Annotated Bibliography-Youth and Accessing Justice

A. Academic Articles

Thalia Gonzalez, "Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline" (2012) 41:2 Educ & LJ 283.

This article analyzes the implementation, development, and impact of school-based restorative justice programs across the United States, contextualizing the examination by providing a case study of North High School in Denver, Colorado. Restorative justice programs are utilized in the school system as an alternative approach to discipline that engages all parties and brings together the individuals impacted by the specific issue or behaviour.

The author divides her analysis into four main sections. In the first section, she criticizes punitive measures and addresses the far-reaching negative impacts of these punitive discipline policies in schools in order to establish the critical importance of adopting alternative methods of dealing with student behaviour.

- According to the author, it has been frequently documented that punitive discipline policies in schools not only deprive students of integral educational opportunities but actually fail to make schools a safer environment for students.
    - Exclusionary punishments, such as suspensions and expulsions, interfere with the education process and lead to a cycle of failure in which students experience decreased academic achievement that results in increased negative attitudes and likelihood of dropping out of school.
    - Studies also indicate that these punishments are not effective at reducing or preventing future problematic behaviour. Further, harsh sanctions tend to push students down the "school-to-prison pipeline", which is generally regarded as a significant civil and human rights challenge.

In the second part of her analysis, the author outlines the practice of restorative justice in schools, and the philosophy and foundation that underlies these programs.

- Restorative justice is based on three core principles: (1) repairing the harm; (2) stakeholder involvement; and (3) transforming the relationships between community members.
- Restorative justice models in the school system establish communities where students take responsibility to repair the harm that they cause, hold one another accountable, and build problem solving skills.
- Modern restorative justice models exist on a continuum, whereby school communities may implement restorative practices that range from formal to informal, and proactive to reactive processes. The implementation of restorative justice practices will be different in each school, and can be used to address different concerns. The author suggests that schools should use a three to five year implementation plan.

Thirdly, the author examines the implementation of The Restorative Justice Program at North High School in Denver, Colorado in order to provide context for engaging in non-exclusionary discipline processes.

- The Program involved both formal and informal methods, such as classroom and student-led circles, mediations, and conferences, which focused on the key restorative principles of identifying harm, establishing responsibility, and developing a remedy.
- The Program yielded very positive results by substantially decreasing the number of school suspension and office referrals and increasing attendance for many of the students who participated. The statistics also showed that the positive results increased over time.

In conclusion, the author asserts that schools have the opportunity to either exacerbate or ameliorate the vulnerability of students to future negative outcomes. Schools can foster more positive environments by moving away from harsh, punitive methods of discipline towards restorative justice practices. Restorative justice practices assists in building healthy relationships between individuals and empowers both students and staff members. The implementation of restorative justice models within the school setting will eliminate the "school to prison pipeline" that currently exists within many American schools.

Tia M Young, "Removing the Veil, Uncovering the Truth: A Child's Right to Compel Disclosure of His Biological Father's Identity", Note and Comment, (2009) 53:1 How LJ 217.

This article criticizes the decision in the American case of *Sutton v. Diane J* 273519 WL 840900 (Mich App 2007), arguing in favour of a cause of action on behalf of a minor child to oblige the child's mother to reveal the identity of the biological father when the mother has either failed to disclose the father's identity or failed to provide accurate information regarding the father's identity. In *Sutton v. Diane J*., "Minor J.", a seventeen year-old Michigan teenager, filed a lawsuit against his mother in order to compel her to disclose the identity of his biological father for the purpose of obtaining Minor J.'s medical history.

The author discusses a child's rights to bring a legal action. A minor child is unable to bring a legal action on his or her own behalf, as they are considered to be legally incapacitated by reason of age. Therefore, the child must be represented by a next friend, a guardian, or a guardian ad litem. The child often has the right to bring a cause of action to establish paternity that is separate from the mother's right, which is necessary for two reasons: (1) to allow the child to enforce his rights against the child's father, and (2) to allow the child enforcement of those rights separate from the actions of another party. In *Sutton v. Diane J.,* the minor child was born during the marriage of Diane J. and Michael J. When the two parties divorced in 1995, it was declared that Michael J. was born out of the marriage and was legally presumed to be the child of Michael J. In 2004, Michael J. requested a DNA test of Minor J., and the test confirmed that Michael J. was not the biological father. Minor J., through his next friend Karen Sutton, brought a paternity action against his mother to compel her to disclose the name of his biological father.

In order to determine whether Minor J. had a constitutional right to bring a paternity action against his mother, the court first considered whether Minor J. had standing. The *Michigan Paternity Act* dictates that a child has standing to bring the action if he is "begotten and born to a woman who was not married from the conception to the date of birth of the child", or where the court has determined that the child was "born or conceived during a marriage but not the issue of that marriage". Under these criteria, Minor J. lacked the necessary requirements for standing to pursue a cause of action. As well, the court said that Minor J. lacked constitutional standing. The Michigan Court of Appeals affirmed the trial court's order and held that "constitutional guarantees are not offended in denying the opportunity to pursue a paternity action".

