERAL****Respondent****and****TOBIN DUFOUR****Applicant****REASONS FOR DECISION****MacDonald J.****Introduction**

1. Tobin Dufour is a patient of the Pine Ridges Centre for Mental Health (“Pine Ridges”) in London, Ontario. He was found not criminally responsible (NCR) for having murdered his father several years ago, and has been in custody at Pine Ridges since. His older brother, Marcel, is Tobin’s guardian for the purposes of the *Substitute Decisions Act*, and is empowered to make medical decisions on his behalf.

2. Tobin was diagnosed with schizophrenia over a decade ago. Despite the efforts of various psychiatrists (including those at Pine Ridges), Tobin spends much of his time in a psychotic state, though he does experience periods of lucidity. During his lucid periods, he is overcome with guilt about having killed his father, and is horrified by the treatments he is subjected to in an attempt to control his illness. He has on many occasions expressed a desire to end his life, but due to the circumstances of his incarceration at Pine Ridges, is unable to do so.

3. In the summer of 2012, Parliament enacted amendments to section 241 of the *Criminal Code* to permit physician assisted suicide in certain limited circumstances. Tobin has been in a state of psychosis since the amendments were passed. Shortly after the amendments came into force, Marcel approached Tobin's treating psychiatrist, Dr. Graham Munroe, about obtaining an assisted suicide for Tobin in accordance with his previously-expressed wishes to end his life. Dr. Munroe was sympathetic to the request, but declined due to concern that he would be prosecuted under section 241 of the *Criminal Code* because Tobin's circumstances did not fall within those prescribed by Parliament.

4. Marcel, acting as Tobin's litigation guardian, commenced an application against the Attorney General of Canada in the Ontario Superior Court of Justice, seeking declarations that:

- i. Section 241.1 of the *Criminal Code* infringes section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), because it discriminates against patients with incurable mental illnesses (as opposed to terminal physical illnesses);
- ii. Section 241.1 of the *Criminal Code* infringes section 7 of the *Charter* because it deprives patients with incurable mental illnesses of liberty and security of the person in a manner not in accordance with the principles of fundamental justice;

5. For the reasons that follow, I find that section 241.1 infringes both section 15(1) and section 7 of the *Charter* and cannot be saved by section 1.

The Facts

6. Tobin was born in 1980; his parents divorced shortly afterwards. His mother passed away when he was seven years old, and he and his older brother Marcel were sent to live with their father, Marc, whom they had seen only sporadically since the divorce. Tobin was deeply affected by his mother's death and was often difficult and aggressive. Marc had difficulty coping with his son and often disciplined him physically, which led to Tobin being removed from the family home and being placed in a group home when he was fourteen.

7. In the four years he lived in the group home, Tobin's behaviour was erratic. While at times he would excel at school and get along well with the other residents, he experienced increasing episodes of withdrawn and bizarre behaviour. He was referred to Dr. Said Nejatian, a psychiatrist, and was treated with medication for attention deficit disorder and depression, but there seemed to be little improvement in his behaviour.

8. In 2000, Dr. Nejatian diagnosed Tobin with undifferentiated schizophrenia. Tobin's schizophrenia was not well controlled despite Dr. Nejatian's best efforts to treat him. Tobin was often not compliant in taking his medication, but even when he did, the medication seemed to be of little help in controlling his psychotic episodes. As a result of his mental illness, Tobin was dependent on welfare and was homeless from time to time.

9. During Tobin's psychotic episodes, he experiences hallucinations, including a recurring delusion that he will be kidnapped and handed over to government doctors who will perform medical experiments on him. He becomes aggressive and sometimes violent whenever he perceives that someone is attempting to control his movement. He is also terrified of doctors and hospitals.

10. His brother Marcel has always attempted to maintain a relationship with Tobin and has been the only consistently supportive influence throughout his life. Their father Marc also attempted to reach out to Tobin from time to time, which given their history, did not go well.

11. In October 2008, Tobin visited Marc at Marc's home, while he was in a psychotic state. During that visit, Marc threatened to have Tobin committed to a psychiatric hospital where they would "sort him out for good". Tobin reacted by stabbing Marc nineteen times with a chef's knife from the kitchen counter. A neighbour called 911. Marc was pronounced dead and Tobin was arrested at the scene and charged with second-degree murder.

