



Protection of Conscience Project

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Amir Attaran and the elves

A law professor makes much ado

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Attaran: CMA siding with "bigots"

In a column in the on-line magazine *iPolitics*,¹ University of Ottawa law professor Amir Attaran asserts that the “corrosive hostility” of the Canadian Medical Association to “physician-assisted dying” is evident in its “cowardly and stupid” position on the procedure. He claims that the Association “all but threatened” the Supreme Court of Canada that “doctors would rise up” to block it.

In his telling, ever since the Court ignored the threat and struck down the law, the CMA has been acting like a “sore loser,” trying to persuade physicians not to participate. As evidence, he quotes a CMA policy recommendation: “Physicians are not obligated to fulfil requests for assisted dying.” And he complains that the CMA won’t force physicians unwilling to kill patients or help them commit suicide to find someone who will.

Now, the CMA also states that all eligible people should have access to the services without undue delay, and physicians will work with others to ensure access to them,² but Professor Attaran ignores this. His analysis of CMA policy is simple and scathing. Some physicians, he says, are “bigots”, and the CMA is siding with “those bigots” rather than with patients.

Professor Attaran identifies the bigots: physicians who believe that killing patients or helping them commit suicide is gravely wrong, or at least a bad idea, even in the circumstances defined by the Supreme Court. Those whom Professor Attaran denounces as bigots include physicians who believe they are ethically obliged to compassionately accompany and support dying patients, but not to kill them.

On the contrary, says Professor Attaran, they are “duty-bound” to kill patients or help them commit suicide precisely because the Supreme Court “pointedly” approved “*physician-assisted suicide*.”*

If physicians won’t help patients commit suicide, he rages, “then who does the CMA think should be obliged to help - elves, maybe?”

To which any number of physicians have already replied, “Not elves, but lawyers.”

Attaran: “they cannot refuse”

Notwithstanding his tone, Professor Attaran is likely pursuing a limited objective. It is doubtful that he intends to compel unwilling physicians to kill

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patients or help them commit suicide - yet. It seems his real purpose is to force them to become parties to suicide and homicide by referral; in his words, “they *cannot* refuse to help their patients access what is now part of the legal standard of care.”*

Within the context of an inflammatory diatribe, this can be made to seem a ‘concession’ or a ‘compromise’ - even a particularly generous and undeserved concession to bigots and a medical association that is too “close-minded and defensive” to agree with Professor Attaran.

What Professor Attaran left out

However, the pretence of ‘compromise’ depends upon the reliability of Professor Attaran’s account of the facts and the law, and this does not withstand scrutiny. He has got his facts plainly wrong and maligned the leadership of the Canadian Medical Association, and his explanation of *Carter v. Canada* is remarkably selective, not to say tendentious.

Taking the last point first, among the things Professor Attaran has left out of his account is the Court’s statement that “*nothing* in the declaration of invalidity which we propose to issue would compel *physicians* to provide assistance in dying,” and that “*a physician’s* decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief.”³

Here the Court referred to “physicians” (plural) and “a physician” (singular). This suggests that there is neither a collective obligation (physicians) nor individual obligation (physician’s) to provide or participate in homicide or suicide. To answer Professor Attaran’s question (who, if not physicians?), patients can have all the assistance they desire - from physicians willing to provide it. Elves need not go where physicians fear to tread.

Thus, *Carter* provides no warrant for Professor Attaran’s claim that physicians are “duty-bound” to kill patients or help them kill themselves. On the contrary: it is entirely consistent with CMA policy that physicians are “not obligated” to do so. On this point, the Supreme Court of Canada and the CMA are on the same page. If this is evidence that CMA leaders are bigots, they are at least in good company.

On the other hand, Professor Attaran himself is remarkably inconsistent.

Professor Attaran then and now

Shortly after the *Carter* ruling, he argued that those “hyperventilating” about the need to enact a new law were “ignorant of history.” Although the abortion law was not replaced after it was struck down by the Supreme Court, he said, the medical profession, “left to its own devices,” had achieved an imperfect but generally satisfactory solution. It could do the same for “assisted dying.”⁴

Note Professor Attaran's serene assurance that the medical profession could be trusted to find a way to implement the Carter decision. No word from him then about "cowardly and stupid" CMA policy. No word then that the CMA had threatened that doctors would rebel against a ruling in favour of "assisted dying." Not one word about then about the "corrosive hostility" of the CMA to euthanasia and assisted suicide.

No word then because these are recently fabricated allegations contradicted by the historical record.