The *Sutton* court decline to apply *Spada v. Pauley*, where the court held that an illegitimate child should be able to bring a cause of action to establish paternity despite the limitations of the *Michigan Paternity Act,* as denying the child the ability to ascertain parentage would amount to a deprivation in the legally enforceable right to obtain child support and this is a right that legitimate children possess without a similar limitation. The Sutton court reasoned that Minor J. was born into Diane and Michael's legal marriage, and therefore was presumed to be Michael's legal child and was entitled to child support. As a result, Minor J. was not denied the opportunity to receive child support, and was afforded the same rights as a legitimate child. The Sutton court essentially held that only a child born out of wedlock may bring suit to establish paternity.

The court in *Sutton v. Diane J.* also examined the competing interests of the parties involved. Even though Minor J. has a psychological and health interest in establishing paternity, one must also consider Diane J.'s privacy interests, the biological father's interest in privacy regarding his medical history and information, and the state's interest in protecting family peace and unity, ensuring a child is financially supported, and avoiding overcrowding in the court system. Each of these interests must be considered on their own merit, but also must be considered in regards to the best interests of the child.

The author argues that the court decided incorrectly that Minor J. lacked standing to bring a cause of action against his mother to compel her to disclose the identity of his biological father. In *Gomez v. Perez*, the court ruled that it was unconstitutional and a violation of the Equal Protection Clause to allow children born in wedlock a judicially enforceable right to support from their biological fathers but deny that right to children born out of wedlock. The court granted both children born in and outside of wedlock the right to bring a cause of action to establish paternity. The author interprets both *Spada* and *Gomez* as dictating that a denial of a child's right to bring a cause of action against the mother to compel disclosure of the biological father's identity as violating the child's rights under the Equal Protection Clause of the *United States Constitution*.

B. Governmental Reports/Materials

Canada, Department of Justice, "The Youth Criminal Justice Act: Summary and Background", Catalogue No J2-375 (Ottawa: DOJ, 24 February 2013).

Introduction:

- This article explains the background of the *Youth Criminal Justice Act* (YCJA), which governs the Canadian youth justice system. The article also summarizes the main provisions of the YCJA and the underlying rationale for those requirements.
- The YCJA applies to youth between the ages of 12 to 18 years old who are subject to allegations that they have committed criminal offences.
- The YCJA was adopted in 2003 and was amended in 2012

Background :

- The YCJA came into force on April 1, 2003 and replaced the previous legislation which governed Canada's youth justice system, the *Young Offenders Act* (YOA).
- The YCJA was meant to address some of the concerns regarding the youth justice system as it had been functioning under the YOA.
    - These concerns included an increase in use of the courts and incarceration for less serious offences, discrepancies in sentencing, overlooking the interests of the

victims, and a lack of effort to meaningfully reintegrate young offenders back into society.

Preamble and Declaration of Principle:

- The YCJA contains a Preamble that sets out the underlying values that form the foundation of the legislation, as well as a Declaration of Principle that provides the policy framework of the YCJA.
- The YCJA also contains more specific principles that guide decision making processes at different points in the youth justice process, which include Extrajudicial Measures, Youth Sentencing, and Custody and Supervision.

Extrajudicial Measures:

- One of the main objectives of the YCJA is to increase the adoption of more effective and time conscientious non-court responses to less serious crimes committed by youth.
- Various provisions in the YCJA address the use of extrajudicial measures for less serious crimes, including requiring police officers to consider the use of extrajudicial measures before charging a young person with an offence.
- The YCJA outlines clear objectives that guide the use of these non-court measures, such as repairing the harm caused to the victim and the community, allowing victims the opportunity to participate in decisions, increasing the involvement of families, victims, and community members, and ensuring that the measures implemented match the seriousness of the crime.
- Under the YCJA, the charging of youth with criminal offences has decreased significantly, while the use of extrajudicial measures has increased significantly. The use of courts has also decreased since the adoption of the YCJA.

Conferences:

- Conferences are the processes through which affected and/or interested parties meet in order to discuss and create plans to address the circumstances surrounding individual youth cases. Conferences allow for increased involvement of both the offender and the victim in order to meaningfully address the offence.
- The YCJA both authorizes and encourages conferences as a way of assisting decision makers in the youth criminal justice system, as the conference provides recommendations to that decision-maker on how to appropriately address the situation under the unique circumstances of the individual case.
    - A conference may inform decisions by suggesting appropriate extrajudicial measures or sentencing, how to reintegrate the young person back into the community, and conditions for release from pre-trial detention.

