Factum of the interveners, the evangelical fellowship of Canada, Christian medical and dental society and physicians for life

Court File No. 26980

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for the Province of Saskatchewan)

BETWEEN:

ROBERT WILLIAM LATIMER

Appellant

- and –

HER MAJESTY THE QUEEN

Respondent

-and-

THE EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN MEDICAL AND DENTAL SOCIETY and PHYSICIANS FOR LIFE

Interveners

FACTUM OF THE INTERVENERS, THE EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN MEDICAL AND DENTAL SOCIETY and PHYSICIANS FOR LIFE

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PART I – OVERVIEW and THE FACTS

1. At its core, this appeal raises a single issue: does Canadian law equally protect the lives of all persons, or does it permit or condone the killing of some because of their physical or mental disabilities? While this appeal technically raises several legal issues concerning criminal law defences, charges to the jury and sentencing, they are sidebars to the fundamental question: was Tracy Latimer a person whose life enjoyed the same protection under Canadian criminal law as that given to every other person in Canada? These Interveners submit that Tracy was such a person. As a result of a deliberate and voluntary act her father killed her. For that criminal act Mr. Latimer should receive the same punishment as any other Canadian who deliberately kills another human being, and his appeal should be dismissed.

2. Some have observed that the current historical moment presents a choice between two cultures: a culture of life, or a culture of death. Canadian law already manifests a very tenuous attachment to a culture of life in that it requires a human being to be "born alive" before receiving legal recognition. If this appeal is granted, the law will signify that even being "born alive" is not enough to obtain legal protection for one's life. A successful appeal will mean that one's entitlement to live, in the eyes of the law, will depend upon one's physical and mental robustness and freedom from pain. A successful appeal will mean that a human being who is physically or mentally disabled and suffering from some degree of pain risks being killed, without legal sanction, if those who care for the person decide that her life is no longer worth living.

3. In an extraordinary passage from his reasons for judgment on sentencing, Justice Noble stated:

> "So I'm satisfied that *while you were compelled* to put Tracy out of her misery as you saw [sic] to alleviate her painful condition, you knew that the act would be seen as an act of murder at the time that you did it." (emphasis added)

The Constitution has been described as "a mirror reflecting the national soul". What does it say of the Canadian soul when one of its courts observes that a father was "compelled" to kill his daughter? To grant this appeal will harden the Canadian soul, will foster and encourage a culture of death in our country, and will say to the disabled that they are lesser beings who do not enjoy the full protection of Canadian law.

> Cheffins and Tucker, *The Constitutional Process in Canada* (2nd ed., 1975), as quoted in Peter W. Hogg, *Constitutional Law of Canada* (2d ed., 1985) at page 1
>
> *Respondent's Record*, p.51, Reasons for Judgment of Noble, J. on Sentence,

4. These Interveners, The Evangelical Fellowship of Canada (the "EFC"), The Christian Medical and Dental Society ("CMDS") and Physicians For Life ("PFL") were granted leave to intervene in this appeal by an Order of the Honourable Madam Justice Arbour dated December 17, 1999. These Interveners accept the facts set out in the Appellant's factum subject to the qualifications and additional facts set out by the Respondent in Part I of its Factum.

PART II – POINTS IN ISSUE

5. These Interveners will focus their submissions on Issues 2, 4 and 5 as set out in Part II of the Appellant's Factum.

PART III – ARGUMENT

First Issue: The Personhood and Dignity of Tracy Latimer

6. The legal issues in this appeal must be examined against the backdrop of a threshold issue - was Tracy Latimer a "person" in the eyes of the law and cloaked with the dignity and protection which surrounds a person; or, was she something less than a person whose killing should not attract the existing penalties of Canadian criminal law? If one acknowledges that Tracy Latimer was a person, then this appeal should fail. If one hesitates or equivocates in acknowledging the personhood of Tracy Latimer; if one considers that her mental and physical disabilities put the killing of her into a "different class" of offence, or registers at the "lower end" of the scale of culpability, then one opens the door to the arguments raised by the Appellant that he should be exonerated from killing of his daughter, or at least pay only a token price for her death.

