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*Canada's only national political pro-choice advocacy group*

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## **Position Paper #58**

### ***The Injustice and Harms of Parental Consent Laws for Abortion***

The following evidence demonstrates that if a parental consent law for abortion was passed by any Canadian province or territory, it would contravene and reverse current medical policies and ethics around the consent of minors to healthcare, violate their constitutional rights to bodily security and privacy, and increase risks to their health and safety.

According to the **Canadian Medical Association**: “*Privacy and confidentiality are cornerstones of the Canadian health care system.*”<sup>1</sup> CMA policies emphasize the importance of these values when caring for all patients, including adolescents, for example: “*A young person who is deemed to understand fully the implications of a medical decision is generally also deemed to have control over their personal health information.*”<sup>2</sup> The CMA code of ethics requires physicians to: “*Recognize the need to balance the developing competency of minors and the role of families in medical decision-making. Respect the autonomy of those minors who are authorized to consent to treatment.*”<sup>3</sup>

The common-law concept of the “mature minor” means that a minor who can understand and appreciate the nature and consequences of a proposed medical procedure/treatment and its alternatives can give valid legal consent. For minors accessing healthcare in Canada, this rule has replaced the previous common law test of “emancipation”, or age of majority. The **Canadian Medical Protective Association** explains:<sup>4</sup>

“The legal age of majority has become largely irrelevant in determining when a young person may consent to his or her medical treatment. The concept of maturity has replaced chronological age, except in Québec, where the age of consent is 14 years and older.” ...  
“A patient need not reach the age of majority to give consent to treatment. In all Canadian provinces and territories the determining factor in a child's ability to provide or refuse consent is 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 – whether or not the patient has attained the age of majority.”

Canada is a signatory to the **United Nations Convention of the Rights on the Child**,<sup>5</sup> an international treaty that clearly states that all persons under the age of 18 are entitled to adequate health education, support and services, and the right to participate in decisions that affect them. This means that youth have the right to independently access sexual and reproductive health information and services, which must include abortion as it has been deemed a medically required service by every province and territory in Canada.

In the **Supreme Court of Canada**'s 2009 decision *A.C. v. Manitoba (Director of Child and Family Services)*, the justices recognized the right of adolescents aged 16-18 to make their own medical decisions, as well as the right of mature adolescents under age 16 to participate meaningfully in decisions relating to their medical treatment. However, in an important dissent, Justice Binnie went further:<sup>6</sup>

“The state’s interest in ensuring judicial control over the medical treatment of ‘immature’ minors ceases to exist where a ‘mature’ minor under 16 demonstrates the lack of need for any such overriding state control. In such cases, the legitimate object and basis of state intervention in the life of the young person has, by reason of the judge’s finding of maturity, disappeared. Whether judges, doctors and hospital authorities agree or disagree with C’s objection, the decision belongs to her, as the Charter is not just about the freedom to make the wise and correct choice; it also gives her the individual autonomy and the religious freedom to refuse forced medical treatment, even where her life or death hangs in the balance, regardless of what the judge thinks is in her best interest.”

A law mandating parental consent for abortion would likely be deemed arbitrary and overbroad, and therefore unconstitutional by the courts, as it prevents all adolescents from making their own decisions without taking into account their individual circumstances or maturity. The Supreme Court of Canada explained in *Chaoulli v. Quebec*:<sup>7</sup> “*The state is not entitled to arbitrarily limit its citizens’ rights to life, liberty, and security of the person.*” And: “*...interference with life, liberty and security of the person is impermissibly arbitrary if the interference lacks a real connection on the facts to the purpose the interference is said to serve.*”

Health professionals in Canada take this issue very seriously, and follow standard ethical protocols to ensure that minors seeking abortion are mature enough to understand what they are doing, and also are not being coerced by anyone. Abortion providers and clinics in Canada already counsel minors to involve their parents, and the majority of minors do so. Similarly, in U.S. states without parental involvement laws, 61% of young women under 18 involve at least one parent, as did 74% of 15-year olds, and over 90% of 14-year olds.<sup>8</sup>