Pre-trial Detention:

- Before the YCJA came into force, one of the main criticisms of pre-trial detention was that it was being inappropriately overused, as many young people were being detained after being charged with a minor offence or an offence for which an adult likely would not be detained.
- One of the major changes between the YCJA and the YOA was that pre-trial detention under the YCJA is not to be used as an alternative for child protection, mental health, or other social measures.
- In 2012, amendments to the YCJA created a new test for pre-trial detention of youth, where the court may detain youth if certain criteria are satisfied.
    - Previously, courts applied the ground for detention in the *Criminal Code* to youth.

Youth Sentencing:

- The YCJA outlines both a purpose and a set of principles that are meant to assist judges in determining fair and appropriate sentences.
    - The purpose of youth sentences under the YCJA is to hold young people accountable through the use of appropriate and fair sanctions. The sanctions should promote meaningful consequences for the young person and promote rehabilitation and reintegration into society, which further contributes to the long-term protection of the public.
    - The set of principles dictate that sentences should be consistent across similar cases, should not be harsher than what an adult would receive for the same offence, be and proportionate to the severity of the offence and the degree of responsibility held by the youth
- The YCJA also dictates that custody sentences should be used primarily for violent offenders and serious repeat offenders.
- The court must consider all reasonable alternatives to custody sentences. A custodial sentence should only be imposed by a court if there is no appropriate alternative that would hold the young person accountable in accordance with the purpose and principles of sentencing outlined in the YCJA.
- The YCJA introduced a number of new sentencing options, including reprimand, intensive support and supervision orders, attendance orders, deferred custody and supervision orders, and intensive rehabilitative custody and supervision orders.
- Under the YCJA, the number of custody sentences has decreased.

Adult Sentences:

- The YCJA eliminated the transfer of young persons from youth court to adult court; rather, the YCJA created a process whereby the youth court determines whether the young person is guilty of an offence and then may, under specific circumstances, impose an adult sentence.
    - Youth may receive an adult sentence if:
        - They were at least 14 years old when
        - They committed an indictable offence
        - For which an adult would be liable to imprisonment for more than two years.

Custody and Reintegration:

- Under the YCJA, youths are subject to a supervision and support order following their release from custody.
- The YCJA includes a number of mandatory conditions that apply to all youth under supervision in the community.

Publication:

- As a general rule, the identity of a youth offender should not be disclosed.
- Under the YCJA, publication of the offender's identity is allowed in very limited circumstances.
    - Information that may identify the young person can be published if the youth has received an adult sentence.
    - Identifying information may also be published where a youth sentence is imposed for a violent offence and certain requirements are met.

Canada, Department of Justice, "Child Advocacy Centres Initiative", (Ottawa: DOJ, 4 April 2003)

This article provides an overview of the Victims Fund, with a specific focus on the Child Advocacy Centres Initiative. The objectives of the Victims Fund focus on enhancing the experience of victims in the criminal justice system through promoting access to justice and increased participation for victims in the judicial process. In addition, the Victims Fund emphasizes the implementation of principles, guidelines, and laws that address the unique needs of victims of crime. Under the Child Advocacy Centres (CACs) initiative, funding is available for a limited number of non-governmental organizations who would like to create or enhance CACs.

CACs focus on the needs of child and youth victims and/or witnesses in the criminal justice system. These CACs are meant to reduce system-induced trauma by providing a child-friendly setting for young victims or witnesses and their families to seek necessary services. Although no two CACs may be completely alike, there are some similarities that exist, including (but not limited to): a child-focused setting, forensic interviewing, victim advocacy and support, specialized medical evaluation and treatment, and a multi-disciplinary response team.

The Victims Fund provides guidelines for the types of projects that are eligible for funding. The Fund will provide economic resources for feasibility studies, planning and development activities, and for providing new services or enhance services already available to children and youth. Funding is not available for capital expenses, such as the purchase of real estate, retroactive funding, or core operational expenses.

C. Private Organization Reports/Materials

Canadian Coalition for the Rights of Children, "Best Interest of the Child: Meaning and Application in Canada" (1 June 2009).

This publication provides a conference report from the Best Interests of the Child: Meaning and Application in Canada. It also outlines indicators and targets for progress, and specific issues that engage the best interests of the child. The specific issues that the publication discusses are the voice of the child in family law, child welfare, adoption, children in the refugee and immigration system, Aboriginal children, youth justice, education, early childhood learning and care, health care, and children and cultural diversity.

D. Case Law

AC v Manitoba (Director of Child and Family Services), [2009] 2 SCR 181, 309 DLR (4th) 581.

Factual Background:
A 14-year old girl named "C" was admitted to hospital due to lower gastrointestinal bleeding. C was a devout Jehovah's Witness. She had signed an advanced medical directive months prior to her hospital admission containing written instructions which dictated that she did not want to be given blood under any circumstances. Her doctor believed that the internal bleeding posed an imminent, serious risk to the girl's health and life, and that she required a blood transfusion. However, the girl,

as a result of her faith, refused the blood transfusions. C underwent a psychiatric assessment where it was determined she understood the consequences of her refusal.