Reasons for Judgment of Noble, J. on Sentence, *Respondent's Record,* p.23

7. Was Tracy Latimer, with her mental and physical disabilities and her pain, a person entitled to the full protection of the law? The simple answer should be "yes" – she was born alive and was 12 years old at the time of her death. Yet the reasons of Justice Noble on sentence and the significant amount of popular sympathy received by Mr. Latimer suggest that many view the killing of Tracy Latimer in a different light than the killing of an "ordinary" person. Justice Noble went so far as to characterize Mr. Latimer as acting "altruistically", implying that he was acting for the betterment of Tracy's interests, not his own. Once Canadian law begins to accept that some persons are better off dead than alive, either through the way it deals with criminal culpability or with sentencing, then Canadian law will have reached a point where it regards different persons to be of different worth. These Interveners submit that any notion that some people are better off dead than alive stands in direct opposition to the basic attributes of human personhood recognized by Canadian law and the equal dignity of all human beings.

Noble, J. Reasons on Sentence, *Respondent's Record,* p. 23

8. How does one go about ascertaining the attributes of human personhood? These Interveners submit that the Preamble to the *Charter* mandates a legal-philosophical approach to evaluating the issue of the attributes of Tracy Latimer's personhood. The Preamble states that the principles upon which Canada is founded in turn recognize two seminal principles: the "supremacy of God" and the "rule of law". By identifying two sources from which we must draw the legal principles on which our political order rests, the Preamble to the *Charter* signals that any effort to understand the meaning of civil rights by reason alone ignores the limits of human reason, the contingency of man and the supremacy of God. As a result, legal principles, especially those relating to the "being" or status of a person, must be discerned and interpreted with a humility stemming from man's "creatureliness", as well as with the objective of ensuring that all human beings enjoy fundamental legal protection for their human dignity as creatures. In this way the "supremacy of God" mandates that all humans be treated in accordance with the "rule of law".

9. Use of the Preamble in such a way recognizes the historical reality that a simple reliance on positive law to answer existential questions of status often results in the wrong answer. The United States Supreme Court, in the *Dredd Scott* decision, for example, held that under a proper interpretation of the U. S. Constitution, blacks were not persons. That

great advocate of civil rights, Dr. Martin Luther King, Jr., stressed that the justness of any law, the justness of any determination of the legal status of a person, lies in the extent to which the law corresponds to principles which transcend positive law. In his *Letter from the Birmingham Jail* Dr. King wrote:

> How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.
>
> Dr. Martin Luther King, Jr., *Letter from the Birmingham Jail* (San Francisco: Harper Collins, 1994), at 11-12

10. The *Charter* purports to articulate certain universal principles and import them into Canadian law – for example, the right to life, and equality before the law. By pointing to certain universal freedoms which positive law is required to protect, the *Charter* draws on sources which lie outside of positive law. These Interveners submit that part of the task which Canadian courts must undertake when interpreting the content of those universal freedoms is to explore and understand the principles which flow from those other sources. Theology and philosophy are those other sources. Looked at in this way, "the supremacy of God" and the "rule of law" are the twin lenses through which courts must look when grappling with the foundational issues of Canadian law.

(i) Tracy Latimer's Personhood and Dignity from the viewpoint of "the supremacy of God"

11. When one considers the attributes of personhood from the perspective of the Jewish and Christian traditions which have informed Canadian law, one sees that a person is regarded as a creature, created by a divine being. As put in the first chapter of *Genesis*: "God created human beings in his own image; in the image of God he created them; male and female he created them." In his recent book, *Natural Law in Judaism*, University of Toronto Professor David Novak reflects on how these words of Genesis inform a legal notion of the person:

> What is it about the other person that I am to find attractive, which minimally entails that I refrain from harming him or her in any way? What is it about the other person that teaches me the most elementary moral law, which is the most basic human right: "Do not harm me"?…
>
> These questions, it seems to me, are better answered by an ontology and theological anthropology that emerges from the doctrine of creation, specifically the creation of the human person as the *image of God*. Human dignity, which is sufficient to ground the minimal right to life and safety of every descendant of the first humans, means that human beings *are* more than they can ever *do* or *make* of themselves…

> Ultimately, we affirm the worth of every human person because we believe somehow or other that we are all the objects of God's concern. To apprehend that concern and Who is so concerned for us is the desire of all desires." (emphasis in original)
>
> David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998), at 167-8 and 172

12. Two legal principles flow from regarding human beings as made "in the image of God" and by giving primacy to the fact of their existence ("they are") rather than to their utility ("they do or make"). First, all human beings enjoy equal dignity in the face of this higher creative power. If we are all made "in the image of God", then our personhood cannot be lessened by differences in our physical or mental attributes. Our humanness results from who are, not from what we do. Second, since, in Professor Novak's words, we are all "the objects of God's concern", it is not open to any one of us to take away the life of another.