Access to healthcare is critical for preserving health and life, which is why minors in Canada do not generally need parental consent for necessary healthcare, but may need permission for things like getting a tattoo or going to a tanning salon. For reproductive health services in particular, a need for parental consent poses a safety risk because of the sensitivity of these health services and a minor’s desire for confidentiality. Fear of exposure or denial of care can drive adolescents away from seeking healthcare, and thereby increase risks to their health and safety through lack of treatment or resort to unsafe or illegal remedies. In the case of abortion, it can also damage family relations or subject minors to family abuse, expose teenagers to unplanned pregnancy, and force minors to travel out of province to obtain abortion services.

Research from the U.S. shows that privacy concerns do in fact prevent many adolescents from seeking care:<sup>9</sup>

“In two large nationally representative surveys, approximately a quarter of middle and high school students reported having forgone health care they needed. In one of these, a third of students who did not seek care reported that one of their reasons was ‘not wanting to tell their parents.’ The impact of privacy concerns when adolescents require specific services to address sensitive health issues is likely much higher. For example, half of single, sexually

active females younger than 18 years surveyed in family planning clinics in Wisconsin reported that they would stop using the clinics if parental notification for prescription contraceptives were mandatory; another one in 10 reported that they would delay or discontinue use of specific services, such as services for STDs. Furthermore, only 1% of adolescent girls who indicated they would stop using family planning services reported that they would also stop having intercourse; the vast majority reported that they would continue to have sex, but use less effective contraceptive methods or none at all.”

In the United States, 38 states mandate some form of parental involvement for abortion,<sup>10</sup> but mainstream American medical organizations uniformly oppose these laws because of the risk to adolescents’ health and safety.<sup>11</sup> According to the **American Medical Association**:<sup>12</sup> “*Physicians should not feel or be compelled to require minors to obtain consent of their parents before deciding whether to undergo an abortion.*” This AMA ethics policy paper outlines some of the harms of mandated parental involvement:

- Some minors may suffer serious physical injury or emotional harm if they are required to involve their parents in the decision to have an abortion, because of an abusive family environment.
- Parental involvement can interfere with the minor’s need for privacy on matters of sexual intimacy and sexual/reproductive health services. Organized medicine has viewed confidential care for adolescents as essential to their use of health services.
- Because the need for privacy can be compelling, minors may be driven to desperate measures to maintain the confidentiality of their pregnancies. They may run away from home, obtain an illegal abortion, or resort to self-induced abortion.
- Experience with parental consent laws in the U.S. shows that they do not enhance parent-child communications or relationships and in fact have negative effects on parent-child relationships.

When minors do not want to involve their parents, studies have shown they have good reasons. The evidence illustrates that it is not possible to legislate good family relations, which is a private matter and no business of the state. In U.S. states *without* parental involvement laws, over 30% of young women who chose not to involve their parents cited fear of physical harm, being kicked out of the house, or other abuse. Others reported that they chose not to involve their parents because of a difficult family situation, including drug dependency, loss of jobs, health problems, and marital strain.<sup>13</sup> Twelve percent of minors who did not involve their parents did not even live with either parent.<sup>14</sup> Among minors whose parents found out about their pregnancy from other sources, 6% reported physical violence, being forced to leave home, or damage to their parents’ health.<sup>15</sup>

In U.S. states with parental consent laws, evidence shows that while it decreases abortions in that state, it increases the frequency with which minors travel out of state for abortion care.<sup>16</sup> For example, Massachusetts passed a parental consent law that reduced by half the number of minors obtaining abortions, but minors representing 88% of that decrease traveled to other states for abortions. After Missouri implemented its parental notification law, the in-state abortion rate for women under age 18 fell by 20%, but the number of minors traveling out of state to obtain abortions increased by 52%.

