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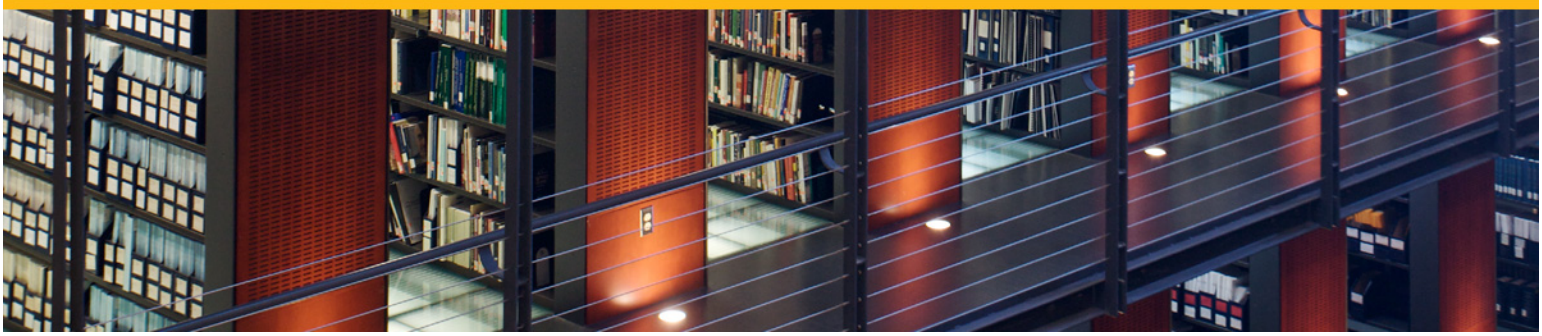

Carter v. Canada: The Supreme Court of Canada's Decision on Assisted Dying

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(Background Paper)

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CARTER V. CANADA: THE SUPREME COURT OF CANADA'S DECISION ON ASSISTED DYING

1 INTRODUCTION

On 6 February 2015, the Supreme Court of Canada released its decision regarding physician-assisted dying in *Carter v. Canada (Attorney General)*.[1] This decision declared that sections 241(*b*) and 14 of the *Criminal Code*,[2] which prohibit a physician's assistance in terminating life, infringe upon the right to life, liberty and security of the person for individuals who want access to physician-assisted death. The Court suspended its declaration so that it would not come into effect for 12 months, stating that "it is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in [the reasons for judgment]."[3]

Carter could have profound effects on end-of-life decision-making in Canada. This paper explains the facts and legal reasoning behind the decision in order to help readers better understand the case and its implications. First, context is provided for the *Carter* decision by summarizing *Rodriguez v. British Columbia (Attorney General)*, the 1993 decision in which the Supreme Court of Canada upheld the *Criminal Code* prohibition against assisted suicide. An explanation of the difference between "physician-assisted suicide" and "physician-assisted dying" follows – an important distinction when considering the potential implications of the decision. Next is a summary of the decisions in *Carter* of the trial judge, the Court of Appeal, and finally, the Supreme Court of Canada. The paper concludes by highlighting some of the responses by key stakeholders, and notes developments that have occurred since the release of the decision.

1.1 *RODRIGUEZ V. BRITISH COLUMBIA (ATTORNEY GENERAL)*

In 1993, the Supreme Court of Canada heard a constitutional challenge to the *Criminal Code* prohibition against assisted suicide.[4] Section 241(*b*) of the *Criminal Code* makes assisting a person to commit suicide an offence punishable by up to 14 years in prison. Section 14 of the *Criminal Code* prohibits individuals from consenting to having death inflicted on them and states that such consent cannot absolve from criminal responsibility individuals who cause another's death.

Sue Rodriguez, a woman living with amyotrophic lateral sclerosis (ALS), a fatal disease that causes progressive paralysis and pain while leaving cognitive functions intact, challenged the *Criminal Code* provisions. Her life expectancy was between two and 14 months. She had lost her claim at trial,[5] and the British Columbia Court of Appeal had rejected her appeal in a 2–1 decision earlier that year.[6] She sought an order that "would allow a qualified medical practitioner to set up technological means by which she might, by her own hand, at the time of her choosing, end her life."[7]

Ms. Rodriguez's challenge of the prohibition against assisted suicide was based on rights set out in the *Canadian Charter of Rights and Freedoms*. The first right upon which she based her claim was section 7, which states as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The second right was section 15, which states the following:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[8]

The Supreme Court in *Rodriguez* was deeply divided. Five of the nine justices dismissed the appeal, and three separate dissenting decisions were delivered. Justice John Major, who formed part of the majority in 1993, has since spoken publicly in the media about *Rodriguez*. He noted that the Court struggled with the decision and that some of his "former colleagues may have thought one way one day and a different way the next day."[9] He called it "a haunting type of case."[10]

The majority in *Rodriguez* held that, while infringement of the section 7 right to security of the person did exist, the infringement was in accordance with the principles of fundamental justice. The majority chose not to perform a section 15 analysis on the basis that any violation would be "clearly" justified under section 1 of the Charter, which states that Charter rights are subject to "reasonable limits prescribed by law [that] can be demonstrably justified in a free and democratic society."