12. In April 2009, a judge found Tobin not criminally responsible (NCR) for murdering Marc. Following a hearing before the Ontario Review Board, he was remanded to the medium-security unit at Pine Ridges for treatment, where he has remained since.
13. Pine Ridges is a world-renowned mental health facility that performs research as well as treating patients. Dr. Munroe is a widely-respected authority on the subject of undifferentiated schizophrenia and has published several papers on ethical issues associated with treating psychotic patients (though none on the subject of assisted suicide). Dr. Munroe has been the lead physician on Tobin's case since his arrival at Pine Ridges.
14. Despite the excellent care Tobin has received at Pine Ridges, his condition has worsened and Tobin is now psychotic most of the time. His medication regime is primarily focused on calming his anxieties and controlling his aggression. These medications have a number of side effects including lethargy, dizziness, and loss of motor control. Despite being medicated, Tobin often has to be restrained to his bed.
15. During a period of lucidity, Tobin consented to treatment with electroconvulsive therapy (ECT); Marcel has twice since consented on his behalf to ECT. As there was no significant improvement in Tobin's condition, Marcel withdrew his consent to this form of treatment.
16. Over the course of his detention at Pine Ridges, Tobin has experienced only four lucid periods, each lasting between three and five days, the most recent of which was in March 2012. During each of these lucid periods, he has been visited by Marcel and seen at length by Dr. Munroe.
17. In each of his last three lucid periods, Tobin has told both Marcel and Dr. Munroe that he wishes to end his life. He is overcome with guilt for having killed his father. Moreover, he is horrified to learn about his psychotic behaviour and that he is frequently placed in restraints, which he considers "barbaric". Tobin believes that his quality of life is basically non-existent, and is appalled by the idea that he may live forty years or more in these conditions.

18. During two of his lucid periods, Tobin attempted to commit suicide—first, by strangling himself with a bed sheet, and on the second attempt by cutting his wrists with shards of a broken mirror. Since that time, preventive measures have been put in place to prevent Tobin from harming himself.

19. The term “competent” means “having the ability to understand the information relevant to making a decision about a medical treatment, and the ability to appreciate the consequences of that decision”. During his lucid periods, Tobin was competent for the purposes of this definition. At all other times during his detention at Pine Ridges, Tobin has not been competent. In particular, he has not been competent since the end of his last lucid period in March 2012.

20. Marcel unequivocally supports Tobin’s wish to end his life. In his affidavit filed in support of the application, he stated:

I am very sad at the thought of losing my brother. Despite his difficulties, I love Tobin and my relationship with him is very important to me. The first time Tobin told me he wanted to end his life, I was very upset and tried to talk him out of it. Since then, however, I have come to see his point of view. I visit him at least three days every week for an hour or more, even when he is psychotic and barely seems to recognize that I am there. It breaks my heart to see him tied to his bed, terrified by things that only he can see, drooling on himself, or crying. I understand that there is virtually no chance that his condition will ever improve, and I feel strongly that this is no life for him.

21. In his affidavit, Dr. Munroe stated:

I have no hesitation in stating that Tobin’s mental suffering is incredibly severe. I do not believe that Tobin will ever recover to a point where he will be released from Pine Ridges. I believe that Tobin’s request to end his life, as it has been expressed in his periods of lucidity, has been well-informed and enduring. During his lucid periods, we have discussed the limited options available to treat his illness and the low likelihood that his condition will improve. We have attempted every form of treatment I know of for this illness, but sadly without success. I have given this issue countless hours of thought and study and have come to the conclusion that, in these particular circumstances, it is my medical duty to help Tobin bring his suffering to an end. If this application is allowed, I would be prepared to assist Tobin in ending his life.

22. Dr. Munroe also stated in his affidavit that he had consulted Dr. Serena Gall, a fellow psychiatrist at the Centre for Addiction and Mental Health in Toronto, about Tobin’s case. Dr. Gall affirmed an affidavit in which she concurred with Dr. Munroe regarding Tobin’s poor prognosis, and stated that if Tobin’s application to the court were allowed, that she would be willing to provide the opinion required under section 241.1(1)(e) of the *Criminal Code*.

