Youth Agency and the Culture of Law

Age of Majority and Age-Based Laws in Canada

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The age of majority is the age at which the law considers someone to have reached adulthood and is therefore a full legal citizen whose decisions no longer require the oversight of a parent or guardian. The age of majority allows one to independently enter contracts, make a will, and buy a lottery ticket, for example. The age of majority is not the same across all provinces of Canada. Rather, it is determined by each province and territory according to section 92(13) of Canada's Constitution Act, 1867. The age of majority applies to all provincial laws, and is set at either 18 or 19 depending on which province you live in. For federal laws – which apply to every Canadian regardless of which province that person lives in – the age of majority is 18. This includes eligibility for military service and voting in federal elections, for example.

Before examining in detail the rules and rationales behind age-based laws in Canada (and Ontario in particular), it may be useful to look at how the age of majority has been applied and conceptualized throughout history in some parts of the world. In the next section, we review the history of the age of majority in ancient Rome.

As you read about the age of majority in ancient Rome, keep in mind that while Roman law is an important influence on the Canadian legal system that exists today, it is not the only legal system that influences the experience of law in Canada. Indigenous peoples, who predated European colonists, had their own customs and legal systems.

Aboriginal legal traditions and reinvigorated approaches to traditional Aboriginal laws continue to be practiced in some communities across Canada. Federal and Provincial law in Canada draws heavily upon British and French laws (the latter being influenced by Roman law). These legal systems were introduced through the arrival of European colonists in North America in the 17th and 18th centuries.

As you read about the history of the age of majority in ancient Rome and how it differs across provinces in Canada, pay close attention to what the rationales justifying an age of majority imply about children, teenagers, and adults. In other words: *what do these rationales suggest about the way the law "sees" youth in your age group*?

History of the Age of Majority

In ancient Rome (753 BC – AD 476), individuals were not considered to have reached the age of majority until they turned 25. The age of puberty, meanwhile, was set at 14 for males and 12 for females. Those who were younger than 25 but had reached puberty possessed some legal capacity, unlike those who had not even reached puberty. This middle category of youth – 12 - 25 years of age for females and 14 - 25 years of age for males – could get married or be drafted into military service, for example. The law still recognized, though, that while these youth (whom we call teenagers and young adults today) were able to make their own legal decisions, they still needed some protection so that they weren't taken advantage of. Because of this, a guardian –

usually the male head of the family – oversaw their affairs. In the absence of a male head of the family, a guardian known as curator was appointed to protect the minor's best interests.

There was a possible exception to being treated as a minor under Roman law however. If someone had reached puberty but was under 25 and displayed *high maturity and intelligence*, he or she could be deemed to have reached the age of majority. In other words, though they were not 25, they would be treated under the law as if they were 25, and thereby would have their full capacity under the law respected. This exceptional privilege was referred to as *venia aetatis*. Generally, only males over twenty and females over eighteen could apply for this privilege. A public assembly would be convened to decide on the matter, and youth who requested this privilege would be required to provide proof of their age and have reputable and high-ranking men vouch for their character.

Centuries later in medieval Europe, the age of majority was determined by reference to the youth's *physical capacity* for military service, as opposed to maturity and judgment. In Europe from the 9th - 11th centuries, the age of majority was often set at 15 on the assumption that youth of this age had the strength and skill to wear and utilize military equipment and weapons (armaments) for combat. As the weight of armaments increased, and longer periods of training were needed to achieve knighthood and the requisite equestrian and combat skills for knighthood, the age of majority in

medieval Europe gradually increased, ultimately reaching 21 years of age.

For subjects who were not required to participate in the military – who instead provided agricultural services or paid rent in exchange for living on their lord's land – the age of majority generally remained at 14 or 15.

Most recently, determining the age of majority has reverted to considerations of the maturity and rational capacity of different age groups. During the mid-twentieth century, philosophers identified *the ability to think rationally and act independently* as the main characteristics required in order for someone to have and exercise legal rights. Although all children are recognized as right-holders, both national and international laws continue to treat age groups differently based on assumptions about their capacity for rational thinking and autonomy. As children grow older, the law presumes that these capacities increase; consequently, their ability to autonomously exercise their legal rights increases as well.