13. Thus, when viewed from the perspective of the *Charter*'s foundational principle of the "supremacy of God", one is moved to concluded that Tracy Latimer must be regarded as a person who possessed the same qualities and dignity as any other human being because she was made in the image of God.

(ii) Tracy Latimer's Personhood and Dignity from the viewpoint of "the rule of law"

14. What, then, are the attributes of Tracy Latimer's personhood when examined in the light of the other foundational principle in the *Charter*, the "rule of law"? During the 17th and 18th Centuries the concept of inalienable human rights founded in human dignity emerged as the basis for the rule of law in democratic states. The American Declaration of Independence, for example, recognized "self-evident truths", including "that all men are created equal; that they are endowed by their creator with inalienable rights; that among these are life, liberty & the pursuit of happiness". While prior to 1945 the idea that the rule of law was based on inalienable human rights was found almost exclusively in some of the Western liberal democracies, the Second World War changed that situation. As stated by Cory, J. in *Kindler v. Canada (Minister of Justice)*:

> "The end of hostilities following World War II signalled a massive movement towards the greater protection of human rights. Prior to the war, international law paid scant attention to human rights. However, the atrocities committed during the war led to the international recognition of the fundamental importance of human dignity and human rights. The United Nations Charter of October 1945, Can. T.S. 1945 No. 7, provides:
>
> WE THE PEOPLES OF THE UNITED NATIONS
>
> DETERMINED
>
> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…
>
> The Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, adopted by the United Nations General Assembly in 1948 in a vote which Canada supported, illustrates the centrality of human dignity and worth in its preamble and in its articles:
>
> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Article I
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.
>
> *Kindler v. Canada (Minister of Justice*),[1991] 2 S.C.R. 779, at 804-5

15. Thus emerged the contemporary view that a person's human and legal rights stem from inalienable attributes of one's existence - his or her inherent human dignity. Dignity may be defined as "the quality or state of being worthy: intrinsic worth", or, the "principle of the dignity of the human person: which holds that a human being must be treated as an end in himself or herself." As such, dignity is an attribute of every human being, and is a quality intrinsic to the existence of each person.

> The *Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998)
>
> *Petit Robert 1*, quoted by L'Heureux-Dube, J., in *Curator v. SNE de l'Hopital St-Ferdinand*, [1996] 3 S.C.R. 211, at 254, para. 101.

16. Several international covenants have echoed the U.N. *Charter*'s recognition of the inherent dignity of all persons. The *International Covenant on Civil and Political Rights* speaks of "equal and inalienable rights" which "derive from the inherent dignity of the human person".

> *International Covenant on Civil and Political Rights, Preamble,* G.A.Res. 2200A(XXI), 21 U.N. G.A.O.R. Supp. (No. 15) at 52, U.N. Doc. A/6316, (1966), 999 U.N.T.S. 171, 1976 C.T.S., No. 47.

17. In Canada, most provincial human rights codes enshrine the dignity of the person as a basic and fundamental tenet of human rights. The *Saskatchewan Human Rights Code* states that one of its objects is "to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family". Within the *Charter,* itself, the guarantees of equality before the law and the equal protection of the law are grounded in the inalienability

of human dignity and, in this regard, section 15 specifically provides that its guarantees are available to any person, regardless of mental or physical disability.