23. Dr. Gall further affirmed that over the course of her career, she has encountered “numerous” cases of incurable psychiatric illness that she believes left those patients in intolerable mental suffering and subject to conditions that Dr. Gall considered “an assault on their independence and dignity as human beings”. Prior to the amendments to the *Criminal Code*, two such patients approached Dr. Gall for assistance in ending their lives, but she refused on the basis that providing any such assistance would be illegal.

24. In cross-examination on their affidavits, both Dr. Munroe and Dr. Gall admitted that, as a general proposition, it can be more difficult to give a certain prognosis in cases of mental illness than in cases of terminal physical illness. One reason for this is that the field of psychiatric medicine is evolving, and new treatments may have promise in difficult cases.

25. The Crown adduced the following expert evidence from Dr. Anna Brean, a professor from Dalhousie University who holds an M.D. and a Ph.D., and who is an expert in the sociology of mental health:

- a. Taken together, the federal and provincial governments have spent approximately \$180 million on mental health awareness and suicide prevention programs over the past three years. The key objectives of these programs have been to destigmatize mental illness and to urge people with mental health issues to seek medical attention.
- b. In the past 15 years, an annual average of 3600 people have committed suicide in Canada. Approximately 60% of these people suffered from depression, with another 30% having some other type of mental illness or addictive disorder.
- c. Patients with serious psychiatric illnesses are generally at a higher risk of neglect or abuse than patients with many other types of disabilities. Dr. Brean is concerned about the risk that such patients may be vulnerable to involuntary or non-voluntary euthanasia.

- d. As a medical doctor, Dr. Brean feels strongly that physician-assisted suicide is unethical in any circumstances; in her view it is contrary to the Hippocratic Oath, and sends a message that the lives of severely disabled people are not socially valuable. Dr. Brean is aware of several medical associations and advocacy groups that share this view.
26. In cross-examination, Dr. Brean agreed that the care provided to Tobin by Dr. Munroe was the “gold standard”, and that she could not think of any additional treatment that was likely to be successful in treating Tobin’s schizophrenia that Dr. Munroe had not attempted.
27. The applicant adduced the following expert evidence from Dr. Peter Wallins, a psychiatrist who is affiliated with an advocacy group called Physicians for Death with Dignity:
- a. There remains a diversity of opinions in the medical profession about the ethics of physician-assisted dying. A significant minority of physicians are of the view that physician-assisted suicide is medically defensible in cases of incurable psychiatric illness, in certain circumstances.
 - b. Suicidal ideation is a feature of many psychiatric illnesses; however an expressed wish to die is not the manifestation of a mental illness in each and every case.
 - c. Studies performed in jurisdictions where physician-assisted suicide has been legal for at least 10 years show that the primary motivators for patients’ requests for an assisted suicide are: loss of independence (86% of cases), loss of dignity (82% of cases), and desire not to be a burden on loved ones (73% of cases). Physical pain was cited as a factor in slightly less than half (46%) of cases.
 - d. There are a handful of jurisdictions where physician-assisted suicide is permitted both in cases of physical and psychiatric illness. A survey of the experience of those jurisdictions found that approximately 10% of the total number of requests made by patients for physician-assisted suicide involved cases of psychiatric illness. In 80% of those cases, the physician declined to assist the patient to end his or her life. The most commonly cited reason for the refusal was that the patient was suffering from depression, which the physician felt could be appropriately managed by other means.
28. Section 241.1 of the *Criminal Code* was enacted following a series of high-profile cases in which patients suffering from Lou Gehrig’s disease or terminal cancers travelled abroad to obtain physician-assisted suicides in countries where it was legal. There was also media attention and public debate around several other cases in which patients suffering from such illnesses

passed away in deplorable conditions in Canada because they were unable to travel abroad to obtain this treatment.

29. In early 2011, a survey undertaken by the Canadian Association of Physicians (CAP) found that a slim majority (52%) of Canadian physicians agreed with the following statement: “Physician-assisted suicide is medically and ethically permissible to alleviate cases of unbearable suffering with no realistic prospect of relief, where the patient will likely otherwise die within two years, and if the patient has made an informed decision to end his or her own life and clearly communicated that wish to his or her treating physician.”

