Protection of Conscience Project

www.consciencelaws.org

23 May, 2016

[Individually addressed to MPs and Senators]
[House of Commons] [The Senate of Canada]
Ottawa, Ontario
Canada K1A 0A4

Dear [individually addressed]:

On behalf of the Protection of Conscience Project I am writing to you concerning Bill C-14. The Project was an intervener in the *Carter* case at the Supreme Court of Canada. It does not take a position on the acceptability of euthanasia or assisted suicide.

The Project submitted a brief to the Standing Committee on Justice and Human Rights by the deadline, but (like many others) it was not distributed to Committee members before they concluded their deliberations. In view of this, the time constraints and the serious nature of the subject, it was decided to write directly to Members of Parliament and Senators.

Enclosed is the amendment to Bill C-14 proposed by the Project. Ironically, perhaps, what the Protection of Conscience proposes is not a protection of conscience amendment. Instead, the amendment is limited to the criminal law, which is strictly and fully within the jurisdiction of the Parliament of Canada. It uses the language of Bill C-14 and the criminal law: "inflicting death," homicide, suicide and the well-established and well-understood criminal concept of "parties" to acts.

The proposed amendment would establish that, as a matter of law and national public policy, no one can be compelled to become a party to homicide or suicide, or punished or disadvantaged for refusing to do so.

This would not prevent the provision of euthanasia or assisted suicide by willing practitioners, nor rational arguments aimed at persuading practitioners to participate, nor the offer of incentives to encourage participation.

The proposed amendment is an addition that does not otherwise change the text of Bill C-14. Nor does it touch the eligibility criteria proposed by *Carter*, nor the criteria or procedural safeguards recommended by the House Standing Committee or Senate Committee. It would not, in fact, affect any further revisions to criteria or procedures that might be adopted, whether they be more or less restrictive than the current text.

However, the amendment would prevent state institutions or anyone else from

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attempting to force unwilling citizens be a party to killing someone or aiding in suicide. It would prevent those in positions of power and influence from harassing, punishing or disadvantaging anyone who refuses to be a party to inflicting death on others.

This is an eminently reasonable and fully defensible exercise of Parliament's jurisdiction in criminal law. It is justified by plans for policies to compel physicians and others to become parties to inflicting death upon patients, some of which are already in force in Ontario.

The proposed amendment does not infringe the constitutional jurisdiction of provinces in the administration and enforcement of human rights law. Nor would it interfere with the full and legitimate exercise of provincial jurisdiction in health care or the regulation of medical professionals. Rather, it would re-establish and preserve a foundational principle of democratic civility: that no one and no state institution should be allowed to compel unwilling citizens be parties to killing other people.

The importance of such foundational principles was demonstrated in the House of Commons on 18 May by the conduct of the Prime Minister, by the volcanic response to his conduct, and by subsequent comments and reflections by members of all parties, including the Prime Minister himself.

The Prime Minister, apologizing, described his conduct as "unadvisable," "unacceptable," and "unbecoming of a parliamentarian." Members of his own party agreed that his conduct had to be taken "very seriously," that "physical intervention is never appropriate in this chamber," and that a member of the opposition directly affected by the Prime Minister's conduct was "justly aggrieved." The Minister of Health empathized and expressed her "sincere concern" for "the members who have been hurt by the incident." (See *Hansard*, 18 and 19 May, 2016)

Nonetheless, granted that the Prime Minister's conduct was a violation of parliamentary privilege, nothing he did was remotely comparable to forcing someone to be a party to killing another human being. That is a gross violation, not of privilege only, but of human dignity and basic principles of democratic civility.

If it is "unacceptable" for Members of Parliament to use physical force against each other, surely it is "unacceptable" for state institutions or others to use the force of law to compel people to be parties to inflicting death upon others, and to punish those who refuse.

To claim that Parliament must allow provinces to do this in the interests of "co-operative federalism" is like asserting that party members must turn a blind eye to the conduct of their leaders in the interests of party unity, or that a spouse must turn a blind eye to child abuse in the interests of preserving a marriage.

The enclosed amendment ought to be common ground in a sea of divergent opinions about euthanasia and assisted suicide. I earnestly recommend that you support it.

Sincerely

Sean Murphy,
Administrator

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Proposed amendment

Compulsion to participate in inflicting death

241.5(1) Every one commits an offence who, by an exercise of authority or intimidation, compels another person to be a party to inflicting death by homicide or suicide.

Punishing refusals to participate in inflicting death

241.5(2) Every one commits an offence who

a) refuses to employ a person or to admit a person to a trade union, professional association, school or educational programme because that person refuses or fails to agree to be a party to inflicting death by homicide or suicide; or

b) refuses to employ a person or to admit a person to a trade union, professional association, school or educational programme because that person refuses or fails to answer questions about or to discuss being a party to inflicting death by homicide or suicide.