The Director of Child and Family Services apprehended C as a child in need of protection under the *Child and Family Services Act*, CCSM 2008, c C-80, s 25 [*CFSA*] and requested a court order under sections 25(8) and 25(9) to provide the required medical treatment. Kaufman J. granted the treatment order, stating that when the child is under 16 years of age, "there are no legislated restrictions of the authority" on the court's ability to order medical treatment in the child's "best interests" under section 25(8) of the *CFSA.* As a result, C was given the blood transfusions and recovered.

C and her parents appealed the order on alternative grounds. First, it was argued that section 25(8) of the Act and the "best interests" test only applied to minors under 16 without capacity; therefore, the test should not have applied to C, who was assessed to have understood the consequences of her refusal. Alternatively, they proposed that sections 25(8) and 25(9) of the *CFSA* were unconstitutional and infringed C's sections 2(a), 7, and 15 *Charter* rights. The constitutional validity of the impugned provisions and treatment order were upheld by the Court of Appeal.

Reasons (relevant to the mature minor doctrine):
Writing for the majority at the Supreme Court of Canada, Abella J. began by outlining the common law position on medical consent for adults. She followed Robins J.A. who summarized the applicable law as follows:

> "The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination." (at para 44).

Abella J. then distinguished the law for minors. While youth do not have the same bodily autonomy as adults, the common law rejects the contention that all minors lack the capacity to make decisions. Instead, it follows the "mature minor" doctrine, which recognizes that children are entitled to a degree of autonomy that is "reflective of their evolving intelligence and understanding" (at para 46). This must be balanced with what the court believes to be in the child's best interest. The more severe the potential consequences of the treatment or the refusal of the treatment, the greater the scrutiny applied when assessing the degree of maturity (at para 46).

Abella J. highlighted that the assessment of youth's maturity must be undertaken with "respect and rigour" since it is important that mature minors not be unfairly deprived of their medical decision-making autonomy (at para 96). She provided a series of factors that may be of assistance when conducting the assessment.

1. What is the nature, purpose and utility of the recommended medical treatment? What are the risks and benefits?

2. Does the adolescent demonstrate the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences?
3. Is there reason to believe that the adolescent's views are stable and a true reflection of his or her core values and beliefs?
4. What is the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment?
5. Are there any existing emotional or psychiatric vulnerabilities?
6. Does the adolescent's illness or condition have an impact on his or her decision-making ability?
7. Is there any relevant information from adults who know the adolescent, like teachers or doctors? (at para 96).

Relevant provisions of the *CFSA* (emphasis added)*:*

- Section 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.**
- Section 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.

Comparable Alberta Legislation (emphasis added):

- *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 22.1.

1(1) (cc) "youth" means a child who is 16 years of age or older.
22.1 (5) If it is satisfied that the treatment is in the **best interests** of the **child**, the Court may authorize the treatment notwithstanding that the guardian of the child refuses to consent to the treatment.

Reconciling the Legislation:
Both pieces of legislation reflect the best interests of the child and allow for the operation of the mature minor doctrine in the context of medical decisions.

Canadian Foundation for Children, Youth and the Law v Canada (Attorney General), [2004] 1 SCR 76, 234 DLR (4th) 257.

Factual Background:

The Canadian Foundation for Children, Youth and the Law brought an action that argued that section 43 of the *Criminal Code* violates the rights that children possess under sections 7, 12, and 15 of the *Charter*. Section 43 of the *Criminal Code* allows parents and teachers to use corrective force with a child that is "reasonable under the circumstances". Essentially, the provision provides parents and teachers with a statutory defence against assault charges when they use physical force to discipline children if that force is deemed to be "reasonable" in the situation. The Foundation was not successful at the lower courts.

Held:
Section 43 of the *Criminal Code* is not unconstitutional; appeal dismissed.

Relevant Provisions of the *Criminal Code*:

- Section 43
  Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances

Reasons (Majority):
The majority at the Supreme Court of Canada held that section 43 does not violate section 7 ("Right to life, liberty, and security of the person") of the *Charter*. Section 43 does affect a child's right to security of the person and, therefore, triggers a section 7 analysis. The impact of section 43 on section 7 *Charter* rights, however, is in accordance with the principles of fundamental justice. The majority determined that section 43 is not vague or overbroad because it contains limitations for its applications, which include:

- The defence is only available to parents and teachers.
- It can only be relied upon for the purpose of correction, which prevents the use of force motivated by frustration or anger and requires that the child be capable of learning from the force. Accordingly, force is not justified for children under the age of two or with disabilities because they are unable to understand the purpose of the force.
- The force must be "reasonable in the circumstances", which excludes conduct that causes harm or has the potential to cause harm.
  - The Court explained that determining what is "reasonable" is assisted by social consensus and expert evidence.
  - There is agreement among most experts that force is harmful when it is exercised on teenagers because it can induce aggressive or antisocial behaviour, involves the use of objects, or is in the form of slaps or blows to the head.
  - There is also social consensus that teachers may use corrective force to remove children from classrooms or secure compliance but that the use of corporal punishment is unacceptable.