Law on abortion vs. law on homicide

To begin with, Professor Attaran's comparison of the *Morgentaler* and *Carter* decisions was incomplete. The 1988 *Morgentaler* decision struck down the abortion law entirely, but *Carter* did not entirely strike down murder and assisted suicide laws. They were invalidated *only to the extent that* they prevent homicide and assisted suicide by physicians adhering to the Court's guidelines. Physicians cannot be charged for providing abortions no matter what the circumstances, but physicians who fail to follow the *Carter* guidelines can be charged for murder, manslaughter or assisted suicide.

In the absence of legislation, the appropriate historical reference point for *Carter* is the period between the 1938 case of *R. v. Bourne* and Canada's 1969 abortion law reform. *Bourne* was an English case that established a defence for physicians who provided abortions deemed necessary to preserve the life of the mother.⁵

Though this condition was broadly construed, physicians were still liable to prosecution if the abortion were shown not to be required for that purpose. In 1967, CMA representatives told a parliamentary committee that "uncertainty about transgression of the law" was one of the reasons the Association supported reform of the abortion law.⁶ Physicians wanted more than a defence to a charge. They wanted positive assurance that they would not be prosecuted.

A difference in perspective

Even with legislation - but particularly without it - it is difficult to see how physicians who are parties to homicide and suicide can entirely avoid some "uncertainty about transgression of the law." As a matter of public policy, complete immunity from prosecution for murder or manslaughter can be safely guaranteed only for public executioners acting in the course of their duties.

One sees this in Quebec, where the government promised that physicians who provide euthanasia in accordance with the province's euthanasia law will not be prosecuted.⁷ But the Quebec Federation of General Practitioners, supported by the Quebec Association of Health Facilities and Social Services, wanted more: a guarantee of complete immunity from prosecution even if a physicians *do not* comply with the law.⁸

The government went some distance to satisfy the Federation. The bill was revised to make it more difficult to prosecute non-compliant physicians,⁹ and further cover has been provided by instructions to falsify the cause of death in euthanasia cases.¹⁰ Ultimately, however, Quebec's euthanasia practice guide warns physicians that "except as provided by law, aid in dying remains subject to criminal sanctions."¹¹

The prospect of a seat in a prisoner's dock is not nearly as inviting and empowering as the tenured view from a law school pulpit, and it is neither cowardly nor stupid for the CMA to take that into account in its policy recommendations.

What else Professor Attaran left out

With respect to CMA policy, Professor Attaran is contradicted by even a cursory review of some of the publicly available documents.

Begin with the 20 page affidavit of then CMA President, Dr. Chris Simpson. Dr. Attaran cherry-picked three lines from this document to ‘prove’ that the CMA virtually threatened to obstruct a Supreme Court ruling in favour of euthanasia and assisted suicide.

The affidavit suggested nothing of the sort. On the contrary: it acknowledged but downplayed then current CMA policy against euthanasia and assisted suicide, stating that it was neither “a certainty” nor “perpetually frozen in time”: that it was “not static and can change.” In the very paragraph from which Professor Attaran plucked his quotation, it implied that the Association would likely change its policy if the procedures were legalized precisely because physicians would be “key players” whose cooperation would be needed to make assisted suicide and euthanasia available.¹²

The affidavit was filed after extensive cross-country public and internal consultations on end-of-life care,^{13,14} but it reflected the CMA’s announcement, months earlier, that it would intervene in *Carter* “not to offer a polarizing ‘pro’ or ‘con’ view on an already divisive issue,” but to provide “a deeper understanding and appreciation” of the results of its consultations and “highlight the challenges posed to physicians’ understanding of their traditional roles” if the law were changed.”¹⁵

Far from planning to block euthanasia and assisted suicide, even before the intervention was announced, CMA officials had quietly begun to study the provision of the services in jurisdictions where they were legal,¹⁶ and by the end of 2014 they were preparing a draft framework for implementing the services.¹⁷

The Association’s 2014 Annual General Council overwhelmingly approved a Board-sponsored resolution promising support for physicians who, within the law, “follow their conscience when deciding whether to provide medical aid in dying.”^{18,19} It was backed by calls for a position of “neutrality” on the issue of physician participation in euthanasia and assisted suicide,^{20,21}

CMA Vice President of Medical Professionalism, Dr. Jeff Blackmer, described this as “the other side” of conscientious objection: “almost conscientious permission.”¹⁹ Indeed, it was unlimited permission, neither qualified nor circumscribed by criteria for providing the services. Consistent with this, CMA submissions in its *Carter* intervention indicated that the Association would support physicians who decide to participate in euthanasia or assisted suicide, no matter how broadly the Court or legislature might cast the rules governing the procedures.^{22, 23}