Ms. Rodriguez died in 1994 with the assistance of an anonymous physician.

2 *CARTER V. CANADA (ATTORNEY GENERAL)*

In 2009, Gloria Taylor was diagnosed with ALS. A month after her diagnosis, she was told that she would likely be paralyzed within six months and die within a year. In 2012, along with the British Columbia Civil Liberties Association, Ms. Taylor decided to challenge the prohibition on assisted suicide.

Ms. Taylor was joined in her claim by three other individual plaintiffs. One of the plaintiffs was Dr. William Shoichet, a physician willing to perform assisted suicide in appropriate cases if the law were changed. The two other plaintiffs, Lee Carter and Hollis Johnson, are the daughter and son-in-law of Kay Carter, a woman with spinal stenosis. Spinal stenosis may cause increasing mobility limitations and pain, while leaving cognitive functions intact. When Kay Carter found her condition had become intolerable, she asked her daughter and son-in-law to help her travel to an assisted suicide clinic in Switzerland. Lee Carter and Hollis Johnson agreed, despite knowing they could face prosecution.

2.1 TERMINOLOGY: "PHYSICIAN-ASSISTED DYING" VERSUS "PHYSICIAN-ASSISTED SUICIDE"

In *Rodriguez*, the plaintiff took the position that the *Criminal Code* prohibition against "assisted suicide" was contrary to the *Canadian Charter of Rights and Freedoms*. The term "assisted suicide," referred to in section 241(*b*) of the *Criminal Code*, was used throughout the decision.

In *Carter*, the plaintiffs argued that the provisions infringe their Charter rights by prohibiting "physician-assisted dying." According to the plaintiffs, "physician-assisted dying" includes both "physician-assisted suicide," which they defined as:

> an assisted suicide where assistance to obtain or administer medication or other treatment that intentionally brings about the patient's own death is provided by a medical practitioner … or by a person acting under the general supervision of a medical practitioner, to a grievously and irremediably ill patient in the context of a patient–physician relationship

and "consensual physician-assisted death," which they defined as:

> the administration of medication or other treatment that intentionally brings about a patient's death by the act of a medical practitioner … or by the act of a person acting under the general supervision of a medical practitioner, at the request of a grievously and irremediably ill patient in the context of a patient-physician relationship.[11]

A distinction did not appear to be made between "consensual physician-assisted death" and "voluntary euthanasia." The trial judge explained that "'[v]oluntary euthanasia' means euthanasia performed in accordance with the wishes of a competent individual, whether those wishes have been made known personally or by a valid, written advance directive."[12]

2.2 THE TRIAL DECISION

The plaintiffs claimed at trial that the prohibition against assisted death (primarily section 241(*b*) and related sections 14, 21, 22 and 222)[13] violated their rights under sections 7 and 15 of the Charter.[14] The Attorney General of Canada argued that an absolute prohibition on assisted suicide was necessary to avoid risking the deaths of incompetent persons, deaths that are involuntary (i.e., that are coerced), the deaths of individuals with treatable conditions, the deaths of "ambivalent" individuals, the deaths of "misinformed" individuals, and the deaths of vulnerable populations, including the elderly and people with disabilities.[15]

The plaintiffs were successful; the trial judge, Justice Lynn Smith, found violations of both sections 7 and 15. When a Charter violation is found, however, the infringement may still be "saved" by section 1 of the Charter. As noted above, that section states that:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Justice Smith concluded that the infringement could not be demonstrably justified.

The plaintiffs had submitted that physician-assisted death should be accessible to "grievously and irremediably ill persons," defining that term as follows:

> "[G]rievously and irremediably ill persons" refers to persons who have a serious medical condition that has been diagnosed as such by a medical practitioner and which is without remedy, as determined by reference to treatment options acceptable to the person, and which causes the person enduring physical, psychological or psychosocial suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.[16]

Justice Smith rejected the argument that "grievously and irremediably ill" should include "psychosocial suffering"[17] and specified that "'grievously and irremediably ill persons' should be limited to those who are also in an advanced state of weakening capacities, with no chance of improvement."[18] She also rejected the claimant's position that physician-assisted dying "should include the provision of assistance by persons other than physicians."[19]

Justice Smith was constrained by legal precedent in her decision. The principle of *stare decisis* ("to stand by that which is decided") is a cornerstone of the common law system, promoting consistency and predictability.[20] It requires lower courts to follow the decisions of higher courts. Generally, a decision of the Supreme Court of Canada is binding on all other Canadian courts. Justice Smith held, however, that the *Rodriguez* precedent did not preclude her from finding in favour of the plaintiffs for a number of reasons.