Relevant Legislation

30. The relevant provisions of the *Criminal Code* are as follows:

SUICIDE

Counselling or aiding suicide

241. Every one who

- (a) counsels a person to commit suicide, or
- (b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Physician-assisted dying

241.1 (1) Despite sections 14 and 241 of this Code, a physician commits no offence where the physician provides and/or administers a lethal dose of medication to a patient, for the purposes of assisting the patient to end his or her life, where all of the following conditions are met:

- (a) the patient is competent;
- (b) the patient has repeatedly and explicitly expressed the wish to end his or her life;
- (c) the patient is experiencing severe pain as a result of a terminal illness;
- (d) the physician has informed the patient of the treatments available for the patient’s condition, and those options have been exhausted or refused by the patient; and

- (e) the physician has consulted a second physician, who has provided a written opinion that it is in the patient's best interest for the patient to be able to end his or her life.
- (2) Where a physician provides and/or administers a lethal dose of medication to a patient as permitted by subsection (1), the physician must inform the local coroner within 24 hours of having done so.
- (3) For the purposes of this section, "physician" means a person who is licensed by the college of physicians and surgeons (or equivalent authority) of a province to practice medicine.
- (4) For the purposes of this section, "patient" means a person who is being treated by the physician for a medical condition.

Legal Issues

31. The parties agree that there are four legal issues that I need to decide:
1. Does section 241.1 of the *Criminal Code* infringe Tobin's right to equality under section 15(1) of the *Charter*?
 2. Does section 241.1 of the *Criminal Code* constitute an ameliorative law or program within the meaning of section 15(2) of the *Charter*?
 3. Does section 241.1 of the *Criminal Code* infringe Tobin's section 7 *Charter* right to liberty or security of the person?
 4. If s. 241.1 of the *Criminal Code* infringes either Tobin's section 15(1) or section 7 rights, is the infringement justified under section 1 of the *Charter*?

ISSUE ONE: Does s. 241.1 of the *Criminal Code* infringe Tobin's right to equality under s. 15(1) of the *Charter*?

32. Section 15(1) of the *Charter* protects against discrimination:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

33. The test for determining a section 15(1) violation was set out by the Supreme Court of Canada in *R. v. Kapp*, and more recently re-affirmed in *Quebec (Attorney General) v. A*. To determine whether a law discriminates, two questions must be asked:

- (1) Does the law create a distinction based on an enumerated or analogous ground?
- (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Quebec (Attorney General) v. A, [2013] 1 SCR 61
R. v. Kapp, [2008] 2 SCR 483

34. The applicant argues that the effect of paragraph 241.1(1)(a) and paragraph 241.1(1)(c) of the *Criminal Code* disproportionately excludes people who experience severe pain as a result of a mental, as opposed to a physical disability. If the law did not demand competence and terminal illness as a prerequisite for physician-assisted suicide, Tobin would not be prevented from ending his life as he wishes.

35. The respondent argues that the physician-assisted suicide provision does not violate section 15(1) as any distinction made does not constitute an analogous or enumerated group. The Crown maintains that Tobin is excluded from physician-assisted suicide because he is not competent and does not have a terminal illness; these requirements do not disproportionately exclude the mentally ill.

36. I find that the requirements of “competence” and “suffering from a terminal illness” in section 241.1 of the *Criminal Code* discriminates against individuals with mental illnesses. The effect of these conditions is that individuals in unbearable suffering, who would otherwise satisfy all of the requirements of section 241.1, are denied access to a physician-assisted suicide, simply because their illness is mental rather than physical. Section 241.1 was drafted with numerous safeguards to ensure that physician-assisted suicide would be permitted only as a last resort, in cases of intolerable suffering, and where it is the patient’s unequivocal desire to end his or her

life, which protects mentally ill patients as much as they protect the physically ill. However, the amendments fail to take into account that severely mentally ill patients may find themselves in equally unbearable pain, and prevents them from ending their lives with dignity.

ISSUE TWO: Does s. 241.1 of the *Criminal Code* constitute an ameliorative law or program within the meaning of s. 15(2) of the *Charter*?

37. Section 15(2) of the *Charter* provides:

15.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

38. While section 15(1) is aimed at preventing discriminatory distinctions that adversely impact on members of groups identified by enumerated and analogous grounds, the government is allowed to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through section 15(2), the Charter preserves the right of governments to implement such programs, without fear of challenge under section 15(1).