In December, 2014, the CMA Board of Directors, rather than adopting a neutral position, formally approved physician assisted suicide and euthanasia, deleting a number of statements reflecting concerns about legalization of the procedures. Approval was not limited to the terminally ill or those suffering uncontrollable pain, nor did the policy exclude minors, the incompetent or mentally ill.²⁴

By convincing delegates to adopt an unqualified policy of “conscientious permission”, taking the position it did in its intervention, and by reversing and rewriting CMA policy, the Board of Directors effectively wrote a blank cheque for the Supreme Court of Canada to legalize assisted suicide and euthanasia on any terms acceptable to the judges. The new policy was released while the Court was considering its opinion on *Carter*, perhaps with the entirely reasonable expectation that it might influence the outcome of the case.²⁵ Ultimately, the *Carter* ruling offered more restrictive criteria for euthanasia and assisted suicide than CMA policy.

Getting the facts backwards

Dr. Chris Simpson and Dr. Jeff Blackmer were interviewed just before and after the *Carter* decision. Their comments reflected excitement and even enthusiasm about participation in an historic event, with proud and frequent references to the prospect that the CMA would assume a “leadership” role in implementing the decision. Dr. Simpson was well aware that euthanasia and assisted suicide could be approved for a wide range of conditions and circumstances, but seemed more exhilarated by the challenges that would offer than concerned about possible consequences.^{26,27,28,29,30,31}

Moreover, when asked, months before the ruling, if someone other than physicians might provide assisted suicide or euthanasia, Dr. Simpson’s response was, “I don’t think we want to be renegeing on our responsibilities to serve our patients.”³²

That does not reflect “corrosive hostility” to euthanasia and assisted suicide. It sounds more like the title of Professor Attaran’s essay.

Professor Attaran’s accusations are absurd. It is easier - even more reasonable - to believe in elves. One cannot produce evidence that elves do not exist, but there is more than sufficient evidence to demonstrate that Dr. Attaran has not only got his facts wrong, but got them completely backwards. He owes the CMA an apology.

Notes

1. Attaran A. “Doctors can’t refuse to help a patient die - no matter what they say.” *iPolitics*, 13 November, 2015
(<http://ipolitics.ca/2015/11/13/doctors-cant-refuse-to-help-a-patient-die-no-matter-what-they-say/>) Accessed 2015-11-24
2. *Principles-based Recommendations for a Canadian Approach to Assisted Dying*, Foundational Principle 2.
(<https://www.cma.ca/Assets/assets-library/document/en/advocacy/submissions/cma-submission-to-federal-external-panel-e.pdf>) Accessed 2015-11-24
3. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 132. Emphasis added.
(<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>) Accessed 2015-06-27.
4. Kirkey S. "No need for Harper government to enact new assisted-suicide legislation: professor." *Calgary Herald*, 26 February, 2015
(<http://www.calgaryherald.com/health/need+Harper+government+enact+assisted+suicide+legislation/10864482/story.html>) Accessed 2015-07-04
5. *R. v Bourne* (1939) 1KB 687
6. "We don't like being lawbreakers,' Dr. Aitken told the committee in partial explanation of the C.M.A's motivation in supporting the move to expunge the *Criminal Code's* prohibition of abortion. Dr. Gray commented that while he knew of no doctor having been prosecuted for performing an abortion openly in a hospital, there was still the uncertainty about transgression of

the law. Dr. Cannell reported there were 262 therapeutic abortions performed in Canadian hospitals between 1954 and 1965.” Waring G. "Report from Ottawa." *CMAJ* Nov. 11, 1967, vol. 97, 1233

7. Quebec’s Select Committee on Dying with Dignity recommended that the Attorney General instruct the Director of Criminal and Penal Prosecutions "that physicians who provide medical aid in dying *in accordance with the criteria provided by law* cannot be prosecuted" (emphasis added). Select Committee, *Dying with Dignity Report* (March, 2012) p. 89-90. See also Recommendation 20.

