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Position Paper: Parental Consent Reconciled with the Mature Minor

Parents and families are the primary source of care, nurturing and acculturation of children, and parents have the primary responsibility for ensuring the well-being of children from birth to adulthood. Healthcare is no exception.

A parental consent law for abortion aligns with the ability of minors to consent to healthcare, as it fits with an appropriately framed understanding of medical practice guidelines and provides safeguards to ensure health and safety are duly protected.

Parental Consent Reconciled with the Mature Minor

Consent, Capacity & the Mature Minor

Consent generally requires both a capacity to consent and that the consent be informed. The mature minor doctrine holds that any young person, regardless of age, may have such a capacity to make health care decisions. The minor must be able to understand information relevant to a health care decision, appreciate the reasonably foreseeable consequences of that decision and be able to communicate the health care decision.[1] It is not surprising, then, that this ability varies. As the Supreme Court of Canada has explained:

> … the right to make those decisions varies in accordance with the young person's level of maturity, with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or its refusal. [2]

For medical professionals, this doctrine has translated into guidelines requiring them to evaluate whether the young person's "physical, mental and emotional development allows for a full appreciation of the nature and consequences of the proposed treatment or lack of treatment." [3]

Mature Minor Decision-Making Rights are Not Absolute

While mature adolescents are granted a degree of autonomy, their claim to autonomous decision making is not absolute. It exists "in tension with a protective duty on the part of the state", [4] often in

the form of child protection legislation [5]. It exists alongside legislation that establishes presumptions about capacity [6]. It exists alongside legislation that specifically prohibits young people from making health care directives [7].

For example, in New Brunswick, capacity is assumed for those 16 and older, but where the minor is under 16 the physician must assess capacity and the medical treatment and procedure must be in the best interests of the minor and her continuing health and well-being [8]. In Quebec, parental consent to health care is required for any minor under the age of 14, regardless of maturity. If a minor over 14 has consented to care that requires she remain in a health services establishment for over 12 hours, her parent(s) must be notified. Where the care entails a "serious risk" for the health of the minor and may cause grave and permanent effects, parental consent is required for a minor over the age of 14, regardless of capacity [9].

Furthermore, in its recent decision to strike down Criminal Code prohibitions on assisted suicide, the Supreme Court of Canada precluded – without explanation or analysis – adolescents under the age of 18 from accessing physician-assisted death [10]. Even though the decision to die is rooted in control over one's bodily integrity and "represents their deeply personal response to serious pain and suffering", minors – whether mature or not – do not have access or recourse to physician-assisted death.

Beyond healthcare, age restrictions are used to determine when a person can vote, drive, sell property, stop attending school, consent to sex and marry. All of these restrictions have some element of a literal arbitrariness [11], but this does not automatically invalidate them. In fact, they are a common and necessary way of ordering our society [12]. Some of these age restrictions also have a parental consent component; for example, youth under 18 years of age who wish to marry [13]. Like abortion, marriage carries with it potentially serious consequences and implications. Yet choosing to marry is a reversible decision. Abortion is not.

Why allow age-based restrictions and permit interference with the mature minor's healthcare decision making? Youth have "reduced maturity and moral capacity" in comparison to adults [14]. This principle is enshrined in various provisions and principles of the Youth Criminal Justice Act [15] and is recognized as a principle of fundamental justice.

According to the Supreme Court of Canada, a youth's "cognitive capacity to reach decisions does not necessarily correlate with 'mature' judgment"[16] and while such cognitive capacity alone is relatively easy to test, it is far more challenging to evaluate other factors such as "individual physical, intellectual and psychological maturity of the minor, the minor's lifestyle [and] the nature of the parent-child relationship"[17].

Further, children are vulnerable members of Canadian society, who depend on parents for guidance and discipline, for protection from harm and for promotion of their healthy development [18].

Parental Consent is in the Child's Best Interest

For any legislation to be constitutionally compliant in the context of medical treatment decisions, it must not be arbitrary, or discriminatory based on age. It must strike the appropriate balance between the right to autonomous decision making and the need to protect vulnerable children from harm [19].

A parental consent law based on the best interests of the pregnant minor strikes that constitutionally required balance. Where that standard is "applied in a way that takes into increasingly serious account the young person's views in accordance with his or her maturity in a given treatment case" [20], it is neither arbitrary nor discriminatory.