> *Saskatchewan Human Rights Code* S.S. 1979, c. S-24.1, s. 3(a); Canadian *Bill of Rights*, R.S.C. 1985, App. III; Alberta *Human Rights, Citizenship and Multiculturalism Act* S.A. 1996, c. 25; British Columbia *Human Rights Code* R.S.B.C. 1996 c. 210; Manitoba *Human Rights Code* S.M. 1987-88, c. 45; New Brunswick *Human Rights Act* R.S.N.B. 1973, c. H-11; Newfoundland *Human Rights Code* R.S.N. 1990, c. H-14*; Northwest Territories Fair Practices Act* R.S.N.W.T. 1988, c. F-2; *Nova Scotia Human Rights Act* R.S.N.S. 1989, c. 214; Ontario *Human Rights Code* R.S.O. 1990 c. H-19; *Prince Edward Island Human Rights Act* R.S.P.E.I. 1988 c. H-12; Quebec *Charter of Rights and Freedoms* R.S.Q. 1977 c. C-12; Yukon *Human Rights Act* S.Y. 1987 c. 3

18. The centrality of inalienable human dignity to the Canadian legal system has been emphasized repeatedly by this Court. Mr. Justice Cory, in his dissenting judgment in *Kindler v. Canada* (Lamer, C.J. concurring), stated:

> "The fundamental importance of human dignity in Canadian society has been recognised in numerous cases. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. at p. 136 referred to the basic principles and values which are enshrined in the *Charter*. He wrote:
>
> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

In the *Kindler* case Cory, J. strongly rejected the suggestion that the legal sanctioning of killing people was compatible with human dignity calling the death penalty "…the ultimate attack on human dignity, the destruction of life by the state", and "…the annihilation of the very essence of human dignity."

> *Kindler v. Canada*, [1991] 2 S.C.R. 779 at pages 804, 813-814, 816f, 817j

19. Madam Justice L'Heureux-Dube explored the meaning of human dignity in the context of the Quebec *Charter of Rights and Freedoms* in her judgment in *Curator v. Sne De L'Hopital St.-Ferdinand*:

> "For its part, s. 4 of the *Charter* enshrines the right to the safeguard of personal dignity…

> In addition to being a right specifically protected by s. 4 of the Charter, dignity is, having regard to the preamble of the Charter, a value that underlies the rights and freedoms guaranteed therein:
>
> Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law;
>
> …
>
> In *Commission des droits de la personne du Quebec v. Lemay, supra*, the Quebec Human Rights Tribunal correctly, in my view, stated the essence of the right to safeguard of personal dignity: (at page 1972)
>
> [TRANSLATION] Consequently, every human being has intrinsic value which makes him or her worthy of respect. For the same reason, every human being is entitled to recognition of the rights and freedoms of the person and to the fully equal exercise thereof." [Emphasis in original]

Her Ladyship also noted that a person is entitled to respect "simply because he or she is a human being", and she specifically rejected the suggestion that a person's dignity might vary with one's level of mental development: "As Fish J.A. observed, however, when we are dealing with a document of the nature of the [Quebec] *Charter*, its is more important that we turn our attention to an objective appreciation of dignity…"

> *Curator v. Sne De L'Hopital St.-Ferdinand*, [1996] 3 S.C.R. 211 at page 254, and 256-7, para. 108

20. Canadian law spells out in numerous ways the practical, legal means by which it seeks to protect the inherent dignity of each human person. A core component of a person's dignity is the person's right to life. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person", and section 15 guarantees the equal protection of legal rights regardless of mental or physical disability. This constitutional right to life finds its most powerful protection in the proscriptions in the *Criminal Code* against culpable homicide. As has been stated by the Law Reform Commission of Canada, the criminal law is our Nation's fundamental statement of public policy and applied morality:

> "In truth the Criminal Law is fundamentally a moral system. It may be crude, it may have faults, it may be rough and ready, but basically it is a system of applied morality and justice. It serves to underline those values necessary or important to society. When acts occur that seriously transgress essential values, like the sanctity of life, society must speak out and reaffirm those values. This is the true role of criminal law."
>
> *Law Reform Commission of Canada*, Report No. 3 "Our Criminal Law" (1976) at p.16.
>
> Canadian *Criminal Code*, R.S.C. 1970, c. C-34 as amended, sections 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 228, 229, 230, 231, 232, 233, 234, 239, 242, 244249, 251, 253, 262

21. The principle of the sanctity of human life is an integral part of our civil and criminal law. As the Law Reform Commission of Canada stated:

> "Law in this respect faithfully reflects one of society's traditional attributes. Our society recognizes that morally, religiously, philosophically, and socially human life merits special protection. This recognition of life's fundamental importance has often been expressed by the concept of the sanctity of human life. One expression of this concept is that because life is God-given and we merely hold it in trust, we should not then interfere with it or put an end to it."
>
> Law Reform Commission of Canada, Working Paper No. 28, "Euthanasia, Aiding Suicide and Cessation of Treatment" (1982) at pp. 3-4

22. As Sopinka J. stated in *Rodriguez*, when commenting on Section 241(b) of the *Criminal Code* (the prohibition against assisting suicide):

> "Section 241(b) has as its purpose the protection of the most vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protection life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our Criminal Code which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life."
>
> *Rodriguez v. Attorney-General of British Columbia* (1993), 107 D.L.R. (4th) 342 (S.C.C.) at page 595

23. International declarations, international conventions, the Canadian Constitution, provincial human rights codes and jurisprudence under the *Charter* all recognize certain inalienable rights which are enjoyed by every person as a result of his or her inherent dignity. Thus, an examination of the attribution of Tracy Latimer's personhood using the twin lenses provided by the Preamble of the *Charter* shows that she was a person, who possessed the same inherent dignity as any other person; and, from that inherent dignity flowed certain inalienable rights, one of which was the protection of the law to ensure her right to life. It is against this background that this Court must assess the issues raised by Mr. Latimer. Having deprived his daughter of her inherent dignity and right to life by killing her, should Canadian law excuse Mr. Latimer for his conduct or create a special exemption for his act? These are the issues which these Interveners will address in the balance of this Factum.

Second Issue: The Defence of Necessity

24. These Interveners adopt the thorough submissions made by the Respondent to refute the Appellant's argument that the defence of necessity should have been left to the jury because his actions constituted a morally involuntary act and that he had no "reasonable alternative". The proposition advanced by Mr. Latimer that it was necessary to kill his daughter is repugnant to principles of equality and inherent human dignity**.** Mr. Justice Tallis of the Saskatchewan Court of Appeal was correct in stating:

> "[The case] deals with the deliberate decision to terminate another's life rather than continue with the scheduled medical treatment and care. In such circumstances it is no defence for a parent to say [that] because of a severe handicap, a child's life has such diminished value that the child should not live any longer. **It does not advance the interest of the state or society to treat such a child as a** person of lesser status or dignity than others.
>
> Furthermore, the evidence is clear that the appellant and his family did have an option. If they could no longer bear the burden of caring for Tracy, there was the real prospect of permanent placement in a group home." (emphasis added)
>
> *R. v. Latimer* (1995), 126 D.L.R. (4th) 203 (Sask. C.A.) at 234(g), 235(b)
>
> *Respondent's Factum*, paras. 50 to 74

25. The Appellant advocates a radical expansion of the concept of necessity. Stripped to its essentials, Mr. Latimer's argument about the "contextualization" of the defence of necessity would make the identification of any situation of necessity a purely subjective exercise. In the context of a parent looking after a disabled child, the assessment of necessity would become solely a function of the perceptions and preferences of the care-giver. If a care-giver concluded that a disabled person's circumstances merited death because the care-giver thought that death would be in the "best interests" of the disabled person, the defence of necessity would be available. Furthermore, the Appellant's conception of necessity suggests that there could be circumstances where care-givers of disabled persons are morally compelled to kill an individual. Since the defence of necessity results in an exoneration from criminal culpability, the circumstances which qualify for such exoneration must reflect objective standards of moral conduct agreed to by society as a whole, and which take into account the principles of inalienable rights and dignity discussed above. Otherwise, the defence of necessity would become a licence to engage in criminal conduct.

26. The concept of necessity advanced by the Appellant also implicitly suggests that some lives are not worthy of living and it is therefore "necessary" to kill such persons. These Interveners submit that once the law embarks upon comparing the relative worth of human lives, under whatever guise, it rejects any commitment to protect the inherent dignity of all persons and absorbs into itself an insidious principle which will only result in the abuse

and killing of the most vulnerable in society. The lessons of recent history must not be forgotten. Weimar Germany saw the publication in 1920 by a jurist and a psychiatrist of a tract entitled, "*Permission for the Destruction of Life Unworthy of Life"* in which the authors wrote:

> "Is there human life which has so far forfeited the character of something entitled to enjoy the protection of the law, that its prolongation represents a perpetual loss of value, both for its bearer and for society as a whole?"