Two of these reasons related to the legal test that is applied when determining whether section 7 rights have been infringed. The test involves two stages: determining whether there has been a deprivation of the right to life, liberty or security of the person, and then, where a breach is found, determining whether it is contrary to the principles of fundamental justice. With respect to section 7, Justice Smith noted that when the Supreme Court in *Rodriguez* examined whether those rights were infringed, it considered only the rights to liberty and security of the person, and not Ms. Rodriguez's right to life. In addition, when considering whether the infringements were in accordance with the principles of fundamental justice, Justice Smith noted that section 7 analysis has evolved since *Rodriguez* and the court should now consider two additional principles of fundamental justice.[21] Finally, Justice Smith noted that the Court in *Rodriguez* "did not address whether or, if so, how, s. 241(*b*) infringes s. 15 of the Charter,"[22] and concluded that "it [was] open to this Court to assess the plaintiffs' s. 15 claim."[23]

Justice Smith held that the prohibition on assisted death is invalid to the extent that it violates the section 7 and section 15 rights of a defined population in situations akin to Ms. Taylor's. Justice Smith defined the invalidity as follows:

> [The assisted suicide prohibition is] of no force and effect to the extent that [it prohibits] physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult patient who: (a) is free

> from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) is materially physically disabled or is soon to become so, has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.[24]

She suspended her declaration of invalidity for 12 months, which the Attorney General of Canada had submitted was the minimum required to "allow Parliament to have time to draft and consider any legislation."[25]

The suspended declaration of invalidity would not have allowed Ms. Taylor to access assisted death legally at least until the end of the 12-month period. Ms. Taylor was therefore granted a personal remedy: a constitutional exemption, which would have made her exempt from the prohibition while it was still in force. The trial judge included several conditions for accessing the constitutional exemption, including that Ms. Taylor's physician had to attest that she was terminally ill and near death. Ms. Taylor did not make use of this exemption, however, as she died of an infection in October 2012.

2.3 The British Columbia Court of Appeal Decision

The governments of Canada and British Columbia appealed the trial judge's declaration that the sections of the *Criminal Code* relating to physician-assisted dying were invalid. The British Columbia Court of Appeal overturned the trial decision on 10 October 2013 in a 2–1 decision.[26] The majority did not consider the merits of the constitutional claims in any depth, focusing instead on the principle of *stare decisis*. The majority held that "the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*,"[27] and further that "[i]f the constitutional validity of s. 241 of the *Criminal Code* is to be reviewed notwithstanding *Rodriguez*, it is for the Supreme Court of Canada to do so."[28]

Although the matter was moot because of Ms. Taylor's death, the majority of the Court of Appeal held that the remedy of constitutional exemption would be appropriate for circumstances in which "a generally sound law … has an extraordinary, even cruel, effect on a small number of individuals."[29]

2.4 The Supreme Court of Canada Decision

The Supreme Court heard the *Carter* appeal on 15 October 2014. Of the nine judges present for the hearing, only Chief Justice Beverley McLachlin was a Supreme Court of Canada Justice at the time of the *Rodriguez* appeal. She had written one of the three dissenting opinions, and would have found that section 241(*b*) unjustifiably infringes section 7 of the Charter. In that decision, she did not consider section 15 arguments, on the basis that *Rodriguez* was not "a case about discrimination."

The Court rendered its decision in *Carter* on 6 February 2015. The first notable feature of the decision is its authorship. Not only was the decision unanimous, it was authored by "the Court." This authorship is generally reserved for controversial cases or ones in which the Court wants to emphasize its unanimity by speaking with one voice.[30]

Early in the decision, the Court states that:

> two of [the provisions of the *Criminal Code*] are at the core of the constitutional challenge: s. 241(*b*) … and s. 14 … It is these two provisions that prohibit the provision of assistance in dying. Sections 21, 22 and 222 are only engaged so long as the provision of assistance in dying is itself an "unlawful act" or offence.[31]

For that reason, there is no discussion of or declaration made with respect to sections 21, 22 or 222.

The decision mentions the debate that has taken place in Canada and abroad since *Rodriguez* was decided, referring to private member's bills on the subject,[32] the Senate Special Committee on Euthanasia and Assisted Suicide,[33] and international legislative developments.[34]

2.4.1 *Stare Decisis*

The Court began its legal analysis by exploring whether the trial judge was bound by *Rodriguez*, and concluded that she was not. The Court held that "*stare decisis* is not a straitjacket that condemns the law to stasis."[35] Following its 2013 decision in *Canada (Attorney General) v. Bedford*,[36] the Court applied the following legal test to determine when lower courts may reconsider settled rulings of higher courts:

> (1) where a new legal issue is raised [or] (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."[37]

This approach to *stare decisis* is much more flexible than the decision the Court of Appeal had relied upon in *Carter*.[38] The Supreme Court found that both of the *Bedford stare decisis* criteria were met and that the developments identified in the trial judge's analysis of section 7 were sufficient to meet the "new legal issue" criterion.