(http://www.consciencelaws.org/archive/documents/2012-03-quebec_death_report.pdf). Then Minister of Health Véronique Hivon promised physicians who appeared before a legislative committee that this would be done Consultations, Tuesday, 17 September 2013 - Vol. 43 no. 34: *Federation of General Practitioners of Quebec (Dr. Louis Godin, Dr. Marc-André Asselin)*, T#021 (<http://www.consciencelaws.org/background/procedures/assist009-002.aspx#021>)

8. Consultations, Tuesday, 17 September 2013 - Vol. 43 no. 34: *Federation of General Practitioners of Quebec (Dr. Louis Godin, Dr. Marc-André Asselin)*, T#015, T#092, T#094 (<http://www.consciencelaws.org/background/procedures/assist009-002.aspx#015, #092, #094>)
Wednesday 18 September 2013 - Vol. 43 no. 35: *Quebec Association of Health Facilities and Social Services (Michel Gervais, Diane Lavalle)*, T#017 (<http://www.consciencelaws.org/background/procedures/assist009-008.aspx#017>)

9. The government dropped Bill 52's provision for \$1,000.00 to \$10,000.00 fines for physicians who fail to report when they perform euthanasia. Instead, ARELC states that anyone who discovers that a physician has failed to report euthanasia must notify the Collège des médecins "so that it can take appropriate measures." *Act Respecting End of Life Care*, Section 46 (<http://www.consciencelaws.org/background/procedures/assist009-041.aspx#046>) It also removed the requirement that the Commission on End-of-Life Care report a physician's failure to adhere to MAD guidelines to authorities other than the Collège des médecins and the institution concerned. ARELC, Section 47 (<http://www.consciencelaws.org/background/procedures/assist009-041.aspx#047>)

10. Collège des médecins du Québec, Ordre des pharmaciens du Québec, Ordre des infirmières et infirmiers du Québec, *L'Aide Médicale à Mourir: Guide d'Exercice* (August, 2015), p. 49. Murphy S. "Quebec Euthanasia Guidelines: Practice guide issued by Quebec health care profession regulators" (August, 2015) (parallel translation) Protection of Conscience Project, T#198 - T#201 (<http://www.consciencelaws.org/law/commentary/legal068-013.aspx#198>)
For a detailed discussion of the directive, see Murphy S. "A bureaucracy of medical deception: Quebec physicians told to falsify euthanasia death certificates: Regulators support coverup of euthanasia from families." Protection of Conscience Project (<http://www.consciencelaws.org/background/procedures/assist012.aspx>)

11. Guide, p. 12 (T# 022)

12. In the Supreme Court of Canada (On Appeal from the Court of Appeal of British Columbia) *Affidavit of Dr. Chris Simpson, Motion for Leave to Intervene by the Canadian Medical Association* (5 June, 2014) para. 28, 58, 56
(<https://www.cma.ca/Assets/assets-library/document/en/advocacy/EOL/Supreme-Court-Affidavit-Carter-Case.pdf>) Accessed 2015-06-22.
13. Canadian Medical Association, *End-of-Life Care: A National Dialogue* (June, 2014)
(<https://www.cma.ca/Assets/assets-library/document/en/advocacy/end-of-life-care-report-e.pdf>)
Accessed 2015-06-10.
14. Canadian Medical Association, *End-of-Life Care: A National Dialogue. CMA Member Consultation Report* (July, 2014) p. 2
(<https://www.cma.ca/Assets/assets-library/document/en/advocacy/Englishreportfinal.pdf>)
Accessed 2015-07-04
15. Blackmer J, Francescutti LH, “Canadian Medical Association Perspectives on End-of-Life in Canada.” *HealthcarePapers*, 14(1) April 2014: 17-20.doi:10.12927/hcpap.2014.23966
16. Kirkey S. “Canadian doctors preparing for 'all eventualities' in case top court strikes down ban on assisted suicide.” *National Post*, 21 December, 2014
(<http://news.nationalpost.com/2014/12/21/canadian-doctors-preparing-for-all-eventualities-in-case-top-court-strikes-down-ban-on-assisted-suicide/>) Accessed 2014-12-22
17. Rich P. "CMA updates assisted dying policy." *Canadian Medical Association*, 9 January, 2015 (<https://www.cma.ca/En/Pages/cma-updates-assisted-dying-policy.aspx>) Accessed 2015-07-02
18. Kirkey S. “Canadian doctors want freedom to choose whether to help terminal patients die: CMA to revisit issue of doctor-assisted death after delegates pass motion supporting physician's right to 'follow their conscience'.” *canada.com*, 19 August, 2014
(<http://o.canada.com/news/national/canadian-doctors-want-freedom-to-choose-whether-to-help-terminal-patients-die>) Accessed 2015-06-26
19. Canadian Medical Association, *147th General Council Delegates’ Motions: End-of-Life Care: Motion DM 5-6*.
(<https://www.cma.ca/Assets/assets-library/document/en/GC/Delegate-Motions-end-of-life.pdf>)
Accessed 2015-06-22
20. Canadian Medical Association, *General Council Motions - 2014 Procedures and Guidelines: Motion Development*, p. 2, point 6.
(<https://www.cma.ca/Assets/assets-library/document/en/about-us/procedures-guidelines-2014-e.pdf>) (Accessed 2015-07-01)
21. Rich, P. “Physician perspective on end-of-life issues fully aired.” *Canadian Medical Association*, 19 August, 2014