Intimidation to participate in inflicting death

241.5(3) Every one commits an offence who, for the purpose of causing another person to be a party to inflicting death by homicide or suicide

(a) suggests that being a party to inflicting death is a condition of employment, contract, membership or full participation in a trade union or professional association, or of admission to a school or educational programme; or

(b) makes threats or suggestions that refusal to be a party to inflicting death will adversely affect

(i) contracts, employment, advancement, benefits, pay, or

(ii) membership, fellowship or full participation in a trade union or professional association.

Definitions

241.5(4) For the purpose of this section,

a) "person" includes an unincorporated organization, collective or business;

b) "inflicting death by homicide or suicide" includes medical assistance in dying as defined in Section 241.1, and attempted homicide and suicide.

Punishment

241.6(5) (a) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life.

(b) Every one who commits an offence under subsection (2) is guilty of an indictable offence and liable to imprisonment for ten years.

(c) Every one who commits an offence under subsection (3) is guilty of an indictable offence and liable to imprisonment for five years.

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To Members of Parliament and Senators

Parliament of Canada (23 May, 2016)

I. Introduction

I.1 The Provincial-Territorial Expert Advisory Group on Physician Assisted Dying made 43 recommendations concerning the implementation of the Supreme Court of Canada ruling in *Carter v. Canada (Attorney General).*[1] The following are of particular concern:

- that objecting facilities should be forced to arrange for homicide or assisted suicide elsewhere by initiating patient/resident transfers;
- that objecting physicians or health care workers should be forced to actively enable homicide or suicide by
  - providing referrals, or
  - arranging direct transfers, or
  - enlisting or arranging the enlistment of patients in a euthanasia/assisted suicide delivery system analogous to an organ transplant system.

I.2 These recommendations are inconsistent with genuine accommodation of freedom of conscience and religion, inasmuch as many conscientious objectors reasonably consider them to involve unacceptable complicity in homicide and suicide. The reasonableness of their position can be verified by considering it within the context of law and public policy.

II. Complicity in public policy and law

II.1 With respect to the legal context, but for the *Carter* decision, it appears that physicians who acted in accordance with any of these recommendations would be exposed to prosecution as a party to the offence of first degree murder or assisted suicide, or conspiracy to commit first degree murder or assisted suicide. In addition, they would be civilly liable for damages arising from the homicides or suicides to which they were parties.

II.2 The public policy context is provided by the case of Maher Arar. In 2002, Arar, a Canadian citizen, was detained in New York, interrogated and "rendered" to Syria by U.S. authorities. In Syria he was imprisoned for almost a year, "interrogated, tortured and held in degrading and inhumane conditions."[2] A subsequent "comprehensive

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and thorough" investigation "did not turn up any evidence that he had committed any criminal offence" and disclosed "no evidence" that he was a threat to Canadian security."[3] A commission of inquiry was appointed to investigate "the actions of Canadian officials" in the case.[4]

II.3 What concerned the Canadian public and the government was whether or not Canada was complicit in the torture of Maher Arar. That concern surfaces repeatedly in the report of the commission of inquiry: in briefing notes to the Commissioner of the RCMP,[5] in the testimony of the Canadian Ambassador to Syria,[6] in references to the possibility of RCMP complicity in his deportation,[7] about the perception of complicity if CSIS agents met Mr. Arar in Syria,[8] in the suggestion that evidence of complicity could show "a pattern of misconduct,"[9] and in the conclusions and recommendations of the report itself.[10]

II.4 The issue of complicity arose again in 2007 when a report in Toronto's *Globe and Mail* alleged that prisoners taken in Afghanistan by Canadian troops and turned over to Afghan authorities were being mistreated and tortured.[11] "Canada is hardly in a position to claim it did not know what was going on," said the *Globe*. "At best, it tried not to know; at worst, it knew and said nothing."[12] On this view, one can be complicit in wrongdoing not only by acting, but by failing to act, and even by silence.

II.5 The Arar Inquiry and the concerns raised by the *Globe and Mail* story about Afghan detainees make sense only on the premise that one can be morally responsible for acts actually committed by another person: precisely the position taken by physicians who would refuse to comply with demands that they help find a colleague who will kill patients or help a patients kill themselves.

II.6 The *Carter* decision changed the law on murder and assisted suicide by making exemptions in defined circumstances, but it did not change the reasoning that underpins the law on parties to offences - the same reasoning that triggered the commission of inquiry investigating the treatment of Maher Arar, the same reasoning that sparked the *Globe and Mail* editorial about the treatment of Afghan detainees, and the same reasoning used by physicians and health care providers who would refuse to facilitate euthanasia or assisted suicide by referral.

II.7 The reasoning that underpins the law on parties to criminal offences, civil liability and public policy on complicity in torture cannot be dismissed as ethically or legally irrelevant to the exercise and protection of fundamental freedoms of conscience and religion.

III. Coerced complicity in homicide and suicide

III.1 The position of the Provincial-Territorial Expert Advisory Group and some influential or powerful individuals or groups is that a learned or privileged class, a profession or state institutions can legitimately compel people to be parties to homicide or suicide - and punish them if they refuse.