Although the Supreme Court did not specifically identify the evidence that met the second criterion, it noted that the record before the trial judge contained evidence that, if accepted, could undermine the *Rodriguez* finding that there is a "'substantial consensus' in Western countries that a blanket prohibition [against assisted suicide] is necessary" to protect vulnerable people.[39] Examples included evidence from several jurisdictions that now permit assisted suicide, as well as reports of the Royal Society of Canada and the Select Committee of the Assemblée nationale du Québec, all of which were considered at trial in the context of societal views on assisted suicide.[40]

2.4.2 SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

As explained earlier, to demonstrate a violation of section 7 of the Charter, a claimant must show that a law interferes with his or her life, liberty or security of the person. Then the claimant must show that this deprivation is not in accordance with the principles of fundamental justice. The Supreme Court held that all three parts of section 7 (life, liberty and security of the person) were violated.

The Court held that the right to life "is engaged where the law … imposes death or an increased risk of death on a person, either directly or indirectly."[41] Having found that the assisted suicide prohibition can lead some people to end their lives prematurely while they are still capable of doing so, the Court held that the prohibition infringes the right to life.

Next, the Court considered the rights to liberty and security of the person. While it stated that these are distinct interests, it considered them together for the purpose of the appeal. The right to liberty protects "the right to make fundamental personal choices free from state interference."[42] The right to security of the person incorporates

> a notion of personal autonomy involving … control over one's bodily integrity free from state interference … and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[43]

The Court held that a prohibition on physician-assisted death interferes with the ability of grievously ill individuals "to make decisions concerning their bodily integrity and medical care and thus trenches on liberty." Furthermore, "by leaving people like Ms. Taylor to endure intolerable suffering, [the prohibition on physician-assisted dying] impinges on their security of the person."[44]

Having found that all three section 7 interests were engaged, the Court went on to determine whether the interference with these interests was in accordance with the principles of fundamental justice.

No exhaustive list of principles of fundamental justice exists. The trial judge identified the principles of overbreadth and gross disproportionality as elements that had not been part of the section 7 analysis in *Rodriguez*.

A law may be considered overbroad if it "takes away rights in a way that generally supports the object of the law, [but] goes too far by denying the rights of some individuals in a way that bears no relation to the object."[45] The Court identified the objective of the prohibition to be "preventing vulnerable persons from being induced to commit suicide at a time of weakness."[46] It concluded that the prohibition was overbroad because it not only prevented *vulnerable* persons from committing suicide, but also persons such as Ms. Taylor who are "competent, fully-informed, and free from coercion or duress."[47] The Court stated that, given its conclusion that the prohibition was overbroad, it was not necessary to decide whether the principle against gross disproportionality was also violated.

2.4.3 SECTION 15 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

At trial, Justice Smith had found that the prohibition against assisted death violates the equality rights of individuals with disabilities by imposing a disproportionate burden on them. While able-bodied individuals may commit suicide legally, people with certain disabilities may be physically unable to commit suicide, but may not seek assistance without subjecting another person to potential prosecution.

The Supreme Court held that, given its finding that there was a section 7 violation, it was "unnecessary to consider" whether there was a section 15 violation.[48] Recently, the Supreme Court has tended to avoid consideration of the merits of an equality claim when another section of the Charter has been claimed as well.[49]

2.4.4 SECTION 1 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

In accordance with the section 1 test established by case law, the government needs to demonstrate that the measure employed to protect its objective (in this case, "protecting the vulnerable from being induced to take their own lives in times of weakness"[50]) impairs the right as little as possible. In *Carter*, the Supreme Court held that the section 7 violation was not "minimally impairing," meaning that the objective of section 241(*b*) could have been achieved in a substantial manner without a blanket prohibition, therefore allowing certain individuals to access physician-assisted death. Specifically, the Court held that the evidence at trial indicated that a "permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error."[51]

2.4.5 DISPOSITION

Having found an unjustifiable violation of section 7, the Supreme Court declared that sections 241(*b*) and 14 of the *Criminal Code*

> are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[52]

"Irremediable," according to the Court, "does not require the patient to undertake treatments that are not acceptable to the individual."[53] The Court noted further that the scope of its declaration responded to the facts in the case before it, and did not pronounce on other situations in which assisted death might be sought.[54]

The trial judge had granted Ms. Taylor a personal constitutional exemption to access physician-assisted dying. The Supreme Court concluded:

> In view of the fact that Ms. Taylor has now passed away and that none of the remaining litigants seeks a personal exemption, this is not a proper case for creating [a mechanism for exemptions during the period of suspended validity].[55]

The Court highlighted the concerns of some of the interveners that physicians' freedom of conscience and religion (as protected by section 2(*a*) of the *Canadian Charter of Rights of Freedoms*) might be infringed if they were forced to participate in physician-assisted death, and stated that "nothing in the declaration of invalidity … would compel physicians to provide assistance in dying,"[56] and that "the *Charter* rights of patients and physicians will need to be reconciled."[57]

Ultimately, the Court noted that "Parliament must be given the opportunity to craft an appropriate remedy," and that "[c]omplex regulatory regimes are better created by Parliament than by the courts."[58]

3 RESPONSES TO AND DEVELOPMENTS FOLLOWING THE SUPREME COURT OF CANADA DECISION

The federal government responded to the judgment by indicating that it would hold consultations on the issue.

