Supreme Court of Canada orders legalization of physician assisted suicide and euthanasia

Carter v. Canada (Attorney General) 2015 SCC 5

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In February, 2015, the Supreme Court of Canada struck down the criminal law to the extent that it prohibits physician assisted suicide and euthanasia in circumstances defined by the Court.[1]

It appears that most or all of the major media outlets understood this to mean that the Court had legalized physician assisted suicide.[2]

However, the ruling referred not only to the assisted suicide provision [Section 241(b)] but to Section 14, which typically pertains to murder:

> No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.[3]

This section prevents someone accused of murder from raising the defence that the deceased consented to be killed.

In other words, the ruling not only permits physician assisted suicide, but physician administered euthanasia. The appellants had made clear from the very beginning that they were seeking both,[4] and the Supreme Court authorized both, including them under the term of art proposed by the appellants: "physician assisted dying."[5]

Unfortunately, physicians and the public reading CMA policy and the *Carter* decision are likely to be perplexed by inconsistent terminology. By "physician assisted dying" the Supreme Court means *both* physician assisted suicide *and* physician administered euthanasia. However, for the the Canadian Medical Association, "physician assisted death,"means *only* physician assisted *suicide*. The CMA uses "medical aid in dying" to refer to *both* physician assisted suicide and physician administered euthanasia.[6] The CMA's written submission in *Carter* did not provide the new definitions, though they are implied in the following statement:

> The CMA accepts that the decision of whether or not **medical aid in dying** should be allowed as a matter of law is for lawmakers, not medical doctors, to determine. The policy itself acknowledges, uniquely among CMA policies in this respect, that "[it is the prerogative of society to decide whether the laws dealing with **euthanasia and assisted suicide** should be changed. (Emphasis added)[7]

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On the other hand, in his oral submissions during the CMA's intervention at the Supreme Court, the CMA's counsel referred only to "physician assisted death/dying," *not* "medical aid in dying," perhaps reflecting the usage of the term among lawyers involved in the appeal rather than the terminology used by his client.[8]

In any case, the point to emphasize is that the Court has authorized physicians not only to help eligible patients commit suicide, but to kill them - whether or not they are capable of suicide. The Court did not restrict physician administered euthanasia to eligible patients who are unable to kill themselves. Under the terms of the ruling, an eligible patient may request euthanasia as a preferred option. This, too, was sought by the appellants:

> We advocate under Section 7 that all persons, able-bodied or disabled, who otherwise meet the [criteria] . . . to be able to seek the assistance of a doctor even if they could do it themselves.[9]

The ruling requires that physician assisted suicide and euthanasia be limited to competent adults who clearly consent to the procedure.[10] The use of the present tense suggests that consent cannot be established by an advance directive or provided by a substitute medical decision maker if the patient is otherwise unable to express valid consent.[11]

According to *Carter*, the condition need not be terminal, but the patient must have "a grievous and irremediable medical condition (including an illness, disease or disability)."[12] The word "including" used here means that assisted suicide and euthanasia may be provided not only for "illness, disease or disability," but for other medical conditions - frailty, for example.[13]

While the Court notes that "minor medical conditions" would not qualify[14] and that the medical condition must be "grievous," these are vague terms. Moreover, the Court does not specify whether it is the patient or the physician who determines that a condition is grievous. The medical condition must be "irremediable"; in oral argument, the appellants suggested this could be understood as "incurable."[15] However, the Court further states that individuals are entitled to refuse any treatments they find unacceptable,[16] so the ruling actually means that even treatable and curable medical conditions can be considered irremediable and incurable if the patient refuses treatment.

Mental illness is a medical condition, and some kinds of mental illness are thought not to affect decisional capacity or competence. In passing, the Court remarks that the parameters they would propose in the reasons would not apply to "persons with psychiatric disorders."[17] However, the parameters actually laid out do not explicitly exclude mental illness, so, on this point, the ruling is ambiguous.

Finally, the medical condition must cause "enduring suffering that is intolerable to the individual."[18] The Court does not specify that the suffering must be physical. Since it acknowledges the distinction between physical and psychological suffering[19] and pain and suffering,[20] the reference to intolerable suffering can be understood to mean both. Although the ruling does not say so, it is generally understood that suffering is subjectively assessed by the individual experiencing it.