This application of the best interests standard is also consistent with Canada's international obligations. As a first principle, under the Convention on the Rights of the Child, State Parties must ensure recognition of the principle that parents have the primary responsibility for the upbringing and development of the child, with the best interests of the child as their basic concern [21].

State Parties are also required to "respect the responsibilities, right and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child" of his or her rights [22].

Canada's international law commitments favour parental determination of the child's best interests whether or not the child is a mature minor. The best interest standard, applied by a parent, taking into account the pregnant woman's level of maturity is therefore neither arbitrary nor discriminatory and aligns with Canada's international law obligations.

Summary of Parental Consent & the Mature Minor

In some situations, some minors have the capacity to make health care decisions; however, this ability is not absolute. Young people have a reduced moral capacity and limited ability to ascertain the long term implications of current decision making. When parental consent takes into account the best interests of the child, the parent by definition also takes into account the increasing maturity of that child. The mature minor doctrine is therefore respected and incorporated into the parental consent requirement by virtue of the child's best interests as the sole factor for consideration.

Medical Ethics vis-à-vis the Law

The existence of current medical ethical guidelines and policies does not preclude the adoption of a parental consent law, and in fact, there is much to support the position of parental involvement in minors' healthcare decisions.

Guidelines, Principles & Law – What is their Respective Status?

Some principles remain static while others are reflective of the statutory environment in which they operate. For example, the foundation on which the Canadian Medical Association's (CMA) Code of Ethics [23] rests is the "fundamental principles and values of medical ethics, especially compassion, beneficence, non-maleficence, respect for persons, justice and accountability". These would fall into the category of static principles. The College of Physicians and Surgeons of Saskatchewan's Guideline, Confidentiality of Patient Information [24] in large measure reflects the relevant legislative provisions of the Health Information Protection Act [25] and is an example of policy reflecting its statutory environment.

It is only in the absence of legal norms that the so-called "soft law" of professional guidelines, norms and

ethical statements will be determinative of what conduct is accepted by courts as lawful [26]. Or, where legal norms do exist, but are incomplete and imprecise, courts may borrow from extra-judicial norms such as professional standards and guidelines [27]. For example, in an Opinion on Mandatory Parental Consent to Abortion, the American Medical Association first advises physicians to "ascertain the law in their state on parental involvement to ensure that their procedures are consistent with their legal obligations" before moving on to discuss other ethical considerations [28].

To state that parental consent norms would violate medical ethics is putting the cart before the horse, so to speak. Professional guidelines operate within statutory schemes, not the other way around.

Existing Ethical Standards Recognize the Importance of Family and Parental Involvement

As noted at the outset, and recognized by governments, families are the basic unit of society and their well-being should be supported and preserved [29]. Families are also the primary source of care, nurturing and acculturation of children, with parents having primary responsibility for ensuring the well-being of their families [30].

Medical ethics also recognize the importance of involving family in health-care decisions. The CMA's Code of Ethics affirms "the need to balance the developing competency of minors and the role of families in medical decision-making" at the same time as requiring that health care providers "respect the autonomy of those minors who are authorized to consent to treatment"[31].

The Canadian Paediatric Society (CPS) Position Statement on Treatment of Children and Adolescents [32]
makes several recommendations, including:

- Physicians should provide patients and their families with appropriate and sufficient information so that they can participate effectively in decision-making.

- Some children and adolescents have the ability and desire to make their own decisions.

Physicians should carefully assess these factors, encourage decision-making by patients, families and the health care team together, and support capable patients who wish to make their own decisions. Disclosure of information and inclusion in decision-making should occur according to the stage of the child or adolescent's development. Respect for parental wishes and values is important, and the needs and interests of the child or adolescent should prevail.

In its Position Statement on Adolescent Pregnancy the CPS acknowledges "the complex social, ethical and religious issues involved" in pregnancy and contraception. As such, it recommends that practitioners "help the adolescent develop a supportive network that may include family members, her partner, trusted friends and other health care providers" to ensure she has the best possible health outcome [33].

Similarly, the Canadian Medical Protective Association acknowledges that, while patients need not reach

the age of majority to give consent to treatment, "it is prudent for physicians to also encourage the child to invite a family member to attend the discussion." Further, parental involvement is "recommended

when the treatment entails serious risks and may have serious and permanent effects on the patient"[34].