The subsequent practice of euthanasia against the disabled in Weimar and National Socialist Germany traced its origins to an affirmative answer to that question. To date Canadian law has answered that question with a resounding "No"; however, to accede to the Appellant's radical definition of necessity would reverse that position and introduce into Canadian law the principle that some lives are unworthy of living.

> Michael Burleigh, *Death and Deliverance: 'Euthanasia' in Germany in 1900-1945* (Cambridge: Cambridge University Press, 1994), at 14-17.

27. Finally, by expanding the concept of necessity, the Appellant seeks to transform killing into a respectable way of dealing with the phenomena of human pain and disability. Pain and disability are common occurrences in human life. Our Constitution and human rights legislation does not carve out from the protection of the law those who are disabled or suffer pain; on the contrary, the law specifically provides that such persons enjoy the equal protection and benefit of the laws. This reflects a commitment by Canadian society to recognize the dignity of those who are disabled. The task of Canadian law is to ameliorate the condition of the disabled, not to sanction the termination of their lives.

Third Issue: The Assertion that a Parent can decide "to Commit Suicide" on behalf of a child

28. The Appellant asserts in his factum (Issue 4) that, as Tracy's legal guardian and decision maker, he had the right to make any surrogate decision for her, including suicide. These Interveners submit that this submission is both bizarre and dangerous.

29. A parent is under an obligation to act at all times in the best interests of the child under his care. As was stated by LaForest, J. in *Richard B. v. Children's Aid Society:*

> "The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system…"

In the same case, Iacobucci and Major JJ. stated:

> "The suggestion that parents have the ability to refuse their children medical procedures such as blood transfusions in situations where such a transfusion is necessary to sustain that child's health is consistent with the view, now long gone, that parents have

> some sort of "property interest" in their children. Indeed, in recent years, this Court has emphasized that parental duties are to be discharged according to the "best interests" of the child…The nature of the parent-child relationship is thus not to be determined by the personal desires of the parent, yet rather the "best interests" of the child.

Richard B. v. Children's Aid Society, [1995] 1 S.C.R. 315, at 374, para. 88; 432-3, para. 218

30. The legal obligation of parents to protect their children's right to life and health is reflected in the principles underlying the courts' inherent *parens patriae* jurisdiction. In *Re Eve* this Court stated:

> "The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".
>
> …
>
> Though the scope or sphere of operation of the *parens patriae* jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised…The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too. that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some individual."

Eve v. Mrs. E, [1986] 2 S.C.R. 388 at 426c and 427e

31. In the course of its decision in the *Eve* case this Court referred to the English Court of Appeal decision of *Re B (a minor)*, a case in which the parents of a child born with Down's Syndrome refused to consent to an operation which could save the child's life. The parents took the view that the kindest thing in the interests of the child was for her not to have the operation. In concluding that the court could not allow the child to die, Lord Templeman emphasized the protective quality of the court's *parens patriae* jurisdiction:

> "The evidence in this case only goes to show that if the operation takes place and is successful the child may live the normal span of a Mongoloid child, *and it is not for this court to say that life of that description ought to be extinguished."* (emphasis added)

Quoted in Eve v. Mrs. E, [1986] 2 S.C.R. 388 at p. 417

32. Substitute decision-makers statutes also stress the duty of a surrogate to act in the best interests of the beneficiary. The Saskatchewan *Health Care Directives and Substitute Health Care Decision Makers Act*, for example, stipulates that a guardian of the person

who does not know the wishes of the person requiring treatment, can only make a decision in respect of treatment "in the best interests" of that person.

Furthermore, the Act states explicitly that it does not authorize the use of a directive to consent to active euthanasia or assisted suicide.