Carter and the criminal law

If all of these criteria are met, a physician who kills a patient or helps him commit suicide cannot be

charged for murder or assisted suicide or any other offence. However, *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.

In the absence of legislation, the appropriate historical reference point for understanding the legal effect of *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.[21]

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.[22] Physicians wanted more than a defence to a charge. They wanted positive assurance that they would not be prosecuted.

That assurance came when the Supreme Court of Canada struck down the abortion law entirely in the *Morgentaler* case. Physicians cannot be charged for providing abortions no matter what the circumstances.

However, 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." In the first place, the law against counselling suicide still stands [241(a) *Criminal Code*], so, while physicians may assist with suicide under the *Carter* guidelines, they can be charged if they recommend it.

Second, 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. Thus, while the *Carter* ruling means that the state cannot prevent qualified patients from obtaining therapeutic homicide and suicide from physicians, it also means that physicians who fail to follow the *Carter* guidelines can be charged for first or second degree murder,[23,24] or manslaughter,[25] or administering a noxious substance.[26]

Further, in such cases it would be a crime to conspire with the physician,[27] to do or omit to do anything for the purpose of aiding the physician,[28] to abet the physician,[29] or to counsel, procure, solicit or incite a physician to violate the *Carter* guidelines,[30] even if a patient is not ultimately killed.[31] Thus, anyone who deliberately participates in or facilitates euthanasia or assisted suicide by "effective referral" or similar means is liable to be charged unless the act is exempted by *Carter* from prosecution.

Moving the goalposts

The Court limited its ruling to the facts of the *Carter* case, but offered no opinion "on other situations" where physicians might be asked to kill patients or help them commit suicide.[32] This means that the parameters set by the Court in *Carter* can be expanded in federal or provincial laws or in later litigation. This is highly likely. For example: Quebec's euthanasia law is supposed to apply only to competent adults, but, even before the law was passed, the government was being pressured by various establishment organizations to expand the law to authorize euthanasia by advance

directives[33] and extend euthanasia to the mentally ill[34] and children.[35] A Provincial Territorial Expert Advisory Group has since recommended precisely these expansions of the original *Carter* ruling.[36]

This must be kept in mind by everyone involved in developing legal and policy responses to the ruling, particularly those touching upon freedom of conscience for physicians and health care workers. It would be a serious mistake to presume that the goalposts set in *Carter* will not be moved.

Carter and freedom of conscience and religion

What of physicians who do not want to kill patients or help them commit suicide?

The question is important, because, even where euthanasia and assisted suicide are legal, only a minority of physicians - sometimes a very small minority - are willing to kill patients or help them kill themselves.[37] Most physicians, it seems, are unwilling to do what the Supreme Court of Canada expects them to do: lethally inject patients and write prescriptions for lethal medications. Ironically - some would say perversely - the appellants claimed that this was exactly the reason that only physicians should be permitted to kill patients or assist with suicide.[38]

The ruling itself is limited to the constitutional validity of the criminal law. It does not impose a legal duty on the state or upon anyone else to pay for euthanasia or assisted suicide or to provide or participate in them.

That is essentially what the judges themselves acknowledge in *Carter*.

> In our view, *nothing* in the declaration of invalidity which we propose to issue would compel physicians to *provide* assistance in dying. *The declaration simply renders the criminal prohibition invalid*. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures (para. 132). (Emphasis added)

Note that the Court here referred to "physicians" (plural), not "a physician" (singular). This passage indicates that striking down the criminal prohibition did not, in the Court's view, create any obligation on the part of physicians (individually or collectively) to provide assisted suicide or euthanasia. The statement is limited to providing - doing the killing or providing the lethal prescription.

However, the Court included the broader term - participation - as it continued:

> . . . we note - as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* -- that a physician's decision *to participate* in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled (para. 132). (Emphasis added)

Unfortunately, euthanasia activists understand "reconciliation" to mean forcing physicians unwilling

to kill patients to find a colleague who will.[39] Dr. James Downar of Toronto is one of them.