Current ethical standards do not reflect a parental consent law for abortion because it does not yet exist; however, there is existing support for encouraging family involvement in health care decision-making, even for mature minors, and there is nothing to preclude medical ethics from reflecting the statutory environment (i.e. one that includes a parental consent law) in which they operate.

Existing Ethical Standards Protect Confidentiality and Provide for Lawful Disclosure

At the outset it is essential to understand that confidentiality is not broken by a parental consent law, as parents are not notified nor consent obtained without the adolescent's awareness. The adolescent is made aware of the need for consent as well as the option of obtaining alternate consent instead of parental consent. It is nonetheless helpful to be aware that there are many ways and means by which disclosure of personal health information is considered lawful.

Principles of confidentiality are essential and, as noted by the CMA, "privacy, confidentiality and trust are cornerstones of the patient-doctor relationship"[35]. The Code of Ethics requires that patient health information be protected [36]. This includes protecting the health information of a young person who is deemed to fully understand the implications of a medical decision by allowing them to exercise control over their personal health information [37].

Yet these requirements for confidentiality are all framed within the context of the subsequent principles which require physicians "handle health information in compliance with the applicable federal and provincial privacy laws and professional regulations" and which permit disclosure without consent "when required by law"[38]. Physicians can also disclose such information without consent where the law does not require but does permit such disclosure [39].

Some of those laws include the Public Health Act, which requires disclosure of communicable diseases [40], the Emergency Protection for Victims of Child Sexual Abuse and Exploitation Act, which requires disclosure of children (defined as under 18) who have been or likely will be exposed to harmful interaction for a sexual purpose [41], and the Child and Family Services Act, which requires disclosure in cases of child abuse or neglect [42]. This may include circumstances in which the patient regards it as a breach of confidentiality, such as when a 13-year-old patient is in a sexual relationship with a 16-year-old. Nonetheless, the law requires the physician to make a report [43].

In other words, while a parental consent law does *not* violate confidentiality, there are many pieces of legislation that legitimately require confidentiality to be broken. To reject a parental consent law on the basis that it is perceived to breach confidentiality not only misunderstands the proposed law, but also misrepresents physicians' obligations and abilities to lawfully disclose patient information.

Parental Consent Safeguards Health & Safety

According to U.S. Statistics, over 70% of young women report discussing sex-related topics with their parents and, in California in particular, 79% of young women aged 14 to 17 report that their parents are aware of their sexual activities [44]. Amongst young women seeking abortions, 61% of those under 18 in states without parental involvement laws nonetheless involved her parent; similarly 90% of 14-year-olds and 74% of 15-year- olds also reported parental involvement [45].

These statistics suggest that young women *want* parental involvement in pregnancy and abortion decision-making. Other American statistics show that it is not only young women who favour parental involvement in abortion: in 2011 a Gallup poll revealed 71% of respondents favoured a parental consent requirement for those under 18 [46]. There is broad recognition that minors benefit from parental involvement in key life decisions.

One such benefit is access to healthcare. Access to healthcare services is critical, and parental involvement would augment such access. In its discussion of barriers to emergency contraception, the CPS provides a list of such barriers. Parental involvement or interference is not on that list [47]. In fact, if it is in the child's best interests, parental involvement would alleviate barriers such as financial resources and geographic limitations. Furthermore, parents have knowledge of family medical history, the minor's medical history, and are able to help identify any complications arising from abortion or pregnancy.

Legitimate concerns about abuse or neglect are addressed in parental consent laws by providing an alternate consent option. Concerns about unsafe remedies are misplaced. As noted in a 2007 report from the United States, no pediatric literature on the topic of self-induced medical abortion has been published [48]. And, as noted above, where neglect or abuse, whether physical or sexual, are present, alternate consent mechanisms are available.

Conclusion

Neither the mature minor doctrine, nor medical ethical guidelines, nor health and safety concerns are sufficient to justify rejecting a parental consent law for abortion. Parental consent takes into account the best interests of the child and her increasing maturity, thus respecting the mature minor doctrine.

Medical ethics supports family involvement in healthcare decision making and is fully capable of operating in a statutory environment that includes a parental consent law. Confidentiality is not breached by such a law, and the health and safety of pregnant women is protected further by involving parents, the primary caregivers who are responsible for ensuring her well-being. Rather than justifying rejection of a parental consent law, these factors point to the ease of integration, the importance of, and the benefits to implementing a parental consent law for abortion.

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