The next *Carter*? Medical assistance in dying and mature minors

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Abstract

In 2016, Parliament legalized medical assistance in dying (MAID) under certain limited circumstances. However, the criminal code provisions relating to MAID remain quite restrictive. A minor cannot ever legally access MAID regardless of their individual maturity or personal circumstances. In this brief article, I review the constitutionality of this restriction in light of the Supreme Court's prior decision in *AC v Manitoba (Director of Child and Family Services)*. In that case, the Court recognized the importance of an individualized approach when assessing the capacity of minors to refuse life-saving medical treatment. I argue that the Court's approach in *AC* is in significant tension with the categorical restriction on MAID for even the most mature minors. I conclude by briefly reviewing some countervailing considerations, which remain to be addressed by Parliament and the courts going forward.

Keywords: medical assistance in dying, mature minors, capacity, parliament

In 2016, Parliament amended the Criminal Code to permit medical assistance in dying (MAID) under certain limited circumstances.[1] Among other restrictions, MAID is only available to persons 18 years of age and older.[2] A healthcare professional cannot legally provide a minor with MAID, regardless of the minor's individual level of maturity or any other relevant personal circumstances.[3] While opinion remains sharply divided, recent evidence suggests that some Canadian physicians believe that this categorical prohibition is too restrictive. For example, in a survey of physicians conducted at a recent Canadian Medical Association session on assisted dying, 69% of respondents favoured expanding MAID to include mature minors who have sufficient decision-making capacity.[4] Notably, the federal government is actively examining the issue and a review is expected to be completed some time this year.[5]

In this article, I will briefly discuss the legal dimension of this debate. In particular – is Parliament's decision to deny mature minors MAID constitutional? In *Carter v Canada (Attorney General)*,[6] the decision which prompted Parliament to legalize MAID, the Supreme Court held that it is unconstitutional to prohibit assisted dying for competent adults (who meet specified criteria), but left the question of mature minors open. Still, the existing jurisprudence gives us some clues as to how the courts would approach the issue. I will outline some of the potential arguments on this question, without considering the actual legal framework under the relevant provisions of the charter. I will focus on one case, *AC v Manitoba (Director of Child and Family Services)*,[7] which is particularly relevant to this analysis.

AC was a 2009 Supreme Court case about a 14-year-old girl who wished to refuse a life-saving blood transfusion because of her religious beliefs as a Jehovah's Witness. Three psychiatrists assessed the girl and found that she understood the reasons for the transfusion and the consequences of refusing to have one. This assessment corresponds with the typical legal definition of capacity, which requires that a person understand the relevant information and appreciate the reasonably foreseeable consequences of different courses of action.[8] Nonetheless, Manitoba Child and Family Services (CFS) apprehended the girl and sought a court order compelling her to receive the blood transfusion. Section 25(8) of Manitoba's child protection legislation allows a Court to order medical treatment for a child in CFS custody if they are under 16 and the treatment

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[1] *Criminal Code*, RSC 1985, c C-46, ss 241-241.3.

[2] *ibid* at s 241.2(1)(b).

[3] *ibid*

[4] Vogel L. Physicians support assisted death for mature minors, but not mental illness. CMAJ. 2017; 189(36):E1173.

[5] Baum KB. Children, teens, parents asking Canadian pediatricians about assisted dying. The Globe and Mail. 2017 Oct 26. https://www.theglobeandmail.com/news/national/pediatricians-across-canada-report-fielding-questions-on-assisted-dying-survey/article36723278/

[6] 2015 SCC 5 [*Carter*].

[7] 2009 SCC 30 [*AC*].

[8] See e.g. *Health Care Consent Act*, SO 1996, c 2, Sched A, s 4(1).

is in the "best interests of the child,"[9] whereas section 25(9) of the legislation states that a Court *cannot* order treatment for a child *over 16* unless they lack capacity.[10] The girl in *AC* challenged the constitutionality of section 25(8) to the extent that it purportedly allowed a Court to order treatment for a child under 16 even if that child had sufficient capacity to evaluate the treatment and wished to refuse the treatment.