> Downar said it is critical that legislators involve stakeholders in crafting a process to ensure all Canadians have access to physicians who will assist them in dying if they meet prescribed conditions. Any process must also require doctors who have a conscientious objection to refer patients to a colleague who will medically assist them with dying.[40]

To suggest that this reconciliation is to be accomplished by forcing unwilling physicians to become parties to homicide and suicide is inconsistent with the comments of Justice Beetz in *Morgentaler*, cited with approval by the full bench of the Court in *Carter*:

> Nothing in the *Criminal Code* obliges the board of an eligible hospital to appoint therapeutic abortion committees. Indeed, a board is entitled to refuse . . . in a hospital that would otherwise qualify to perform abortions, and boards often do so in Canada. Given that the decision to appoint a committee is, in part, one of conscience, and, in some cases, one which affects religious beliefs, a *law cannot force a board to appoint a committee any more than it could force a physician to perform an abortion*.[41] (Emphasis added)

Note that Justice Beetz, while distinguishing between appointing a committee and performing an abortion, nonetheless considered both acts to involve judgements of conscience and religious belief, and the legal suppression of one to be the equivalent of the legal suppression of the other.

Therapeutic abortion committees did not provide abortions. In fact, members of therapeutic abortion committees were prohibited from doing so.[42] The committees facilitated abortions by authorizing them. The refusal of boards to approve the formation of such committees was a refusal to become part of (participate in) a chain of causation culminating in abortion, even if not every case brought to a committee resulted in abortion.

Thus, Justice Beetz' comments, affirmed by *Carter*, are authority for the proposition that the state is not only precluded from forcing individuals or institutions to provide morally contested procedures, but also precluded from forcing them to participate indirectly by referral or other forms of causal facilitation.

At the very least, this passage indicates that the suppression or restriction of freedom of conscience or religion by compelling indirect participation in a morally contested procedure is legally equivalent to compelling direct participation, a conclusion wholly consonant with the law on criminal responsibility and civil liability. The same constitutional standard applies, whether the state means to force unwilling physicians to kill patients themselves, or to force them to arrange for patients to be killed by someone else.

Put another way, compelling indirect participation in a morally contested act is not a constitutionally valid 'solution' for the 'problem' that arises from being unable to compel direct participation.

The Court's statement that "the *Charter* rights of patients and physicians will need to be reconciled" is not, as some seem to think, a warrant for the suppression of freedom of conscience and religion

among health care workers.

The *Charter* right of patients clearly established by *Carter* is a legal right not to be impeded or obstructed by the state in seeking euthanasia and assisted suicide in accordance with the Court's guidelines from willing physicians, except to the extent that impediments or obstructions can be demonstrably justified in a free and democratic society.

The *Charter* right of physicians clearly established by *Carter* is their legal right not to be to impeded or obstructed by the state in providing euthanasia and assisted suicide in accordance with the Court's guidelines, except to the extent that impediments or obstructions can be demonstrably justified in a free and democratic society.

Any additional rights claims are derived by reading into the ruling what the judges either did not address, or purposefully and expressly left out.

Notes:

1. *Carter v. Canada* (Attorney General), 2015 SCC 5, para. 132. (Hereinafter "Carter") (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do) Accessed 2015-06-27.

2. For example: MacCharles T. "Supreme Court strikes down assisted suicide ban." Toronto Star, 6 February, 2015 (http://www.thestar.com/news/canada/2015/02/06/supreme-court-rules-strikes-down-assisted-suicide-ban.html) Accessed 2015-02-07

Cheadle B. "Canadians have right to doctor-assisted suicide, Supreme Court rules." Times Colonist, 6 February, 2015. (http://www.timescolonist.com/opinion/columnists/canadians-have-right-to-doctor-assisted-suicide-supreme-court-rules-1.1754632) Accessed 2015-02-07

MacLeod I. "Supreme Court of Canada strikes down ban on doctor-assisted suicide." National Post, 6 February, 2015. (http://news.nationalpost.com/2015/02/06/supreme-court-of-canada-strikes-down-ban-on-doctor-assisted-suicide/) Accessed 2015-02-07

Balinksi P. "Canada's top court rules doctors can help kill patients; overturns assisted suicide law." LifeSite News, 6 February, 2015 (https://www.lifesitenews.com/news/breaking-canadas-top-court-rules-doctors-can-help-kill-patients) Accessed 2015-02-07

3. Criminal Code, Section 14 (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-5.html#docCont) Accessed 2015-02-07

4. In the Supreme Court of British Columbia, *Notice of Civil Claim between Lee Carter, Hollis Johnson, Dr. William Shoichet and the British Columbia Civil Liberties Association (Plaintiffs) and the Attorney General of Canada (Defendant)* dated 26 April, 2011, Part 1, para. 6, 7