In Canada, age continues to be used as a condition to determine when someone can participate in certain activities that require either or both *physical and mental ability,* such as voting, driving, drinking, marrying, contracting, will-making, education, employment, and jury duty.

QUESTIONS TO CONSIDER:

1. What ages have Romans, Medieval Europeans, and modern Canadians selected as turning points from childhood to adulthood?

2. What different criteria did the Romans, Medieval Europeans, and modern Canadians use to set the age of majority in their societies?

3. Rank these criteria in order of importance to you and explain your choices for the top two criteria that should be applied in determining the age of majority.

International Law and Youth Agency: *United Nations Convention on the Rights of the Child*

Canada's laws related to youth are also influenced by the United Nations (U.N.) *Convention on the Rights of the Child*. The *Convention on the Rights of the Child* sets out basic rights that apply to children under 18 throughout the world. The Convention protects all children from discrimination on 13 specific grounds including ability, ethnicity, race, religion, and sex.

To briefly summarize, the *Convention* declares that all children have rights to:

- Proper care from parents, guardians, and governments who must all look out for the **best interests of a child**
- Access to good quality health care
- Protection from discrimination, exploitation, physical and mental abuse, and neglect
- Access to education and information through the media that is important to their well-being
- Participation in society through expressing their opinions, sharing these with others, and having their views respected and taken into account by others
- Rest, leisure, and play

The convention also includes specific rights for children with disabilities, children who have been abused, children who have broken the law, and Aboriginal children in Canada. In 1991, Canada ratified the Convention. While the Convention has led to some changes in our laws, it has not been fully implemented into Canadian law by Parliament. In a report released in 2012, the UN was critical of Canada's progress in upholding its obligation under the Convention.

The Age of Majority in Canadian Provinces

18 years of age

Alberta, Manitoba, Ontario, Quebec, Prince Edward Island, and Saskatchewan

19 years of age

British Columbia, New Brunswick, Northwest Territories, Nova Scotia, Nunavut, Yukon, and Newfoundland

For any activity that falls under the jurisdiction of the federal government, however, 18 is the age of majority. Therefore, regardless of what province you live in, once you turn 18 you can join the military without parental consent, vote in federal elections, and run for federal office. To be consistent with federal voting laws, provincial and municipal voting laws across Canada also set the minimum *voting age* (as opposed to age of majority) at 18.

QUESTIONS TO CONSIDER:

1. Why do you think that the United Nations and 6 provinces selected age 18, while 4 provinces and 3 territories selected age 19 for the age of majority?

2. Does it make sense that some provinces would allow you to vote at the age of 18, but limit your ability to do other things until you turn 19? For example, in Ontario, although the age at which you can legally vote is 18, the legal drinking age is 19. What does this say about the rational capacity required to vote, as opposed to drink? Do different activities require a different level of maturity and rationality?

Fitzgerald v Alberta:
Should the legal voting age be lowered to 16?

Election laws in Alberta, as in other provinces, allow individuals to vote in elections once they turn 18. In 2002, high school students Christine Jairamsingh and Eryn Fitzgerald campaigned to lower Alberta's voting age from 18 to 16 to allow them to vote for city councillors and school trustees. Eryn and Christine had lived in Alberta for their entire lives, and were both 16 when the province held municipal elections in October 2001. They believed that 16 and 17 year olds were capable of making an informed choice, and deserved to have a say: "There are so many issues that are brought up and you don't get attention paid to you if you don't have the vote," said Fitzgerald. "We are taking this in school, we're forced to know this stuff. We're covering current events. We know a lot about it. We're educated."