> *The Health Care Directives and Substitute Health Care Decision Makers Act* S.S. 1997, c.H-0.001, s. 2(2)

33. The disabled, particularly those who are unable to consent to treatment, are vulnerable and in need of protection. Any weakening of the laws regarding the duties and responsibilities of guardians or decision makers is a serious threat to all of these individuals who are not able to speak for themselves. As Mr. Justice Major stated, in his dissenting judgment in *Winnipeg Child and Family Services:* "Someone must speak for those who cannot speak for themselves".

> *Winnipeg Child and Family Services v. G (D.F.),* [1997] 3 S.C.R. 925 at page 992

34. Canadian law requires a parent or guardian of a person to act all times in the best interests of a child and to protect the child's right to life and health. Canadian law does not permit a surrogate to decide to kill the vulnerable person under his care. Indeed, the Appellant has not relied on any case law to support his medical proposition that there is such a thing as a power to commit "surrogate suicide". These interveners submit that the concept of "surrogate suicide" advanced by the Appellant is simply a euphemism for "euthanasia". The Appellant seeks to persuade this Court that it should legalize euthanasia in cases where the victim was legally incompetent due to physical and mental disabilities. The reasons given by the Law Reform Commission of Canada in rejecting a call for the legalization of euthanasia remain as sound today as they were in 1983:

> "(T)he legalization of euthanasia is unacceptable to the Commission because it would indirectly condone murder, because it would be open to serious abuses, and because it appears to be morally unacceptable to the majority of Canadian people. The Commission believes that there are better answers to the problems posed by the sufferings of the terminally ill. The development of palliative care and the search for effective pain control methods constitute a far more positive response to the problem than euthanasia on demand. To allow euthanasia to be legalized, directly or indirectly, would be to open the door to abuses, and hence indirectly weaken respect for human life."
>
> Law *Reform Commission of Canada*, Report No. 20, "Euthanasia, Aiding Suicide and Cessation of Treatment" (1983) at p. 18

35. For these reasons this Court should reject the Appellant's assertion that he has any right as "surrogate" to take another person's life, and this Court also should refuse to tacitly condone the killing of a person without their consent.

Fourth Issue: Constitutional Exemption on Sentence

36. These Interveners agree with the submissions of the Respondent that the Appellant has not established that a minimum sentence of ten years for second-degree murder constitutes cruel or unusual punishment and that there is not any basis upon which a constitutional exemption could or should be granted in this case.

37. To grant the Appellant a constitutional exemption would send a clear judicial signal to Canadian society that killing a disabled person is not as "bad" as killing a "normal" person and that some lives are "lives not worth living". Simply put, a constitutional exemption would operate to stamp judicial approval on acts of euthanasia of the disabled.

38. A constitutional exemption would also operate as a judicial nullification of sections 235(2) and 745(c) of the *Criminal Code*. Assisted suicide and euthanasia are topics which have generated extensive debate in Canada during the past two decades. They involve profound issues affecting the meaning of life and the scope of legal protection which Canadian society offers to its most vulnerable members. These Interveners submit that any decision to change the current legal framework which protects the lives of the disabled should result from a full, open and wide-ranging debate which is properly done within the political, not the judicial, process. When this Court was asked to consider extending the protection of tort law to the unborn in the case of *Winnipeg Child and Family Services v. G(D.F.)*, it responded in the following fashion:

> "The proposed changes to the law of tort are major, affecting the rights and remedies available in many other areas of the law. They involve moral choices and would create conflicts between fundamental interests and rights….In short, these are not the sort of changes which common law courts can or should make. These are the sort of changes which should be left to the legislature.
>
> The point is that they are major changes attracting an array of consequences that would place the courts at the heart of a web of thorny moral and social issues which are better dealt with by elected legislators than by the courts."

The changes to the criminal law sought by the Appellant would be just as major and would equally involve a "web of thorny moral and social issues". Any consideration of changing the legal prohibition against euthanasia should be left to elected legislators.

Winnipeg Child and Family Services v. G(D.F.), [1997] 3 S.C.R. 925 at pages 941 and 943

PART IV - ORDER SOUGHT

39. For the reasons set out above, these Interveners respectfully submit that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Court File No. 26980

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Saskatchewan)

BETWEEN:

ROBERT WILLIAM LATIMER
Appellant

- and -

HER MAJESTY THE QUEEN
Respondent

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