(http://www.consciencelaws.org/archive/documents/carter/2011-04-26-noticeofclaim01.pdf) (Hereinafter "*Original Notice of Claim*")

5. *Original Notice of Claim*, para. 8

6. CMA Policy, *Euthanasia and Assisted Suicide* (Update 2014) (http://policybase.cma.ca/dbtw-wpd/Policypdf/PD15-02.pdf) Accessed 2015-02-08

7. In the SCC on appeal from the BCCA, *Factum of the Intervener, The Canadian Medical Association*, para. 5. (http://www.consciencelaws.org/archive/documents/carter/2014-08-27-cma-factum.pdf)

8. 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 (http://www.consciencelaws.org/law/commentary/legal073-009.aspx#Harry_Underwood)

9. Supreme Court of Canada, Webcast of the Hearing on 2014-10-15, 35591, *Lee Carter, et al. v. Attorney General of Canada, et al* (British Columbia) (Civil) (By Leave). Joseph Arvay, Oral Submission, 94:58/491:20 - 95:23/491:20 (http://www.scc-csc.gc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35591&urlen=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1938/201410150500wv150en,001&urlfr=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1940/201410150500wv150en,001&date=2014-10-15) Accessed 2015-02-09

10. *Carter*, para. 4, 127, 147

11. This interpretation has been adopted by others. The College of Physicians and Surgeons of Alberta recently released a policy on euthanasia and assisted suicide that states, "PAD **cannot** be provided to patients who lack the capacity to make the decision, including when consent can only be provided by an alternate decision maker, is known by patient wishes or is provided through a personal directive." (Emphasis in the original). College of Physicians and Surgeons of Alberta, Physician Assisted Death (December, 2015) (http://www.cpsa.ca/standardspractice/advice-to-the-profession/pad/) Accessed 2015-12-18

12. *Carter*, para. 4, 127, 147

13. Cimons M. "Frailty Is a Medical Condition, Not an Inevitable Result of Aging (Op-Ed)." Livescience, 29 November, 2013. (http://www.livescience.com/41602-frailty-is-medical-condition.html) Accessed 2015-06-28.

14. *Carter*, para. 111

15. "We are limiting our case to people whose condition is irremediable, or incurable if you want to use that language, because it, assisted dying should only be allowed in the most serious cases. And not just because somebody wants to. It's because their condition is not going to get any

better." Supreme Court of Canada, Webcast of the Hearing on 2014-10-15, 35591, Lee *Carter*, et al. v. Attorney General of Canada, et al (British Columbia) (Civil) (By Leave). Joseph Arvay, Oral Submission, 113:35/491:20 - 114:50/491:20 (http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35591&urlen=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1938/201410150500wv150en,001&urlfr=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1940/201410150500wv150en,001&date=2014-10-15) Accessed 2015-06-28

16. *Carter*, para. 127

17. *Carter*, para. 111

18. *Carter*, para. 4, 127, 147

19. *Carter*, para 40 , 64

20. *Carter*, para. 68

21. *R. v Bourne* (1939) 1KB 687

22. "'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

23. *Criminal Code* (R.S.C., 1985, c. C-46) (Hereinafter "CC"), Section 229 (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-114.html); Section 231(1) (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-115.html) (Accessed 2014-07-25)

24. CC, Section 229 (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-114.html); Section 231(7) (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-115.html) (Accessed 2014-07-25)

25. CC, Section 232(1) (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-116.html) (Accessed 2014-07-25)

26. CC, Section 245. (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-119.html) (Accessed 2014-07-25)

27. CC. Section 465. (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-225.html)(Accessed 2014-07-25)

28. CC, Section 21(b). (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-6.html)(Accessed 2014-07-25)

29. CC, Section 21(c). (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-6.html) (Accessed 2014-07-25)

30. CC, Section 22 (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-6.html)(Accessed 2014-07-25)

31. CC, Section 464. (http://laws-lois.justice.gc.ca/eng/acts/c-46/page-224.html) (Accessed 2014-07-25)

32. *Carter v. Canada (Attorney General)*, 2015 SCC 5, paragraph 127 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do) Accessed 2015-02-07