R. v. Kapp, [2008] 2 SCR 483

39. A law will be protected under section 15(2) if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds.

R. v. Kapp, [2008] 2 SCR 483

40. The respondent argues that section 241.1 of the *Criminal Code* is a genuinely ameliorative program and is shielded by section 15(2) of the *Charter*. The amendments to the *Criminal Code* are aimed at improving the situation of severely disabled individuals who are unable, by reason of their physical disabilities, to end their lives when they choose.

41. The applicant argues that section 241.1 does not specifically target a disadvantaged group identified by the enumerated or analogous grounds, but actually distinguishes between individuals based on characteristics which are arbitrary.

42. I find that the first part of the section 15(2) test is met, but the second part is not. Section 241.1 does have an ameliorative purpose, but I am persuaded by the applicant's argument that the law does not specifically target a disadvantaged group identified by the enumerated or analogous grounds.

ISSUE THREE: Does s. 241.1 of the *Criminal Code* infringe Tobin's s. 7 Charter right to life, liberty or security of the person?

43. Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

44. The section 7 analysis consists of two stages. The first question is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice and determining whether the deprivation has occurred in accordance with the relevant principle or principles of fundamental justice.

Blencoe v. B.C. (Human Rights Commission), 2000 SCC 44.

45. The applicant argues that section 241.1 of the *Criminal Code* infringes Tobin's right to liberty and security of the person by preventing him from making fundamental choices about his body and his life.

46. The respondent argues that section 7 of the *Charter* does not encompass an individual's right to commit suicide, and moreover, Tobin's section 7 rights have been constitutionally limited due to his incarceration.

47. Prohibiting individuals from making fundamental choices about their body and their lives is a deprivation of liberty and security of the person. The choice to die in a manner of one's own choosing is a very personal decision which goes to the core of individual dignity and independence.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519
Godbout v. Longueuil (City), [1997] 3 S.C.R. 844

48. I am not persuaded by the respondent's submission that Tobin's constitutional rights have been limited by his incarceration. There is a distinction between prisoners who have been found criminally responsible for their crimes and those who have been found NCR due to a mental illness.

The NCR accused is to be treated in a special way in a system tailored to meet the twin goals of protecting the public and treating the mentally ill offender fairly and appropriately. Under the new approach, the mentally ill offender occupies a special place in the criminal justice system; he or she is spared the full weight of criminal responsibility, but is subject to those restrictions necessary to protect the public

Winko v. British Columbia (Forensic Psychiatric Institute), [1999] 2 S.C.R. 625 at para 30.

While a prisoner who has been found criminally responsible may have limits to her section 7 rights while incarcerated, I do not find that Tobin's section 7 rights are so limited in this case.

49. With respect to the second stage of the section 7 analysis, I find that section 241.1 of the *Criminal Code* is not enacted in accordance with the principles of fundamental justice because the law is arbitrary and grossly disproportionate to any legitimate public interest.

ISSUE FOUR: Is the infringement justified under s. 1 of the *Charter*?

50. As I have found that section 241.1 of the *Criminal Code* infringes both Tobin's section 15(1) and section 7 rights, I must now determine whether these infringements are justified under section 1 of the *Charter*. Section 1 provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

51. The physician-assisted suicide provision is undoubtedly "prescribed by law" because it is a duly enacted legislative provision. What I must determine is whether this law is a reasonable limit on Tobin's section 15(1) and section 7 rights.

52. The two-stage test for "reasonable limits" was established in *R. v. Oakes*:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

R. v. Oakes, [1986] 1 S.C.R. 103

53. I accept that protecting mentally ill individuals from abuse, specifically from being subjected to involuntary euthanasia, is a pressing and substantial objective, and that this infringement is rationally connected to that objective. Nevertheless, I am unable to conclude that a regime that totally excludes mentally ill individuals from being able to access physician-assisted suicide is minimally impairing of Mr. Dufour's rights. As such, sections 241.1(1)(a) and (c) cannot be saved under section 1 of the Charter.

CONCLUSION

54. Section 241.1 violates section 15(1) and section 7 of the *Charter* and these violations cannot be justified under section 1. The appropriate remedy is to read in the words "at the time of the patient's request that the physician assist the patient to end his or her life" to the end of section 241.1(1)(a) and to strike the words "as a result of a terminal illness" from the end of section 241.1(1)(c).

MACDONALD, J.