The **American Civil Liberties Association** (ACLU) concurs with American medical organizations on the various harms of parental consent laws,<sup>17</sup> and further points out: “*These laws unfairly single out those pregnant teens who choose abortion.*” Ironically, minors are not subject to parental consent before having a baby, even though pregnancy is far riskier for adolescents.<sup>18</sup> Moreover, pregnant teenagers who want to carry to term could be under pressure to have an abortion by their parents or others, something which abortion clinics are aware of and screen for. Even anti-choice groups campaign against coerced abortion by parents<sup>19</sup> or others (although such coercion is not nearly as common as they seem to think.<sup>20</sup>) Coercion is wrong regardless of whether it is directed towards abortion or birth, but a parental consent law for abortion would essentially give parents the "right" to coerce a child to have a baby, endangering her health and life and future.

Internationally, courts have agreed that parents have no right to obstruct medically required care for their children. A scholarly review<sup>21</sup> of adolescents’ legal consent and right to confidentiality around reproductive healthcare noted that:

- “Parents of pregnant adolescents who do not satisfy criteria of being mature minors have no legal discretion to deny their consent to medically indicated abortion, since their legal duty is to provide their dependent children with medically indicated care.” When parents do obstruct such care, “there are stronger grounds to assess the adolescents as capable of providing consent for themselves.”
- In 1986, the Alberta Court of Appeal “found a minor competent to give her own consent to abortion despite her parents’ objection that she lacked necessary moral comprehension.” (C.v. Wren)
- The Axon case in the English High Court (2006) “ruled that adolescents’ right to medical confidentiality does not offend parents’ rights to involvement in their adolescent children’s choices.”
- The Axon case also found that parental involvement laws in the U.S. are irrelevant internationally, because they “responded to a peculiar preoccupation with abortion in US public life, and ignored adolescents’ human rights entitlements under the European Convention on Human Rights, and the CRC [UN Convention on the Rights of the Child], which the US is alone (with Somalia) in not ratifying.”

Most parental consent laws in the U.S. have a bypass provision allowing the minor to seek permission from a judge if they can demonstrate their maturity and competency. But the ACLU states: “*For many young women, going to court for a waiver is not a real alternative.*”<sup>22</sup> One obvious reason for this is that it takes a mature and competent minor to navigate the justice system in the first place. Regardless, if a child is too immature to have an abortion, how can she be mature enough to have a baby?