On 24 February 2015, Justin Trudeau, leader of the Liberal Party of Canada, moved in the House of Commons that a special committee be established

> to consider the ruling of the Supreme Court; that the committee consult with experts and with Canadians, and make recommendations for a legislative framework that will respect the Constitution, the Charter of Rights and Freedoms, and the priorities of Canadians.[59]

That motion was defeated.

Twenty-four groups were granted intervener status when *Carter* was before the Supreme Court of Canada, the majority of whom supported the existing *Criminal Code* provisions that prohibited assisted suicide. Not surprisingly, many of those organizations were disappointed by the decision, in at least one case stating that Parliament should invoke the constitutional notwithstanding clause[60] set out in section 33 of the *Canadian Charter of Rights and Freedoms*.[61] Other interveners were concerned that the decision puts "persons with disabilities at serious risk"[62] and is not limited to individuals who are suffering from a terminal illness.[63] There is debate as to whether the decision is restricted to authorizing physician-assisted suicide, or whether it also applies to voluntary euthanasia.[64]

After *Carter* was released, many intervener organizations commented on what should be included in future legislation relating to physician-assisted dying. Suggestions included ensuring that patients are aware of all treatment and palliative options, the need for safeguards to ensure that patient consent to physician-assisted dying is informed and free of coercion, and ensuring protection for physicians and other health care professionals who did not want to participate in the process.[65]

The need to focus on improving palliative care rather than physician-assisted death has also been raised in the context of the *Carter* decision.[66]

In June 2015, the Canadian Medical Association (CMA) released a draft version of a document entitled "Principles-Based Approach to Assisted Dying in Canada."[67] The final version, "Principles-Based Recommendations for a Canadian Approach to Assisted Dying," sets out the following foundational principles:

- respect for persons;
- equity;
- respect for physician values;
- consent and capacity;
- clarity;
- dignity;
- protection of patients;
- accountability;
- solidarity; and
- mutual respect.

The CMA document also contains a number of recommendations for the potential statutory framework, including determining the steps involved for patients and physicians in relation to a request for medical aid in dying,[68] outlining documentation and oversight requirements, and establishing the duty of care owed by "conscientiously objecting" physicians to patients who make a request for physician-assisted death. On the last point, the CMA's document states,

> 5.2 Conscientious objection by a physician
>
> Physicians are not obligated to fulfill requests for assisted dying. This means that physicians who choose not to provide or participate in assisted dying are not required to provide it or participate in it or to refer the patient to a physician or a medical administrator who will provide assisted dying to the patient. There should be no discrimination against a physician who chooses not to provide or participate in assisted dying.
>
> Physicians [are] obligated to respond to a patient's request for assistance in dying. There are two equally legitimate considerations: the protection of physicians' freedom of conscience in a way that respects differences of conscience and the assurance of effective patient access to a medical service. In order to reconcile physicians' conscientious objection with a patient's request for access to assisted dying, physicians are expected to provide the patient with complete information on all options available, including assisted dying, and advise the patient on how they can access any separate central information, counseling, and referral service. [69]

Some provincial colleges of physicians and surgeons have either drafted or are in the process of drafting guiding documents for their members with respect to physician-assisted death.[70] In October 2015, the College of Family Physicians of Canada released "A Guide for Reflection on Ethical Issues Concerning Assisted Suicide and Voluntary Euthanasia."[71] The Royal College of Physicians and Surgeons of Canada has indicated that it is collaborating with the CMA "to support their current efforts to create a unified, profession-wide response to the Supreme Court decision."[72]

In mid-July 2015, the federal Minister of Justice and the federal Minister of Health announced the creation of a three-person external panel. [73] That panel consulted directly with those who intervened in the Supreme Court of Canada case as well as with medical authorities. An online consultation process also took place. The panel provided its report to the federal Minister of Justice and the federal Minister of Health on 15 December 2015.[74]

The panel composition has been criticized in the media for potential bias. Both the panel's chair (Dr. Harvey Chochinov, professor of psychiatry who holds the Canada Research Chair in Palliative Care), and panel member Catherine Frazee (former co-director of the Ryerson-RBC Foundation Institute for Disability Studies Research and Education, and Chief Commissioner of the Ontario Human Rights Commission) were interveners in the *Carter* case and supported the prohibition against physician-assisted dying.[75] The third member of the panel is law professor and former government of Quebec minister, Benoît Pelletier.

