Carter v Canada (Attorney General)

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On February 6, 2015, the Supreme Court in *Carter v Canada (Attorney General)* [1] (*Carter 2015*) declared the *Criminal Code* [2] prohibitions on "aiding or abetting suicide", and "consenting to death", invalid to the extent that they deprive an individual seeking MAID of "life, liberty and security of the person", contrary to section 7 of the *Charter of Rights and Freedoms* [3] (the *Charter*), "in a manner that does not accord with the principles of fundamental justice."

In making this "declaration of invalidity", the Court found that the infringement on section 7 *Charter* rights could not be saved under section 1 of the *Charter*, as a "reasonable limit" prescribed by law that was "demonstrably justified in a free and democratic society". Although the purpose of the *Criminal Code* prohibitions was to protect vulnerable persons from being induced to commit suicide at a time of weakness, the prohibitions were overly broad because they applied to everyone, including persons who are not vulnerable. The Court agreed with the trial judge, on the basis of a review of the evidence at trial from scientists, medical practitioners, and others familiar with end-of-life decision-making in Canada and abroad, that a "permissive regime" with "properly designed and administered safeguards" was capable of protecting vulnerable people from abuse and error.

The Court suspended its declaration of invalidity for 12 months, until February 6, 2016, to allow Parliament and the provincial legislatures to respond, "*should they so choose*," by enacting legislation consistent with the constitutional parameters set out in *Carter 2015*. Due to the delay occasioned by the intervening 2015 federal election, however, the new federal Liberal government requested a six month extension of the declaration of invalidity in *Carter v Canada (Attorney General)* [4] (*Carter 2016*) to draft, debate and pass new legislation on MAID, but was granted just a four month extension (equivalent to the four month dissolution of Parliament from August 2 to December 3, 2015) by the Supreme Court, until June 6, 2016.

Exempt from this extension were (a) Quebec, because the province has already enacted comprehensive legislation on MAID through *An Act Respecting End-of-Life Care* [5] (the *Quebec Act*), which came into force on December 10, 2015, and (b) individuals from provinces other than Quebec who met the criteria in *Carter 2015*, who could apply to the superior court of their jurisdiction for "relief" (*i.e.*, a court order for MAID) during the extension period. Requiring judicial authorization during this interim period, in the Court's view, ensured compliance with the rule of law and provided an effective safeguard against potential risks to

vulnerable people, pending new MAID legislation.

The Supreme Court in *Carter 2016* (and lower courts in subsequent decisions) [6] quoted paragraph 127 of *Carter 2015* as the "operative paragraph" describing the declaration of invalidity by setting out the test or criteria for individual access to MAID, a.k.a. physician-assisted death (PAD):

> [127] The appropriate remedy is therefore a declaration that s. 241(b) and s. 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...

Importantly, the Supreme Court did not limit access to MAID to individuals who are terminally ill or in the advanced stages of decline of their capabilities. To the contrary, the very first paragraph of *Carter 2015* identifies the "cruel choice" that all people seeking MAID face, which subsequent case law has confirmed exists whether or not they are terminally ill or in an advanced state of decline:

> [1] It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

As subsequently stated by the Alberta Court of Appeal in *Canada (Attorney General) v EF* (a judicial authorization application brought under *Carter 2016* during the extension period above): "The cruelty in the situation is there regardless of whether the illness causing the suffering may be classified as terminal." [7]

By declaring the *Criminal Code* prohibitions on MAID unconstitutional in *Carter 2015*, regardless of whether an individual is terminally ill or in an advanced state of decline, the Supreme Court recognized MAID as right protected by section 7 of the *Charter*. An individual's response to a grievous and irremediable medical condition, in the Court's view, was a matter "critical to their dignity and autonomy." The prohibitions allowed people in this situation "to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment," but denied them the right to request MAID. This interfered with their ability to make decisions concerning their bodily integrity and medical care and thus trenched on liberty. And, by leaving them to endure intolerable suffering, the prohibitions "impinged on their security of the person." [8]

As stated by the trial judge and quoted by the Supreme Court in *Carter 2015*: "the risks inherent in permitting [MAID] can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced." [9] The trial judge found that it was feasible for "properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process."

In reaching this conclusion, the trial judge "relied on the evidence on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making" and concluded that "it would be possible for physicians to apply the

informed consent standard to patients who seek [MAID], adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity." [10]

In other words, at the core of the issue for the Court, requiring a clinical opinion (or two) by a physician or physicians (or other qualified regulated health professionals) that an individual, (a) has capacity, and (b) has given informed consent to receive MAID, in circumstances that meet the other criteria established in *Carter 2015*, adequately balances "the sanctity of life and the need to protect the vulnerable," on the one hand, and "the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition," on the other hand. [11]

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[1] 2015 SCC 5 (CanLII), http://canlii.ca/t/gg5z4 [*Carter 2015*].

[2] RSC 1985, c C-46, http://canlii.ca/t/52hd3.

[3] *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, http://canlii.ca/t/ldsx.

[4] 2016 SCC 4 (CanLII), http://canlii.ca/t/gmxkq.

[5] RSQ c S-32.0001, http://canlii.ca/t/52mj4.

[6] See, for example, *Canada (Attorney General) v EF*, 2016 ABCA 155 (CanLII), http://canlii.ca/t/grqkg at ¶4.

[7] *Ibid* at ¶37.

[8] *Carter 2015*, supra note 5 at ¶66.

[9] *Ibid* at ¶105.

[10] *Ibid* at ¶106.

[11] *Ibid* at ¶2.

Next chapter: "Bill C-14 and its Deviation from *Carter 2015*"

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