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- <sup>1</sup> Canadian Medical Association, *Privacy and Confidentiality*, 2014. <https://www.cma.ca/En/Pages/privacy-confidentiality.aspx>
  - <sup>2</sup> Canadian Medical Association, *Principles for the Protection of Patients' Personal Health Information*, 2011. <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD11-03.pdf>
  - <sup>3</sup> Canadian Medical Association, *Code of Ethics*, 2004. <http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD04-06.pdf>
  - <sup>4</sup> Canadian Medical Protective Association, *Can a Child Provide Consent?* March 2014 (revised June 2016). [https://oplfrpd5.cmpa-acpm.ca/en/duties-and-responsibilities/-/asset\\_publisher/bFaUiyQG069N/content/can-a-child-provide-consent-](https://oplfrpd5.cmpa-acpm.ca/en/duties-and-responsibilities/-/asset_publisher/bFaUiyQG069N/content/can-a-child-provide-consent-)
  - <sup>5</sup> United Nations, *Convention on the Rights of the Child*. September 1990. <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
  - <sup>6</sup> Supreme Court of Canada, *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 SCR 18.1. <https://www.canlii.org/en/ca/scc/doc/2009/2009scc30/2009scc30.html>
  - <sup>7</sup> Supreme Court of Canada, *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, Para 129. <https://www.canlii.org/en/ca/scc/doc/2005/2005scc35/2005scc35.html>
  - <sup>8</sup> American Civil Liberties Union. <https://www.aclu.org/other/laws-restricting-teenagers-access-abortion>
  - <sup>9</sup> English, Abigail and Carol A. Ford. The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges, *Perspectives on Sexual and Reproductive Health*, Volume 36, Number 2, March/April 2004. <http://www.guttmacher.org/pubs/journals/3608004.html>
  - <sup>10</sup> Guttmacher Institute, *Parental Involvement in Minor's Abortions*, State Policies in Brief, March 1, 2014. [http://www.guttmacher.org/statecenter/spibs/spib\\_PIMA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf)
  - <sup>11</sup> Center for Adolescent Health & the Law. Policy Statements About Adolescents' Informed Consent and Confidential Access to Specific Health Care Services, *Policy Compendium on Confidential Health Services for Adolescents*, Second Edition, September 2005. [http://www.cahl.org/PDFs/PolicyCompendium/Specific\\_Services\\_with\\_References.pdf](http://www.cahl.org/PDFs/PolicyCompendium/Specific_Services_with_References.pdf)
  - <sup>12</sup> American Medical Association, Council on Ethical and Judicial Affairs, *The American Medical Association Code of Medical Ethics' Opinions on Confidential Care for Sexually Active Minors and Physicians' Exercise of Conscience in Refusal of Services*, *Virtual Mentor*. February 2012, Volume 14, Number 2: 118-120. <http://journalofethics.ama-assn.org/2012/02/coet1-1202.html>  
Referencing: American Medical Association, Council on Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion*, CEJA Report H-A92, 1992-1993.
  - <sup>13</sup> Bixby Center for Global Reproductive Health, University of California San Francisco, *Adolescents & Parental Notification for Abortion*, Sept 2008. [https://bixbycenter.ucsf.edu/publications/files/ParentalNotification\\_2008Sep.pdf](https://bixbycenter.ucsf.edu/publications/files/ParentalNotification_2008Sep.pdf)
  - <sup>14</sup> Stanley K. Henshaw and Kathryn Kost, "Parental Involvement In Minors' Abortion Decisions", *Family Planning Perspectives*, pp 196- 200, 1992. <https://www.ncbi.nlm.nih.gov/pubmed/1426181>
  - <sup>15</sup> Dailard, Cynthia and Chinué Turner Richardson. "Teenagers' Access to Confidential Reproductive Health Services", *The Guttmacher Report on Public Policy*, November 2005, Volume 8, Number 4. <http://www.guttmacher.org/pubs/tgr/08/4/gr080406.html>
  - <sup>16</sup> Bixby, Idem.
  - <sup>17</sup> American Civil Liberties Association, *Laws Restricting Teenagers' Access to Abortion*, April 2001. <https://www.aclu.org/reproductive-freedom/laws-restricting-teenagers-access-abortion>

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- <sup>18</sup> Ontario Ministry of Health and Long-term Care, *Initial Report on Public Health: Teen Pregnancy*, Nov. 2012. [http://www.health.gov.on.ca/en/public/publications/pubhealth/init\\_report/tp.html](http://www.health.gov.on.ca/en/public/publications/pubhealth/init_report/tp.html)
- <sup>19</sup> Butts, Charlie, “Pregnant teens can’t be forced to have abortions – by anyone”, *OneNewsNow*, August 9, 2013. <https://www.onenewsnow.com/legal-courts/2013/08/09/pregnant-teens-can-t-be-forced-to-have-abortions-by-anyone>
- <sup>20</sup> Only half a percent of women cite the most important reason for their abortion as “Parents want me to have an abortion” or “Husband or partner wants me to have an abortion” (i.e., one percent total), although 6% and 14% cite these as one of the reasons (respectively). Finer, Lawrence B., Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh and Ann M. Moore. “Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives”, *Perspectives on Sexual and Reproductive Health* (Guttmacher Institute), Vol.37, No. 3, September 2005. <http://www.guttmacher.org/pubs/journals/3711005.pdf>
- <sup>21</sup> Cook, R.J., J.N. Erdman, B.M. Dickens, “Respecting adolescents’ confidentiality and reproductive and sexual choices”, *International Journal of Gynecology and Obstetrics*, 2007, 98, 182-187. <http://www.sciencedirect.com/science/article/pii/S0020729207002342>
- <sup>22</sup> American Civil Liberties Association, Idem.