33. The Federation of General Practitioners believed that the legislature should consider allowing euthanasia authorized in advance directives, though it thought that this "should perhaps be in a second stage." *Consultations*, Tuesday, 17 September 2013 - Vol. 43 no. 34: Federation of General Practitioners of Quebec (Dr. Louis Godin, Dr. Marc-André Asselin), T#024 (http://www.consciencelaws.org/background/procedures/assist009-002.aspx#024)

34. The Quebec Ombudsman suggested that the Commission on End of Life Care "should really very thoroughly" study the possibility of providing euthanasia for the mentally ill. *Consultations*, Tuesday 24 September 2013 - Vol. 43 No. 37: Quebec Ombudsman (Raymonde Saint-Germain, Marc André Dowd, Michel Clavet), T#080 (http://www.consciencelaws.org/background/procedures/assist009-012.aspx#080)

35. This was recommended by the College of Social Workers & Marriage & Family Therapists of Quebec [*Consultations*, Wednesday, 18 September 2013 - Vol. 43 no. 35: College of Social Workers & Marriage & Family Therapists of Quebec (Claude Leblond, Marielle Pauzé), T#016, T#092 (http://www.consciencelaws.org/background/procedures/assist009-007.aspx#016; http://www.consciencelaws.org/background/procedures/assist009-007.aspx#092)], Ghislain Leblond and Dr. Yvon Bureau [*Consultations*, Wednesday, 25 September 2013 - Vol. 43 no. 38: Ghislain Leblond, Dr. Yvon Bureau, T#130 (http://www.consciencelaws.org/background/procedures/assist009-019.aspx#130)], the Observatory for Aging and Society [*Consultations*, Tuesday, 1 October 2013 - Vol. 43 no. 40: Observatory for Aging and Society (André Ledoux, Gloria Jeliu, Denise Destrempes, Claude Tessier)T#129, T#130 (http://www.consciencelaws.org/background/procedures/assist009-025.aspx#129; http://www.consciencelaws.org/background/procedures/assist009-025.aspx#130)] and the Commission on Human Rights and Youth Rights. [*Consultations*, Friday, 4 October 2013 - Vol. 43 no. 43: Commission on Human Rights and Youth Rights (Jacques Fremont, Renée Dupuis, Daniel Carpentier, Marie Carpentier), T#010, T#011, T#014 (http://www.consciencelaws.org/background/procedures/assist009-031.aspx#010; http://www.consciencelaws.org/background/procedures/assist009-031.aspx#011; http://www.consciencelaws.org/background/procedures/assist009-031.aspx#014)]

36. Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report* (30 November, 2015), Recommendations 12, 17, 18.

37. Murphy S. "Redefining the Practice of Medicine: Euthanasia in Quebec, Appendix 'C'." *Protection of Conscience Project* (July, 2014) (http://www.consciencelaws.org/law/commentary/legal068-012.aspx)

38. ". . . all doctors believe it is their professional and ethical duty to do no harm. Which means, in almost every case, that they will want to help their patients live, not die. It is for the very reason that we advocate only physician assisted dying and not any kind of assisted dying because we know physicians will be reluctant gatekeepers, and only agree to it as a last resort." Supreme Court of Canada, Webcast of the Hearing on 2014-10-15, 35591, *Lee Carter, et al. v. Attorney General of Canada, et al* (British Columbia) (Civil) (By Leave). Joseph Arvay, Oral Submission, 81:32/491:20 - 82:12/491:20

39. Schuklenk U, van Delden J.J.M, Downie J, McLean S, Upshur R, Weinstock D. *Report of the Royal Society of Canada Expert Panel on End-of-Life Decision Making* (November, 2011) p. 62, 101 (http://rsc-src.ca/sites/default/files/pdf/RSCEndofLifeReport2011_EN_Formatted_FINAL.pdf) Accessed 2014-02-23

40. Eggertson L. "Rights may conflict with assisted-dying ruling." *Canadian Medical Association Journal*, 9 February, 2015. (http://www.cmaj.ca/site/earlyreleases/9feb15_fights-may-conflict-with-assisted-dying-ruling.xhtml) Accessed 2015-02-09)

41. *R. v. Morgentaler* (1988) 1 S.C.R.95-96 (Supreme Court of Canada) (http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/288/index.do) Accessed 2015-06-28.

42. CC, Section 287(4)a. (http://laws-lois.justice.gc.ca/eng/acts/C-46/page-152.html?texthighlight=abortion#s-287.) Accessed 2015-06-27