In mid-August 2015, a provincial–territorial expert advisory group on physician-assisted death was announced.[76] The advisory group's work was to "complement the work of the federal panel"[77] and "provide advice on the development of policies, practices and safeguards for provinces and territories to consider when physician-assisted dying is legal within their respective jurisdictions."[78]

The final report, dated 30 November 2015 and posted publicly on 14 December 2015, contained 43 recommendations.[79] Key recommendations include:

- establishing a pan-Canadian Strategy for Palliative and End-of-Life care, including physician-assisted dying;
- establishing a program within the publicly funded system that will link patients with an appropriate provider;
- amending the *Criminal Code* to allow physician-assisted dying by regulated health professionals acting under the direction of a physician or a nurse practitioner, and to protect health professionals who participate in physician-assisted dying;
- amending the *Criminal Code* to ensure that eligibility for physician-assisted dying is based on competence rather than age;
- having medical regulatory authorities develop guidance/tools for physicians;
- not requiring a mandatory waiting period between a request and provision of assistance in dying;
- requiring "conscientiously objecting" health care providers to inform patients of all end-of-life options, including physician-assisted dying, and requiring providers to give a referral or direct transfer of care or to contact a third party and transfer the patient's records;
- having provincial and territorial governments establish Review Committee systems to review compliance in all cases of physician-assisted dying;
- establishing a pan-Canadian Commission on End-of-Life Care (preferably in collaboration with the federal government); and
- providing public education about physician-assisted dying and engaging the public so that it can inform future developments of related law, policies and practices.

On 11 December 2015, motions were passed in the House of Commons and the Senate to establish a Special Joint Committee of the Senate and the House of Commons. Those motions stated that the committee's purpose is:

> to review the report of the External Panel on Options for a Legislative Response to *Carter v. Canada* and other recent relevant consultation activities and studies, to consult with Canadians, experts and stakeholders, and make recommendations on the framework of a federal response on physician-assisted dying that respects the Constitution, the Charter of Rights and Freedoms, and the priorities of Canadians.

The motions also stated that "the Committee be directed to consult broadly, take into consideration consultations that have been undertaken on the issue, examine relevant research studies and literature and review models being used or developed in other jurisdictions."[80]

On 3 December 2015, the Attorney General of Canada applied to the Supreme Court of Canada for an order to extend the suspension of the declaration of the constitutional invalidity for an additional six months.

Concerns have been expressed that the absence of federal physician-assisted death legislation could result in a patchwork of laws that vary not only from province to province,[81] but also from hospital to hospital.[82]

NOTES

1. *Carter v. Canada (Attorney General)*, 2015 SCC 5.
2. Those sections of the *Criminal Code*, R.S.C. 1985, c. C-46, read as follows:

   > 14. 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.
   >
   > 241. Every one who
   >
   > (*a*) counsels a person to commit suicide, or
   >
   > (*b*) aids or abets a person to commit suicide,
   >
   > whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

3. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 126.
4. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519.
5. *Rodriguez v. B.C. (Attorney General of)*, 1992, 726 (BC SC).
6. *Rodriguez v. British Columbia (Attorney General)*, 1993, 1191 (BC CA).
7. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, p. 531.
8. Ms. Rodriguez also claimed a violation of section 12 of the Charter. This claim was unsuccessful.
9. Duncan McCue, "Assisted suicide laws need updating, says former Supreme Court justice," *CBC News*, 25 October 2013.

10. Kirk Makin, "Haunting right-to-die case weighs on judges' minds, 18 years on," *The Globe and Mail*, 16 December 2011.

11. *Carter v. Canada (Attorney General)*, 2012 BCSC 886, para. 23.

12. The trial judge set out the differences between voluntary euthanasia and involuntary or non-voluntary euthanasia:

> Non-voluntary euthanasia' means euthanasia performed without knowledge of the wishes expressed by a competent person or through a valid advance directive. 'Involuntary euthanasia' means euthanasia performed against the wishes expressed by a competent person or through a valid advance directive. (*Carter v. Canada (Attorney General)*, 2012 BCSC 886, para. 38.)

13. Sections 21, 22 and 222 of the *Criminal Code* read as follows:

> 21.(1) Every one is a party to an offence who
>
> (*a*) actually commits it;
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (*c*) abets any person in committing it.
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.
>
> 22.(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.
>
> 222.(1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (*a*) by means of an unlawful act;
>
> (*b*) by criminal negligence;
>
> (*c*) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
>
> (*d*) by wilfully frightening that human being, in the case of a child or sick person.