In addition, the majority held that the "best interests of the child" doctrine is not a principle of fundamental justice. This doctrine is not vital or fundamental to our societal notion of justice. The Court drew support for this conclusion from article 3(1) of the *Convention on the Rights of the Child*, which describes the best interests of the child as *a* primary consideration as opposed to *the* primary consideration.

The Court held that section 43 also does not violate section 12 ("Right to be secure against cruel or unusual treatment or punishment") of the *Charter*. It is logically impossible to have force that is both deemed "reasonable" but also "cruel or unusual".

Finally, the Court found that section 43 did not violate section 15 ("Right to equality before or under the law") *Charter* rights. The defence under section 43 allows parents and teachers to use limited forms of physical contact in order to provide guidance, discipline, and protection from harm. Physical contact that would produce harmful consequences to the child is not protected under this provision. In addition, the distinction made between children or other persons in the context of section 43 does not lead to unconstitutional discrimination.

Reasons (Dissent):
Binnie J. determined that section 43 of the *Criminal Code* violates a child's section 15 *Charter* rights. Some physical acts that would be considered assault if done against an adult are not criminal if done against a child under section 43. Binnie J. also found that a section 1 *Charter* analysis would show that section 43 is justified for parents, but not for teachers. This infringement is justified for parents because the objective of minimizing governmental interference in family life is pressing and substantial, and rationally connected to the means chosen to bringing effect to the objective. For teachers, however, the infringement is not justified because committing an assault is not rationally connected to maintaining discipline in schools.

Arbour J. found that the Court must determine the constitutionality of the provision on how it explicitly reads, and may not "read down" a criminal defence to be constitutional. Arbour J. considered the majority to be reading in exceptions that were not in the provision, and therefore did not exist as it is written. In her opinion, as section 43 of the *Criminal Code* is currently written, it is very vague and infringes on the child's section 7 *Charter* rights.

Deschamps J. determined that section 43 of the *Criminal Code* violates children's equality rights. Under a section 1 *Charter* analysis, the objective of the provision is pressing and substantial but the provision does not satisfy the proportionality or minimal impairment test. Less intrusive means could have been chosen and, further, the deleterious effects of the provision outweigh its salutary effects because of the significance of the right of children to be free from violence

Carter v Canada (Attorney General), [2015] 1 SCR 331, 384 DLR (4th) 14

Factual Background:
This is a landmark case in relation to the legality physician-assisted dying. Section 241(b) of the Canadian *Criminal Code* made it a criminal offence to assist another individual in ending their own life and section 14 prohibited a person from consenting to death being inflicted on him or her. The issue of doctor-assisted suicide was previously reviewed in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 where the court upheld a "blanket prohibition on assisted suicide". However, the contentious debate surrounding the issue of physician-assisted suicide continued over many years until the present case.

In *Carter v Canada (Attorney General),* T, who was suffering from a fatal neurodegenerative disease, challenged the constitutionality of sections 14 and 241(b) of the *Criminal Code*, claiming these provisions violated her section 15 and 7 *Charter* rights. She was joined in her action by C and J, who helped C's mother seek physician-assisted death in Switzerland, S, a physician who would be willing to participate in physician-assisted dying if it were to become legal, and the British Civil Liberties Association.

At trial, the judge concluded that the deprivation of the plaintiff's section 7 *Charter* rights were not in accordance with the principles of fundamental justice, and the infringement was not saved under section 1 of the *Charter*. Accordingly, the judge deemed the provision to be unconstitutional.

The Court of Appeal allowed the appeal by Canada and British Columbia, stating that the trial judge was bound to follow the decision in *Rodriguez* and uphold the prohibition on assisted suicide. The plaintiffs appealed the decision to the Supreme Court of Canada.

Relevant Provisions of the *Criminal Code*:

- Section 14
  No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent
- Section 241(b)
  Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not, (b) aids a person to due by suicide

Held:
The Supreme Court of Canada ruled that both sections 14 and 241(b) of the *Criminal Code* infringe on section 7 *Charter* rights, and the violation is not saved under section 1 of the Charter.

Reasons:

In this case, the Court distinguished *Rodriguez*, and found that the matter of physician-assisted suicide requires the crucial balancing of competing but equally important interests- the autonomy and dignity of an adult who is experiencing debilitating pain and seeks an end to their unmeasurable suffering, and the protection of vulnerable individuals in our society.