III.2 Nothing of the kind is stated or implied in *Carter*. This is not a reasonable limitation of fundamental freedoms, but a reprehensible attack on them and a serious violation of human dignity. From an ethical perspective, it is incoherent, because it posits the existence of a

moral or ethical duty to do what one believes to be wrong. From a legal and civil liberties perspective, it is profoundly dangerous. If the state can demand that citizens must be parties to killing other people, and threaten to punish them or discriminate against them if they refuse, what can it not demand? Yet the Group appears to experience resistance to coerced participation in homicide and suicide as a "uniquely Canadian" mountain to be climbed.[13]

III.3 If so, it is a legitimate response to a uniquely Canadian demand. Other countries have demonstrated that it is possible to provide euthanasia and physician assisted suicide without suppressing fundamental freedoms. None of them require "effective referral," physician-initiated "direct transfer" or otherwise conscript objecting physicians into euthanasia/assisted suicide service (See http://bit.ly/1qDKUBb). It appears that they recognize a point made by Dr. Monica Branigan when she appeared before the Committee: that one "cannot build a sustainable system on moral distress."[14]

IV. Federal and provincial jurisdiction

IV.1 Provincial governments have primary jurisdiction over human rights law, subject to the *Canadian Charter of Rights and Freedoms*. By virtue of the subject matter in this particular case (homicide and suicide), the federal government has jurisdiction in criminal law.

IV.2 Criminal law is not used to enforce or defend fundamental rights and freedoms *per se.* For that, Canada relies upon human rights statutes. But Canada does use the criminal law to prevent and to punish particularly egregious violations of fundamental freedoms that also present a serious threat to society: unlawful electronic surveillance, unlawful confinement and torture, for example.

IV.3 Coercion, intimidation or other forms of pressure intended to force citizens to become parties to homicide or suicide is both an egregious violation of fundamental freedoms and a serious threat to society that justifies the use of criminal law.

IV.4 For this reason, whatever might be decided about laws regulating euthanasia and assisted suicide, the Project proposes that the federal government make it a matter of law and national public policy that no one can be compelled to become a party to homicide or suicide, or punished or disadvantaged for refusing to do so, even if the homicide or suicide is not a criminal offence.

Notes:

1. Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report* (30 November, 2015) (http://www.consciencelaws.org/archive/documents/2015-12-14-prov-panel.pdf) For commentary on the Report, see Murphy S. "A uniquely Canadian approach" to freedom of conscience: Experts recommend coercion to ensure delivery of euthanasia and assisted suicide." Protection of Conscience Project, 22 January, 2016. (http://www.consciencelaws.org/law/commentary/legal073-012.aspx)

2. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*. (hereinafter, "*Arar Inquiry: Analysis and Recommendations*") p. 9 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

3. *Arar Inquiry: Analysis and Recommendations,* p. 35-36 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf) Accessed 2008-09-08

4. *Deputy Prime Minister Issues Terms of Reference for the Public Inquiry into the Maher Arar Affair.* (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Terms_of_Reference.pdf) Accessed 2008-09-08

5. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, (hereinafter "*Arar Inquiry"*) Vol. 1, p. 64. (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_I_English.pdf) Accessed 2008-09-08.

6. *Arar Inquiry:* Vol. I, p. 271. Accessed 2008-09-08.

7. *Arar Inquiry:* Vol. I, p. 299.

8. *Arar Inquiry:* Vol. I, p. 309-310.

9. *Arar Inquiry:* Vol. II, p. 770 (http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/Vol_II_English.pdf) Accessed 2016-01-27

10. *Arar Inquiry: Analysis and Recommendations,* p. 29, 35, 199, 271, 345-346.

11. Smith, Graeme, "From Canadian custody into cruel hands." *Globe and Mail*, 23 April, 2007 (http://www.theglobeandmail.com/news/world/from-canadian-custody-into-cruel-hands/articlA585956/?page=all) Accessed 2016-01-27

12. Editorial, "The truth Canada did not wish to see." *Globe and Mail*, 2 April, 2007. (http://www.theglobeandmail.com/opinion/the-truth-canada-did-not-wish-to-see/article1074431/) Accessed 2016-01-27.

13. Meeting No. 5, PDAM Special Joint Committee on Physician Assisted Dying, 26 January, 2016. *Maureen Taylor, speaking for the Provincial-Territorial Expert Advisory Group on Physician Assisted Dying* - 19:07:53 to 19:08:11. (http://parlvu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20160126/-1/24370?useragent=Mozilla/5.0 (Windows NT 6.1; WOW64; Trident/7.0; SLCC2; .NET CLR 2.0.50727; .NET CLR 3.5.30729; .NET CLR 3.0.30729; Media Center PC 6.0; .NET4.0C; .NET4.0E; InfoPath.3; GWX:DOWNLOADED; rv:11.0) like Gecko) Accessed 2016-01-28

14. Meeting No. 6, PDAM Special Joint Committee on Physician Asssisted Dying, 27 January, 2016. *Dr. Monica Branigan, speaking for the Canadian Society of Palliative Care Physicians* - 17:29:02 to 17:29:30