Video: http://www.cbc.ca/archives/categories/politics/rights-freedoms/voting-in-canada-how-a-privilege-became-a-right/fighting-for-a-lower-voting-age.html

Eryn and Christine brought their challenge to court, arguing that the age restriction on voting was unconstitutional because it denied people under 18 the right to vote guaranteed to all Canadians, and discriminated against them based on age. Specifically, Christine and Eryn argued that the voting laws violated sections. 3 and 15(1) of the *Canadian Charter of Rights and Freedoms*:

Canadian Charter of Rights and Freedoms

3. *Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.*

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.*

Under s. 3, Christine and Eryn argued that the words "every citizen" included citizens of all ages, even minors, and thus the age restriction clearly violated this section. The government, defending the age restriction, argued against this interpretation. Instead, they claimed that the words "every citizen" contained implied restrictions that such citizens must qualify to vote based on age and residence.

The judge agreed with Eryn and Christine that aside from the requirement of being a Canadian citizen, s. 3 contained no other limitations on the right to vote. Accordingly, the court found that setting the voting age at 18 violated s. 3 of the Charter.

Next, the court had to consider whether the age restriction violated s. 15(1) of the *Charter*. To convince the court that s. 15(1) was violated, Christine and Eryn had to follow the test for discrimination set out by the court in the leading case, *Law v Canada (Minister of Employment & Discrimination)*. For the court to be satisfied that s.15(1) was violated, Christine and Eryn would have to show that: a) they were being treated differently because of their age; and b) this different treatment was discriminatory because it interfered with their dignity by resulting in them being marginalized, ignored, or devalued, and thus could not be a legitimate differentiation under the law.

The first part of this test was clearly met: the voting age restriction resulted in individuals under 18 being treated differently than individuals over 18. Under the second part of the test, Christine and Eryn argued that the ability to vote is a basic and fundamental part of living in a democratic country like Canada. They claimed that by denying them the ability to fully participate in society, the law interfered with their dignity.

The government disagreed that the age restriction was discriminatory. In response to Christine and Eryn's claims, they argued that age is different than other characteristics like race, religion, and gender, because age corresponds with ability. For example, while restricting all atheists from voting would certainly be discriminatory, restricting all individuals under 18 is not. A voting age set at 18, while not perfect,

corresponds to a significant difference in ability between children and adults.

As with s. 3, the judge again agreed with Christine and Eryn that the voting rule discriminated against them.

However, the case was not over. As part of a standard *Charter* analysis, the government was allowed to present evidence that the voting laws, despite violating their rights, were nonetheless reasonable limits on the rights of youth under 18. That the government could make this argument – namely, admit that their rights were being violated but still justify this as necessary – is also part of any *Charter* analysis. Section 1 of the *Charter* states:

> ***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.*

The judge decided that, while discriminatory, setting the voting age at 18 was a *reasonable* limitation on the rights of younger individuals, and so ultimately rejected Christine and Eryn's claim. The judge based his decision on the opinion that *some* age restriction on voting was necessary to make sure that those who vote are mature enough to make an informed and independent decision, and 18 years of age seemed to be

the most appropriate choice:

> It is clear that some restriction is necessary since newborns and young children clearly do not have sufficient maturity to cast a rational and informed vote. Since there is no test to determine voting ability… individual evaluation of every potential voter is not even an option, leaving aside practical and budgetary considerations. Completion of high school, financial independence, and marriage are other possible indicators of maturity, but none of these are necessarily connected to the ability to cast a rational and informed vote.
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> Since an age-based voting restriction is necessary, the only matter remaining to be considered is whether setting the age at 18, rather than 16, 17 or some other age, impairs the right to vote and the right to equality as little as reasonably possible. Since individuals mature and develop at different rates, and their life experience varies greatly, any reasonable age-based restriction is going to exclude some individuals who could cast a rational and informed vote, and include some individuals who cannot.
>
> **Common sense** dictates that setting the restriction at age 18 does not go further than necessary to achieve the legislative objective. In general, 18 year olds as a group have completed high school and are starting to make their own life decisions. They must

decide whether to continue with their schooling or join the workforce. This often coincides with the decision whether to remain at home with their parents, or move out on their own. It makes sense that they take on the responsibility of voting at the same time as they take on a greater responsibility for the direction of their own lives. Experience is a legitimate consideration in evaluating a voting restriction.