The Court conducted a section 7 *Charter* analysis. In terms of the life interest, the Court found that the provision criminalizing doctor-assisted suicide violated section 7 of the Charter. They reasoned that sanctity of life "is no longer seen to require that all human life be preserved at all costs" (at para 63). Rather, a prohibition on all physician-assisted suicide deprives many people of their ability make end-of-life decisions. In relation to liberty and security of the person, the Court concluded that these rights include the protection of individual autonomy and dignity, and that individuals should be able to exert "control over one's bodily integrity free from state interference" (at para 64).

In terms of the principles of fundamental justice, the Court found that the provisions pertaining to physician-assisted suicide were not arbitrary. The provisions were meant to protect vulnerable individuals from ending their life. However, the blanket prohibition on physician-assisted suicide is overbroad because it does not allow for anyone to make the decision to end their own life. It fails to take into account that many individuals who want to make this type of choice are not vulnerable individuals, but have carefully considered the decision and fully understand the consequences. Lastly, the Court found that the impact of the provisions were both severe and grossly disproportionate. The provisions are not proportionate to their objectives as they impose unnecessary suffering on many individuals who are capable of making informed choices regarding their own bodies.

The Court then conducted a section 1 analysis in order to determine whether the violation of section 7 *Charter* rights could be justified. The *Criminal Code* provisions were not saved under the section 1 analysis. The Court determined that the blanket prohibition on physician-assisted suicide was rationally connected to the objective of protecting the vulnerable from taking their own lives without understanding the consequences of that choice, which satisfied the requirement that the infringement be rationally connected to the objective. The Court, however, held that the prohibition was not a minimal impairment of section 7 rights. The Court determined that the risks could be properly addressed using thoughtful safeguards.

As the prohibition on physician-assisted suicide violated section 7 of the *Charter*, the court did not find it necessary to consider whether it also violated section 15 of the *Charter*.

In light of this analysis, the Court issued the following declaration:

> "section 241(b) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is

intolerable to the individual in the circumstances of his or her condition" (at para 147).

This declaration was suspended for twelve months in order to give Parliament time to draft legislation in relation to physician-assisted death.

Current State of the Law:

Changes to the law in relation to physician-assisted dying were introduced in Bill C-14, titled "An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)". Bill C-14 received Royal Assent on June 17, 2016. More information on Bill C-14 can be found at http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C14&Parl=42&Ses=1.

CMM v DGC, 2015 ONSC 2447

Factual Background:

The appellant's parents became unexpectedly pregnant with the appellant during the course of a short-term relationship. Before her birth, the appellant's parents executed a written agreement that stipulated that the father would give the mother a one-time lump sum payment of $37,500 and have no contact with the child whatsoever.

Years later, the appellant wrote to her biological father's mother to request money for tuition to a private all-girls high school. Soon after, the appellant brought an application for child support. During the proceedings, it was determined that the appellant must be represented in the proceedings by a litigation guardian, pursuant to Rule 7 of the *Rules of Civil Procedure*. This is an appeal of that that decision to require a litigation guardian.

Held:

The appeal was allowed and the order of the motion judge that required the appellant to have a litigation guardian was set aside.

Issue:

Whether Ontario's *Family Law Rules* and *Rules of Civil Procedure* preclude a minor from bringing a claim for child support to the court without the help of a litigation guardian.

Reasons:

The motion judge found that the *Family Law Rules* does not address the issue of the litigation guardian and, instead, relied on the *Rules of Civil Procedure*. On appeal, Marrocco A.C.J., disagreed and found that the *Family Law Rules* does address the issue of the litigation guardian. Marrocco A.C.J. reasoned that the exemption for children as special parties in custody, access, child protection, adoption, and child support cases suggests that in these situations, the *Family Law Rules* has intentionally chosen *not to establish* a litigation guardian requirement (at para 19). In the alternative, even if the *Family Law Rules* fail to adequately address the issue, Rule 7.01(1) of the *Rules of Civil Procedure* allows for discretion of the court. Accordingly, the requirement of a litigation guardian is not absolute (at para 14).

Hamilton Health Services Sciences Corp v DH, 2014 ONCJ 603, 123 OR (3d) 11

Factual Background:
J.J. is an 11 year old girl who was diagnosed with leukemia in 2014. The doctors predicted that if treated with chemotherapy, J.J. would have a 90 to 95% chance of recovery. The doctors also emphasized that they are unaware of any child who has survived leukemia without the treatment. J.J. initially began chemotherapy treatment but then her mother withdrew consent it in favour of continuing with traditional Aboriginal treatment. There was never a question that J.J.'s mother is a good mother who believed she was acting in her daughter's best interests.
The hospital brought an application under Ontario's *Child and Family Services Ac*, RSO 1990, c 11, s 40(4) to Brant Family and Child Services (Brant FACS) for an order to apprehend J.J. The hospital stated that since J.J. does not have capacity to make her own decision and the medical team does not agree with the mother's decision, Brant FACS should intervene and apprehend J.J. (para 12). Brant FACS decided not to intervene.