The Supreme Court held that section 25(8) was constitutional, but only after giving the phrase "best interests of the child" a nuanced interpretation. The court held that the "best interests of the child" must take into account a child's own views in a manner commensurate with their level of maturity.[11] Indeed, "[i]n some cases, courts will inevitably be so convinced of a child's maturity that .... the child's wishes will become the controlling factor."[12] Although there must be intense scrutiny of a child's maturity when their life or health is endangered, the child must still have the opportunity to demonstrate that they have the requisite capacity.[13] Most importantly for our purposes, the court observed that if section 25(8) could *not* sustain this nuanced interpretation, it would be "arbitrary and discriminatory" (and therefore presumably unconstitutional, although the court did not say this explicitly).[14] The Court observed:[15]

> If ss. 25(8) and 25(9) did in fact grant courts an unfettered discretion to make decisions on behalf of all children under 16, despite their actual capacities, while at the same time presuming that children 16 and over were competent to veto treatment they did not want, I would likely agree that the legislative scheme was arbitrary and discriminatory. A rigid statutory distinction that completely ignored the actual decision-making capabilities of children under a certain age would fail to reflect the realities of childhood and child development.

The categorical prohibition on MAID for minors, regardless of their level of maturity, is arguably inconsistent with this reasoning. It is inconsistent to say that a sufficiently mature minor must have their views considered in determining whether they receive life-saving treatment, but a minor cannot *ever* access MAID, no matter their level of maturity. There are, of course, legitimate concerns about the vulnerability of minors and the difficulties of assessing their capacity on an individual basis. However, the Supreme Court's reasoning in *Carter*, speaking about adults, already addresses this point:[16]

> Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying.

If a minor's capacity can be reliably assessed in the context of life saving care, it stands to reason that it can also be assessed in the context of MAID. Moreover, it is noteworthy that the provision in *AC* pertained to minors under 16, whereas the MAID restriction is for all minors under 18. Presumably, the argument that the provision at issue in *AC* was unconstitutional would have been much stronger had the provision differentiated between persons over and under 18, because the number of minors with the capacity to refuse life saving treatment will obviously tend to increase with age.

There are several important caveats here. Firstly, it is beyond the scope of this brief article to assess these arguments within the current framework for deciding constitutional issues of this nature, which has shifted since *AC*.[17] Secondly, there are numerous situations where age-based distinctions have been upheld by the courts. As the Court stated in *Gosselin v Québec (Attorney General)*, "age-based distinctions are a common and necessary way of ordering our society."[18] These distinctions "determine when a person can marry, vote, drive, consent to sexual intercourse and sell property."[19] That said, the nature of the interest in medical treatment situations is arguably among the most fundamental and deeply implicates many constitutionally protected values. This is particularly true of a decision to seek MAID. Finally, regarding the *AC* case specifically, there is an arguable difference between the ability of a court to *compel an undesired treatment*, and the ability of a child to *request a treatment*. It remains to be seen how courts would address this distinction.

[9] *Child and Family Services Act*, CCSM c C80, s 25(8) [*CFS Act*].

[10] *ibid* at s 25(9). Specifically, the provision states that a Court cannot order treatment for a child over 16 unless they are unable to "understand the information that is relevant to making a decision" or "appreciate the reasonably foreseeable consequences of making a decision to consent or not consent." As stated above, this is a typical legal definition of capacity.

[11] *AC, supra* note 7 at para 87

[12] *ibid.*

[13] *ibid* at para 86. See also *Carter, supra* note 6 at para 116.

[14] *AC, supra* note 7 at para 116. I note that an arbitrary law that infringes the right to life, liberty or security of the person violates section 7 of the charter, and section 7 violations are rarely upheld under section 1. See e.g. *Carter, supra* note 6 at para 95.

[15] *AC, supra* note 7 at para 116

[16] *Carter, supra* note 6 at para 115. See also *ibid* at para 116.

[17] Regarding s. 7. of the charter, see e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72.

[18] 2002 SCC 84 at para 31.

[19] *AC, supra* note 7 at para 110.