Furthermore, it can be assumed that by age 18 more individuals will have completed high school social studies courses giving them some information about our political system and our history as a nation. The completion of these courses gives these individuals important background knowledge for rational and informed voting.

QUESTIONS TO CONSIDER:

1. Do you agree with the court's decision in *Fitzgerald v Alberta?* Is 18 the appropriate age to set as the minimum voting age? Should it be higher or lower?

2. Does it matter that the teenagers wanted the right to vote only for city councillors and school trustees? Why do you think they limited their request to only these elections and not all elections?

3. What does the judge mean by "common sense" and "experience"? Do you share his "common sense"? Do you agree with his comments on "experience"? Why or why not?

QUESTIONS TO CONSIDER:

4. Is it fair for the law to assume that teenagers develop the capacity to make informed decisions at the same time?

5. What would you argue to the court if you were representing Christine and Eryn? What if you were representing the government?

6. Prepare a debate in your class to argue for and against granting the right to vote in all elections in Ontario to students under the age of 18 who successfully pass the Grade 10 Civics course.

In August 2013, a recent high school graduate named Hirad Zafari wrote an article in support of lowering the voting age to 16 for school board elections.

READ: "Why wait until 18 to vote? Let's start at 16" The Globe and Mail, August 2, 2013: http://www.theglobeandmail.com/news/national/education/why-wait-until-18-to-vote-lets-start-at-16/article13430567/

"Lowering the voting age for trustee elections is the first step in increasing youth citizenship and reducing youth apathy – and it makes the most sense, too. Unlike provincial or federal politics, educational politics affect all students under the age of 18, and their opinions are invaluable. Students are the only ones who can say, with conviction, what works and what does not in their classrooms. When it comes to policy, they know what would benefit their learning experience, and when it comes to trustees, they should know who would benefit their learning experience."

QUESTIONS TO CONSIDER:

1. Read the Globe and Mail article by Hirad Zafari. Should the age requirement for school board elections be different than for municipal, provincial, and federal elections?

In California, a group of youth proposed legislation that would lower the state's voting age to 14. Rather than counting as a full vote, however, the votes of 14- and 15-year-olds would count as ¼ of an adult vote, and the votes of 16- and 17-year olds would count as ½ of an adult vote.

Supporting the legislation, State Senator John Vasconcellos observed that lowering the voting age in this way "would much more likely develop [youths'] sense of responsibility" while still recognizing that "they're not fully mature." Art Croney, a member of the Committee on Moral Concerns, opposed the legislation, stating that young teenagers lack the life experience necessary to vote and do not have "legal responsibility for their own lives." Their votes could be "susceptible to peer pressure, even a rock or a rap song." The legislation did not pass.

QUESTIONS TO CONSIDER:

Read the article at: http://www.sfgate.com/politics/article/Teenage-voting-rights-proposed-Ballot-would-2783145.php. Would you support a similar amendment to voting laws in Canada? What are the pros and cons of adopting this system?

Challenges to Age-Based Laws: Consent to Medical Treatment

Manitoba (Director of Child & Family Services) v C(A)

Under Manitoba's *Child and Family Services Act* (CFSA), minors who are 16 years or older can consent to their own medical treatment, unless they are unable to understand the relevant facts and consequences of the decision. For children under 16 years of age, however, a court can make a decision about medical treatment that they decide is in the best interests of the child. In *Manitoba (Director of Child & Family Services) v C(A)*, A.C., a "mature" 14-year-old girl from Manitoba who identified as a Jehovah's Witness, tried to challenge this law based on her religious beliefs.

> *As you learn the details of this case, think about which decisions a young person who shows evidence of maturity should be allowed to make. Should a mature minor be allowed to make her own medical decisions – including a decision that might threaten her life?*

A.C. was a 14-year-old girl in Manitoba who was admitted to hospital after suffering from internal bleeding due to Crohn's disease. The doctors at the hospital wanted to give A.C. a blood transfusion: without the blood transfusion, they believed that A.C. could potentially lose her life, and at the very least would suffer from serious long-term health consequences. As a devout Jehovah's Witness, however,

A.C. refused to consent to the blood transfusion. As part of her faith, A.C. believed that the Bible prohibited blood transfusions. A.C.'s parents supported her decision, stating that she "treasures her relationship with God and does not want to jeopardize it" and that she "understands her disease and what is happening".