Issue:
Whether J.J. is a child in need of protection under the *Child and Family Services Act*?

Ontario Native Council on Justice Holding:
J.J. is not a child in need of protection because her substitute decision-maker chose to exercise her constitutionally protected right to pursue traditional Aboriginal medicine (at para 83).

Reasons:
The doctors were correct in concluding that JJ lacked capacity to make the decision to stop chemotherapy (at para 39). In answering the question of whether J.J. is a child in need of protection the judge established that the decision to pursue traditional medicine is an Aboriginal right and does not need to be qualified by employing a western medical paradigm (at para 81).

Amendment:
Rather than pursue litigation, the Attorney General of Ontario and the court chose to engage in a dialogue. This dialogue led to a joint submission, which notes that the province and the family have chosen to work together to form a collaborative approach to healthcare for JJ (at para 5). This approach recognizes that the combination of traditional medicine and western medicine is in J.J.'s best interest (at para 5). Edward J. clarified his previous reasoning stating, "[…] the right to use traditional medicines must remain consistent with the principle that the best interests of the child remain paramount. The aboriginal right to use traditional medicine must be respected and must be considered, among other factors, in any analysis of the best interests of the child, and whether the child is in need of protection" (at para 83a).

Relevance:
This case leaves great uncertainty as to how child service agencies and courts are to respond if an Aboriginal parent chooses that their child should receive traditional treatment exclusively, even though the consequential outcome will be death. In other words, how should the courts understand the best interests of the child when the western medical perspective conflicts with the Aboriginal perspective?

R v JZS, [2010] 1 SCR 3, 282 BCAC 108

Factual Background:
J.Z.S. was convicted of sexually assaulting his two minor children. At the time of trial, his son and daughter were eight and eleven years old, respectively. The children gave testimony behind a screen, pursuant to section 486.2 of the *Criminal Code*. J.Z.S appealed his conviction, contending that section 486.2 of the *Criminal Code* and section 16.1 of the *Canada Evidence Act* were unconstitutional and infringed his sections 7 and 11(d) *Charter* rights.

Held:
The Supreme Court of Canada dismissed the appeal, affirming the reasons given by the British Columbia Court of Appeal. Both section 486.2 of the *Criminal Code* and section 16.1 of the *Canada Evidence Act* do not violate section 7 and/or section 11(d) of the *Charter*.

Summary of Impugned Legislation:
- Section 486.2 of the *Criminal Code* allows for a witness to testify outside the court room or behind a screen or other device, such as CCTV, that would allow the witness to avoid seeing the accused and would facilitate a candid account of the acts in question.
- Section 16.1 of the Canada Evidence Act provides for the presumptive testamentary capacity of a child witness who is less than 14 years of age.

Reasons Provided by the British Columbia Court of Appeal:

(1) Section 16(1) of the *Canada Evidence Act*
- The promise to tell the truth is enough to satisfy the child witness's moral obligation to tell the truth.
- Child witnesses are placed on a more equal footing with adult witnesses by presuming they have the necessary testamentary capacity.
- A child's testamentary capacity is still able to be challenged on cross-examination, which is similar to the manner in which an adult's testimony would be examined.
- The Court does not accept that the child's presumed testimonial incompetence is a fundamental principle of justice or that assuming a child has the capacity to testify diminishes the accuses ability to have a fair trial.
- Section 16.1 does not impede the traditional safeguards that allow for the accused to have a fair trial, such as the requirement that the Crown prove the alleged offence beyond a reasonable doubt, or the presumption of innocence until proven guilty.
- Section 16.1 also gives the judge discretion to permit a testimonial inquiry if it can be shown that there is an issue as to the ability of the child witness to appropriately comprehend and respond to questions.

(2) Section 486.2 of the *Criminal Code*

- Section 7 requires the balancing of competing interests. In this case, the Court was required to balance the right of the accused to a fair trial and the broader societal interest of ensuring that offences are prosecuted.
- The Court rejected the argument that the accused must be able to confront the accuser in order to make full answer and defence.
- The main objective of the judicial process is to seek the truth.
    - Certain testimonial accommodations may be required for child witnesses in order to facilitate truth-telling.
- The section 7 right to a fair trial is appropriately protected by allowing the accused to cross-examine the child witness.
- Similarly, section 11(d) *Charter* rights to a fair trial are also not infringed, as the accused has the right to cross-examine the child witness

WP v Alberta, 2014 ABCA 404, 378 DLR (4th) 629

Factual Background:
The appellants were former resident students at Alberta School for the Deaf. They allege that while they were at the school they were sexually, physically, and emotionally abused by teachers, staff, and other children. They argue that Alberta breached its fiduciary duty in failing to protect them. In its summary judgment application, Alberta submitted that the appellants' action is barred by the *Limitations Act*, RSA 200, c L-12, s 3 since the appellants commenced the action more than ten years after they turned 18.