> (6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

14. *Carter v. Canada (Attorney General)*, 2012 BCSC 886.
15. Ibid., paras. 749–754.
16. Ibid., para. 1385.
17. Ibid., para. 1390.
18. Ibid., para. 1391.
19. Ibid., para. 1389.
20. Joseph J. Arvay, Sheila M. Tucker and Alison M. Latimer, "*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?," *Supreme Court Law Review*, Vol. 58, 2012.
21. The two principles were gross disproportionality and overbreadth, which are both considered at the second stage of the section 7 analysis. These principles are discussed in a subsequent section of this paper.
22. *Carter v. Canada (Attorney General)*, 2012 BCSC 886, para. 936.
23. Ibid., para. 988.
24. Ibid., para. 1393.
25. Ibid., para. 1395.
26. *Carter v. Canada (Attorney General)*, 2013 BCCA 435.
27. Ibid., para. 324.
28. Ibid., para. 352.
29. Ibid., para. 326.
30. See Peter McCormick, "The Political Jurisprudence of Hot Potatoes," *National Journal of Constitutional Law*, Vol. 13, 2002; Marie-Claire Belleau, Rebecca Johnson and Christina Vinters, "Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson," *Supreme Court Law Review*, Vol. 41, 2008.
31. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 20.

32. A number of private member's bills have been introduced relating to end-of-life issues and assisted death: Bill C-203, Robert Wenman (Fraser Valley West), 16 May 1991; Bill C-261, Chris Axworthy (Saskatoon–Clark's Crossing), 19 June 1991; Bill C-385: An Act to amend the Criminal Code (aiding suicide), Svend Robinson (Burnaby–Kingsway), December 1992; Bill C-215: An Act to amend the Criminal Code (aiding suicide), Svend Robinson, February 1994; Bill S-13: An Act to amend the Criminal Code (protection of health care providers), Senator Sharon Carstairs, November 1996; Bill S-29: An Act to amend the Criminal Code (Protection of Patients and Health Care Providers), Senator Thérèse Lavoie-Roux, 29 April 1999; Bill S-2: An Act to facilitate the making of legitimate medical decisions regarding life-sustaining treatments and the controlling of pain, Senator Sharon Carstairs, 13 October 1999; Bill C-407: An Act to amend the Criminal Code (right to die with dignity), Francine Lalonde (La Pointe-de-l'Île), 15 June 2005; Bill C-562: An Act to amend the Criminal Code (right to die with dignity), Francine Lalonde (bill is similar to Bill C-407), 12 June 2008; Bill C-384: An Act to amend the Criminal Code (right to die with dignity), Francine Lalonde (Bill C-384 is identical to Bill C-562), 13 May 2009; Bill C-581: An Act to amend the Criminal Code (physician-assisted death), Steven Fletcher (Charleswood–St. James–Assiniboia), 27 March 2014; Bill C-582: An Act to establish the Canadian Commission on Physician-Assisted Death, Steven Fletcher, 27 March 2014; Bill S-225: An Act to amend the Criminal Code (physician-assisted death), Senator Nancy Ruth, 2 December 2014.

33. Senate, Special Committee on Euthanasia and Assisted Suicide, *Of Life and Death – Final Report*, 1st Session, 35th Parliament, June 1995.

34. The Court noted that by 2010, eight jurisdictions permitted some form of assisted dying, including the Netherlands, Oregon and Washington.

35. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 44.

36. *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

37. Ibid., para. 44.

38. It may be interesting to note that the majority of the B.C. Court of Appeal in *Carter* relied on the Ontario Court of Appeal decision in *Bedford* for its analysis of *stare decisis* (*Canada (Attorney General) v. Bedford*, 2012 ONCA 186). The Supreme Court decision in *Bedford* set a very different test than the Ontario Court of Appeal had, but was released two months after the B.C. Court of Appeal rendered its decision in *Carter*.

39. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 47.

40. Justice Smith admitted into evidence the two following reports: Udo Schuklenk et al., *End-of-Life Decision Making*, The Royal Society of Canada, November 2011; and Report of the Select Committee on Dying with Dignity of the National Assembly of Québec, *Dying with Dignity*, March 2012.

41. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 62.

42. Ibid., para. 64.

43. Ibid.

44. Ibid., para. 66.

45. Ibid., para. 85.

46. Ibid., para. 78.

47. Ibid., para. 86.

48. Ibid., para. 93.

49. See, for example, *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37; and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20. The notable exception is *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, but that decision focused primarily on section 15(2), which deals with "affirmative action programs."

50. *Carter v. Canada (Attorney General)*, 2015 SCC 5, para. 99.

51. Ibid., para. 105.

52. Ibid., para. 127.

53. Ibid.

54. Ibid.

55. Ibid., para. 129.

56. Ibid., para. 132.

57. Ibid.

58. Ibid., para. 125.

59. House of Commons, *Debates*, 2nd Session, 41st Parliament, 24 February 2015, p. 11564.

60. Association for Reformed Political Action Canada, "Euthanasia Q&A: Where the Supreme Court's Decision Leaves Canada," 18 February 2015.

61. Essentially, section 33 of the *Canadian Charter of Rights and Freedoms* allows Parliament or a legislature to override certain sections of the Charter. That section provides as follows:

> 33.(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
>
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
>
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
>
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

62. Council of Canadians with Disabilities, "Commentary on SCC Assisted Suicide Judgment in Carter v. Canada – Key Concerns," 6 February 2015.