While at the hospital, three psychiatrists completed an assessment of A.C.'s mental state to determine whether she in fact fully understood the consequences of this decision. The psychiatrists found that A.C. was cooperative, well-spoken, and did not have any psychiatric illnesses. They concluded that: "The patient understands the reason why a transfusion may be recommended, and the consequences of refusing to have a transfusion."

Despite A.C.'s religious beliefs and the findings by the psychiatrists that she was fully aware of the significance of the decision, the trial court ordered A.C. to undergo a blood transfusion against her will. The trial judge's decision was based on the CFSA in Manitoba, which states that a court can make a decision about medical treatment that is in the **best interests of the child** and does not need the consent of the child if he or she is under 16. In contrast, a child aged 16 or older, was presumed to have the capacity to consent to his or her own treatment:

Child and Family Services Act

25(8) Subject to subsection (9), upon completion of a hearing, the court may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child.

25(9) The court shall not make an order under subsection (8) with respect to a child who is 16 years of age or older without the child's consent unless the court is satisfied that the child is unable

a) to understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or
b) to appreciate the reasonably foreseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment.

In determining the best interests of the child, the CFSA specifies a number of things that the court must consider, including:

- *the mental, emotional, physical and educational needs of the child and the appropriate care of treatment to meet such needs;*
- *the child's mental, emotional and physical stage of development;*
- *the views and preferences of the child where they can reasonably be ascertained; and*
- *the child's cultural, linguistic, racial and religious heritage.*

According to the trial judge, the CFSA allowed the court to step in to make a decision that they felt were in her best interests. Whether or not A.C. had the capacity to make her own decision, then, was irrelevant. The trial judge believed the hospital doctors' testimony that A.C. would be in immediate danger if she wasn't forced to have a blood transfusion. Approximately six hours after the decision, A.C. received the blood transfusion against her will, and recovered.

Nevertheless, A.C. and her parents decided to challenge the decision to order a blood transfusion in court. They argued that the sections of the CFSA that denied her the ability to give consent violated sections 2(a), 7, and 15 of the *Charter of Rights and Freedoms:*

Charter of Rights and Freedoms

2. *Everyone has the following fundamental freedoms:*

(a) freedom of conscience and religion;

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.*

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.*

A.C. argued that the CFSA was contrary to s. 7 of the Charter because not allowing those under 16 to prove that they are capable of making their own medical decision was an arbitrary restriction. This restriction in the CFSA, then, interfered with her right to liberty and security. Under s. 15(1), A.C. argued that the act discriminated against her because of her age. Finally, under s. 2(a), A.C. argued that the act interfered with her religious beliefs as a Jehovah's witness.

A.C. believed that these Charter rights were violated by the CFSA because the act did not allow her and others under 16 to prove their capacity. If the act allowed minors the ability to do this, it would not offend these Charter provisions.

The Supreme Court of Canada, in a decision written by Justice Rosalie Abella, disagreed with A.C. that these rights were violated. The Supreme Court ruled that the CFSA was constitutional, with 6 of the 7 judges in agreement. However, although the court ruled that the act was constitutional, A.C. didn't completely lose her case. She managed to convince the court that, in order to be constitutional, s. 25(8) and 25(9) of the CFSA should be interpreted in a way that allows an adolescent under 16 to provide evidence of her maturity, such as a psychiatrist's report like the one A.C. had submitted.

If a young person under 16 can persuade a court that she is mature enough to make her own medical decisions, then her views must be respected. According to Justice Abella:

> The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s. 25(8). In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor. If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent

> judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected. Such an approach clarifies that in the context of medical treatment, young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity.

The majority believed that the act was written in a way that allowed for this interpretation; interpreted in this way, the CFSA did not violate s. 7, s. 15, and s. 2(a) of the *Charter*. The following paragraphs outline the court's decision under each section of the *Charter*.