(<https://www.cma.ca/En/Pages/Physician-perspective-on-end-of-life-issues-fully-aired.aspx>)
Accessed 2015-06-22

22. In the SCC on appeal from the BCCA, *Factum of the Intervener, The Canadian Medical Association* (27 August, 2014)
(<http://www.consciencelaws.org/archive/documents/carter/2014-08-27-cma-factum.pdf>)

23. Murphy S. "Re: Joint intervention in *Carter v. Canada* -Selections from oral submissions." Supreme Court of Canada, 15 October, 2014. Harry Underwood (Counsel for the Canadian Medical Association) *Protection of Conscience Project*.
(http://consciencelaws.org/law/commentary/legal073-009.aspx#Harry_Underwood)

24. Canadian Medical Association Policy: *Euthanasia and Assisted Death* (Update 2014)
(https://www.cma.ca/Assets/assets-library/document/en/advocacy/EOL/CMA_Policy_Euthanasia_Assisted%20Death_PD15-02-e.pdf) Accessed 2015-06-26

25. Such an expectation would have been fully justified in light of the influence of the CMA noted in the affidavit of Dr. Simpson. In the Supreme Court of Canada (On Appeal from the Court of Appeal of British Columbia) *Affidavit of Dr. Chris Simpson, Motion for Leave to Intervene by the Canadian Medical Association* (5 June, 2014) para. 19-20
(<https://www.cma.ca/Assets/assets-library/document/en/advocacy/EOL/Supreme-Court-Affidavit-Carter-Case.pdf>) Accessed 2015-06-22. In fact, the Court quoted the new policy in the *Carter* ruling. *Carter*, para. 132.

26. Kirkey S. "Helping suffering patients die may be doctor's most humane option, Canadian Medical Association says." *National Post*, 4 February, 2015
(<http://news.nationalpost.com/news/canada/helping-suffering-patients-die-may-be-doctors-most-humane-option-canadian-medical-association-says>) Accessed 2015-07-02

27. Stone L. "'Historic' assisted suicide ruling could make Parliament draft new laws." *Global News*, 5 February, 2015
(<http://globalnews.ca/news/1814606/historic-assisted-suicide-ruling-could-make-parliament-draft-new-laws/>) Accessed 2015-07-02

28. Ubelacker S. "Doctors ready for Supreme Court decision on assisted suicide." *CTV News*, 5 February, 2015
(<http://www.ctvnews.ca/health/doctors-ready-for-supreme-court-decision-on-assisted-suicide-1.223268>) Accessed 2015-07-04

29. Grant K. "Canadian doctors drafting new rules in case doors open to assisted suicide." *Globe and Mail*, 5 February, 2015
(<http://www.theglobeandmail.com/news/national/canadian-doctors-drafting-new-rules-in-case-doors-open-to-assisted-suicide/article22798448/>) Accessed 2015-07-03

30. Geddes J. "Interview: The CMA's president on assisted dying: Dr. Chris Simpson calls for a process to set new rules." *Macleans*, 6 February, 2015 (Edited transcript at <http://www.macleans.ca/politics/ottawa/interview-the-cmas-president-on-assisted-dying/>) Accessed 2015-07-16. (Full transcript at <http://www.consciencelaws.org/publications/reports/report-2015-001/2015-02-06-macleans-simpson-interview-edited.pdf>)

31. Hume J. "Supreme Court strikes down ban on assisted suicide." *Toronto Sun*, 6 February, 2015 (<http://www.torontosun.com/2015/02/06/supreme-court-strikes-down-ban-on-assisted-suicide>) Accessed 2015-07-04

32. Kirkey S. "Doctor-assisted death appropriate only after all other choices exhausted, CMA president says." *canada.com*, 26 August, 2014 (<http://o.canada.com/news/national/doctor-assisted-death-appropriate-only-after-all-other-choices-exhausted-cma-president-says>) Accessed 2014-10-06.