63. Ibid.

64. See, for example, Sharon Kirkey, "How far should a doctor go? MDs say they 'need clarity' on Supreme Court's assisted suicide ruling," *National Post*, 23 February 2015; Jocelyn Downie, "The Supreme Court of Canada Decision Allows for the Prescription and the Syringe," *Impact Ethics*, 1 March 2015; Peter Ryan, "Does the recent Supreme Court Of Canada Decision Carter v. Canada legalize euthanasia? Or only assisted suicide?," *New Brunswick Right to Life*, n.d.

65. One intervener, the Christian Medical and Dental Society of Canada (CMDSC), is in the process of challenging the College of Physicians and Surgeons of Ontario's (CPSO) policy, "Professional Obligations and Human Rights," which was reviewed and updated in March 2015. CMDSC has stated that "[t]his policy requires Physicians to give effective referrals and in some cases to perform procedures that are contrary to their moral, ethical and religious beliefs. This policy directly contravenes the freedom of conscience of Physicians." It has filed an application in the Ontario Superior Court of Justice seeking, among other things, an interim and permanent injunction prohibiting the CPSO from enforcing that policy, and a declaration stating that the policy violates section 2(*a*) of the *Canadian Charter of Rights and Freedoms*.

66. See, for example, "Harvey Chochinov: With too few Canadians having access to palliative care, little wonder we're afraid of dying," *National Post*, 14 May 2015.

67. Canadian Medical Association, "Principles-Based Approach to Assisted Dying in Canada," Draft backgrounder, n.d.

68. The CMA policy, "Euthanasia and Assisted Death," defines "medical aid in dying" as "a situation whereby a physician intentionally participates in the death of a patient by directly administering the substance themselves, or by providing the means whereby a patient can self-administer a substance leading to their death." This is to be distinguished from its definition of euthanasia (in *Update 2014*):

> knowingly and intentionally performing an act, with or without consent, that is explicitly intended to end another person's life and that includes the following elements: the subject has an incurable illness; the agent knows about the person's condition; commits the act with the primary intention of ending the life of that person; and the act is undertaken with empathy and compassion and without personal gain.

69. Canadian Medical Association, *Principles-Based Recommendations for a Canadian Approach to Assisted Dying*, n.d.

70. See, for example, College of Physicians and Surgeons of Alberta, *Advice to the Profession – Physician-Assisted Death*, December 2015; College of Physicians and Surgeons of Saskatchewan, *Policy – Physician-Assisted Dying*, November 2015; College of Physicians and Surgeons of Manitoba, "Standard of Practice for Physician-Assisted Death: Schedule M attached to and forming part of By-Law No. 11 of the College," *Physician Assisted Dying Update*, December 2015; College of Physicians and Surgeons of Ontario, *Interim Guidance on Physician-Assisted Death*, (draft), n.d.; College of Physicians and Surgeons of New Brunswick, "Assistance in Dying," *Guidelines*, 12 December 2015.

71. College of Family Physicians of Canada Task Force on End-of-Life Care, "A Guide for Reflection on Ethical Issues Concerning Assisted Suicide and Voluntary Euthanasia," September 2015.

72. Royal College of Physicians and Surgeons of Canada, "Message from the CEO – Grappling with physician-assisted death: The Royal College plans response," 28 October 2015.

73. Government of Canada, "Archived – Government of Canada Establishes External Panel on options for a legislative response to Carter v. Canada," News release, Ottawa, 17 July 2015.

74. External Panel on Options for a Legislative Response to *Carter v. Canada, Consultations on Physician-Assisted Dying – Summary of Results and Key Findings*, 15 December 2015.

75. See, for example, Laura Payton, "Doctor-assisted suicide panel includes original Crown witnesses," *CBC News*, 17 July 2015; André Picard, "Canadians deserve stronger response on assisted death," *The Globe and Mail*, 20 July 2015.

76. Except for Quebec, which has passed its own legislation with respect to physician-assisted death (Bill 52, An Act respecting end-of-life care), and British Columbia, which is an observer to the process, all provinces and territories are participating in the panel.

77. Government of Ontario, "Provinces, Territories Establish Expert Advisory Group On Physician-Assisted Dying," News release, 14 August 2015.

78. Ibid.

79. Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report*, 30 November 2015.

80. House of Commons, *Debates*, 1st Session, 42nd Parliament, 11 December 2015, 1015; Senate, *Journals,* No. 6, 1st Session, 42nd Parliament, 11 December 2015, p. 56.

81. Lauren Vogel, "CMA developing assisted death guidelines," *Canadian Medical Association Journal*, Vol. 187, No. 13, 22 September 2015.

82. Shannon Lough, "Doctors take lead in preparing for assisted dying law," *Canadian Medical Association Journal*, Vol. 187, No. 11, 11 August 2015.