Right to life, liberty, and security (s. 7): The majority decided that s. 7 of the *Charter* was not violated because rather than assuming that no one under the age of 16 had the maturity to make a decision about their own treatment, s. 25(8) and 25(9) of the CFSA allowed for the possibility that an individual could have some input in the decision if they had provided enough evidence of their maturity. Justice Abella, writing for the majority, stated that:

> Given the significance we attach to bodily integrity, it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity

> to do so. Interpreting the best interests standard so that a young person is afforded a degree of bodily autonomy and integrity commensurate with his or her maturity navigates the tension between an adolescent's increasing entitlement to autonomy as he or she matures and society's interest in ensuring that young people who are vulnerable are protected from harm. . . .

Equality Rights (s. 15): Under s. 15, The Supreme Court stated that using the age of 16 as the age for presuming capacity was not discriminatory, because on the Court's interpretation of the CFSA, those under 16 can provide evidence of their maturity:

> By permitting adolescents under 16 to lead evidence of sufficient maturity to determine their medical choices, their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged.

Freedom of Religion (s. 2): Finally, the court found that A.C.'s religious rights under s. 2(a) of the *Charter* were also not violated because the act allowed a minor to provide evidence of his or her maturity. To add to this, the CFSA also states that religious beliefs would be taken into account in determining the best interests of the minor.

The court interpreted s. 25(8) and s. 25(9) of the CFSA to mean that, should they wish to make their own medical

decision, adolescents under 16 will have an opportunity to prove to the court that they are mature enough to do so. If a court agrees that the adolescent is mature, they must respect the adolescent's views. But that does not mean the court steps back to let the adolescent decide. The court, and not the adolescent, will ultimately make the final decision as to treatment based on what they think is best for the adolescent, in light of all the evidence. The majority found this necessary to look out for the best interests of a vulnerable group – minors.

Chief Justice McLachlin, agreeing with Justice Abella, also wrote part of the decision. She emphasized the importance of having the court make the final decision:

> Age, in this context, is a reasonable proxy for independence. The CFSA is not alone in recognizing age 16 as an appropriate marker of maturity for certain purposes. Below 16, many adolescents are physically dependent on parents for mobility (e.g. driving) and cannot work full-time. Most are also required by law to attend school. In other words, a variety of laws and social norms make them more dependent on their immediate families and peers in their daily lives than older adolescents. The danger of excessive parental and peer influence overwhelming free and voluntary choice is ever-present. Similarly, in the youth criminal law context, it is recognized as a principle of fundamental justice that young persons must generally be treated differently from adults by virtue of their

> "reduced maturity and moral capacity"… The CFSA acknowledges these realities and therefore places the final decision-making power with the courts in accordance with the best interests of the child.

Justice Binnie was the single dissenting judge. He agreed with the majority that the wishes of a mature child must be taken into account. But he went one step further. Justice Binnie argued that if an adolescent under 16 can prove to the court that she is mature and capable of understanding the facts and consequences of the decision, then the court should step back and allow the mature adolescent to decide her own treatment.

For this reason, Justice Binnie argued that the CFSA violated the *Charter* because the court could order treatment even when the child showed evidence of maturity. Denying mature minors the right to decide medical treatment could not be justified under the *Charter*:

> My colleague Abella J. acknowledges that judges should be required to take the views of a mature minor into consideration when the judge decides what is in the best interest of A.C. But this position ignores the heart of A.C.'s argument, which is that the individual autonomy vouchsafed by the Charter gives her the liberty to refuse the forced pumping of someone else's blood into her veins **regardless of what the judge thinks is in her best interest**. In my respectful view, the *Child and Family Services Act*… is insufficiently respectful

of constitutional limits on the imposition of forced medical treatment on a mature minor. …
A.C. is not an adult, but nor was she a toddler at the relevant time… Under Abella J.'s approach, the court may (or may not) decide to give effect to the young person's view, but it is still the court that makes the final decision as to what is best for the young person. This mature young person, however, insists on the right to make her own determination about what treatment to receive or not to receive, based on a mature grasp of her perilous situation.