Held:
The plaintiff's action is barred by virtue of section 3 of the *Limitations Act*. The appeal is dismissed.

Reasons (relevant to the *Limitations Act*):
The appellants argued both exceptions provided in the *Act*; fraudulent concealment and person under disability (*Limitations Act*, ss 4 & 5.),

Fraudulent Concealment:
The appellants contended that the school acted fraudulently by telling them not to discuss the abuse with anyone. The Court determined that this is not the same as having wrongful conduct deliberately concealed and thus does not constitute fraudulent concealment (at para 36).

Person under Disability:
As proof of disability, the appellants did not try to argue that they were represented adults under the *Adult Guardianship and Trusteeship Act* nor that they are persons with a certificate of incapacity under the *Public Trustee Act*. Instead, they shared the difficulties that they encountered in their lives including time spent in a psychiatric facility. Life difficulties alone do not meet the requirement for "person under disability". The appellant must be able to show that said difficulties prevented them from making reasonable judgments in respect of their claims (at para 37).

Yugraneft Corp v Rexx Management Corp, [2010] 1 SCR 649, 318 DLR (4th) 257

Factual Background:
Yugraneft Corp. (Y Corp.) is a Russian corporation that develops and operates oilfields in Russia. Y Corp. purchased materials from Rexx Management Corp. (R Corp.), a corporation based out of Alberta. Y Corp. and R Corp. became engaged in a contractual dispute, and Y Corp. brought arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The arbitration tribunal ordered R Corp. to pay US$952,614.43 in damages to Y Corp on September 6, 2002. Y Corp. applied for enforcement of the award to the Alberta Court of Queen's Bench on January 27, 2006. The application was dismissed, as it was time-barred under section 3 of the Alberta *Limitations Act*, which sets a two-year limitation period for bringing an action. The Alberta Court of Appeal upheld the ruling.

Held:
The Supreme Court of Canada upheld the ruling of the Alberta Court of Appeal. The appeal is dismissed.

Reasons:
The recognition and enforcement of foreign arbitral awards in Alberta is governed by the *International Commercial Arbitration Act* (ICAA). The ICAA incorporates both the *UNICITRAL Model Law on International Commercial Arbitration* (the "Model Law") and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"). Under Alberta law, Alberta is required to recognize and enforce foreign arbitral awards that meet the relevant criteria. In this case, the Court was required to determine what limitation period applies to the recognition and enforcement of foreign arbitral awards.

The Court questioned whether the New York Convention or Model Law allows for local limitation periods to apply to foreign arbitral awards. Both the New York Convention and Model Law put forth exhaustive lists of the grounds on which an award may be denied, but neither mentions limitation periods as a ground of refusal. The Convention does state that recognition and enforcement of these awards shall be "in accordance with the rules of procedure of the territory where the award is relied upon". The *Limitations Act* is the only piece of Alberta law that would be applicable to the arbitral award in this case, as the *Arbitration Act* excludes foreign awards and the *Reciprocal Enforcement of Judgments Act* does not apply to Russia, as Russia is not a reciprocating jurisdiction.

The Court found that foreign arbitral awards are subject to the *Limitations Act*, and that a "remedial order" would be required for the recognition and enforcement of these awards. The application for a "remedial order" is subject to the general two-year limitation period set forth in section 3 of the *Act* and is applicable to most causes of action. As an arbitral award is not considered a judgment or a court order for the payment of money, it does not fall under the 10-year limitation period under section 11 of the *Act*.

The two-year limitation period set forth in section 3 of the *Limitations Act* is subject to the discoverability rule. In this case, the injury was the "non-performance of an obligation" and the arbitral creditor sought to have a foreign award recognized and enforced. The date on which the order was issued is generally not considered the date that the party did not fulfill its obligation for the purposes of the limitation period. Instead, the two-year limitation period would begin to run when there was no longer a possibility that the award might be set aside by the local courts in the country where the award was rendered.

The first two elements of discoverability under section 3(1)(a)(i) and (ii) were satisfied: the arbitral creditor would know that the injury (non-payment) occurred and that it was attributable to the arbitral debtor on the date that the award became final and the arbitral debtor failed to make a payment. The third element of discoverability, section 3(1)(a)(iii) was also satisfied, as the arbitral creditor knew or ought to have known that the injury warrants commencing a proceeding.

Due to the above reasoning, Y Corp.'s application for recognition and enforcement of the arbitral award could only be brought until December 2004, after which the two-year limitation period ended.