QUESTIONS TO DISCUSS:

1. The decision in *Manitoba (Director of Child & Family Services) v C(A)* suggests that the court believes that minors are a vulnerable group whose autonomy must be limited so that decisions can be made in their best interests. In other words, the court seems to be expressing paternalistic beliefs about minors. Would you consider teenagers to be a vulnerable group? At what age should teenagers no longer be considered in need of protection through decision-making on their behalf?

QUESTIONS TO DISCUSS:

2. Do you agree with the majority or the dissent? Is it appropriate for the court to make the final decision on the best interests of a child under 16, even if that child seems capable of making her own decision?

3. What should a court take into account in determining whether or not a minor is mature?

Ontario

In Ontario, medical decisions are covered by the *Health Care Consent Act* (HCCA). Unlike in Manitoba, there is *no minimum age of consent* for medical treatment under the HCCA. For consent to a medical treatment to be valid, the patient must be determined by the physician to be *capable* of giving consent. Furthermore, the consent must be *informed* (meaning that the physician has provided enough information about the treatment) and *voluntary* (meaning that the patient cannot be coerced into giving consent).

Because there is no minimum age of consent, a person of any age could technically consent to treatment if they are determined to be capable of making the decision, and if consent is informed and voluntary. According to the College of Physicians and Surgeons of Ontario, "The *Act* does not identify an age at which minors may exercise independent consent for health care because the capacity to exercise independent judgment for health care decisions varies according to the individual and the complexity of the decision at hand. Physicians must make a determination of capacity to consent for a child just as they would for an adult."

The HCCA states that an individual is capable of making a medical decision if:

> "…the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as

the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

QUESTIONS TO DISCUSS:

1. While Manitoba chooses the age of 16 as a "reasonable proxy" for when minors are mature enough to consent to medical treatment, Ontario leaves it up to the physician to determine if a child at any age has the capacity to consent. Do you agree with Ontario's approach or Manitoba's approach? Would you suggest a different approach? Is there another age at which a young person should be allowed to make his or her own medical decisions?

QUESTIONS TO DISCUSS:

2. Should there be different rules for decisions that might be life-threatening?

3. Does it matter whether this decision is based on a religious belief? To what extent should the reasons for a young person's medical decision matter, if at all?

Makayla Sault

Makayla Sault was a 10 year-old girl from the New Credit First Nation near Caledonia, Ontario. Makayla was diagnosed with leukemia in January 2014, and was told by doctors that she would have a 75 per cent chance of survival if she received chemotherapy, but would likely die if she chose not to receive chemotherapy.

After 11 weeks of chemotherapy, which caused Makayla to suffer severe side effects, Makayla and her parents decided to stop using chemotherapy, and use traditional medicines instead. Makayla stated that she came to this decision after a spiritual encounter in her hospital room. The hospital referred Makayla's case to the Children's Aid Society, but they chose not to interfere.

WATCH: https://www.youtube.com/watch?v=NrF5wWQ4hIU

READ: First Nations girl chooses traditional medicine over chemo: http://www.cbc.ca/news/aboriginal/first-nations-girl-chooses-traditional-medicine-over-chemo-1.2644637

READ: Makayla Sault's case raises questions about child welfare laws: http://www.cbc.ca/news/aboriginal/makayla-sault-s-case-raises-questions-about-child-welfare-laws-1.2658155

QUESTIONS TO DISCUSS:

1. Who do you think should be responsible for making the decision about Makayla's treatment? Makayla, her parents, the physicians, a court, or another individual or group?

2. Should Makayla have been allowed to stop receiving chemotherapy? Why or why not?

QUESTIONS TO DISCUSS:

3. How would you determine whether Makayla has shown the "capacity" to make this treatment decision?

4. Compare Makayla's story with the case of A.C. in Manitoba. What are the differences in the two cases that may have led to different outcomes?

Key Terms

- Age of Majority
- Capacity
- Curator
- *Venia Aetatis*
- Discrimination
- Paternalistic
- Vulnerable