

ASSISTED SUICIDE IN CANADA:
What Does the Law Mean Now?



OVERVIEW



- Case Law: *Rodriguez and Carter* (HH)
- Statute: Quebec's Bill 52 (HH)
- What could go wrong? (MH)
- What's Next? (panel discussion)



Criminal Code: section 241(b)

- Everyone 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.



Criminal Code: section 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.



Charter of Rights and Freedoms

- **Section 7:** 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.
- **Section 15 (1):** 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.
- **Section 1:** 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.

CASE LAW: *Rodriguez* (1993)



- **Facts:** Sue Rodriguez was a 42-year-old woman living in British Columbia. She was married and the mother of an 8½-year-old son. Ms. Rodriguez suffered from ALS.
- **Majority** [La Forest, Sopinka, Gonthier, Iacobucci and Major]: Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. Given the concerns about abuse and the great difficulty in creating appropriate safeguards, the blanket prohibition on assisted suicide does not infringe s. 7 of the *Charter*.
- **Minority** [L'Heureux-Dube, **McLachlin**, Lamer and Cory]: Dying is an integral part of living and, as a part of life, is entitled to the protection of s. 7. It follows that the right to die with dignity should be as well protected as is any other aspect of the right to life.

CASE LAW: *Carter* (2015)



Lower Courts (2012):

- **Facts:** Gloria Taylor, Kathleen (“Kay”) Carter, by her daughter Lee Carter and Lee’s husband Hollis Johnson, Dr. William Shoichet, and the British Columbia Civil Liberties Association
- **Justice Lynn Smith:** prohibition against physician–assisted dying violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition
- **Court of Appeal:** *Rodriguez* is binding (“*stare decisis*”) and lower courts have to follow that precedent

CASE LAW: *Carter* (2015)



Supreme Court of Canada

- “**The Court**”: [McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon]
- Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Here, both conditions were met.

CASE LAW: *Different Legal Issues?*



Rodriguez 1993

Legal issues:

- Whether the s. 7 flaw is:
 - Arbitrary (no)

- Whether prohibition deprives physically disabled adults of the right to equal treatment under s. 15 (presume it does, but saved by section 1)

Carter 2015

Legal issues:

- Whether s. 7 flaw is:
 - Arbitrary (no)
 - Overboard (yes)
 - Grossly disproportionate (not necessary to decide)

- Whether prohibition deprives physically disabled adults of the right to equal treatment under s. 15 (unnecessary to decide)

CASE LAW: *Different Evidence?*



Rodriguez 1993

Social and Legislative Facts:

- There is a moral (or ethical) distinction between passive and active euthanasia
- There is no sufficient means with which to protect the vulnerable, so breach of section 15 is saved by section 1

Carter 2015

Social and Legislative Facts:

- No ethical distinction between physician-assisted death and other end-of-life practices whose outcome is likely death
- Evidence regarding regulatory structures in other jurisdictions; current practices re assessment of informed consent in medical decision-making



Remedy:

Sections 241 (b) and 14 unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who:

CASE LAW: *Carter*



(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.



Remedy (cont'd)

Suspend the declaration of invalidity for 12 months

(until February 6, 2016)



Freedom of Conscience and Religion

- ...a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief ... the *Charter* rights of patients and physicians will need to be reconciled.



- ***Overview***

- Purpose is twofold:

- To ensure that end-of-life patients are provided care that is respectful to their dignity and autonomy
 - To recognize the primacy of wishes expressed freely and clearly with respect to end-of-life care



Overview (cont'd):

- Establishes requirements for certain types of end-of-life care, namely terminal palliative sedation and medical aid in dying. Prescribes criteria that must be met for a person to obtain medical aid in dying, and the requirements to be complied with before a physician may administer it
- Establishes a Commission on end of life care: <http://www.soinsdefindevie.gouv.qc.ca>, which has a mandate to oversee the application of specific requirements relating to medical aid in dying
- Establishes an advance medical directives regime and specifies the conditions that must be met in order for such directives to have binding force



Definitions

- **Terminal palliative sedation:** The administration of drugs or substances to a person at the end of his or her life in order to alleviate suffering by keeping him or her unconscious until death. Does not postpone or accelerate death.



Definitions

- **Medical aid in dying:** Treatment that involves the administration of drugs or substances by a physician to a person in later life, at the request of the latter, in order to alleviate suffering by causing his death. For a minority of people, palliative care cannot relieve all suffering. Medical aid to die is a new option, quite exceptional in the continuum of care in Quebec, to meet the exceptional suffering situations.



Rules that Apply to Institutions

- Every institution MUST :
 - Offer end-of-life care (*terminal palliative care and medical aid in dying*)
 - Adopt a policy for end-of-life care which:
 - Is consistent with ministerial directions;
 - Is made known to employees, patients and their relatives;
 - Provides for the collection and reporting of statistics that includes, among other things, number of requests for and refusals of medical aid in dying



Terminal Palliative Sedation

- A patient or a person authorized to consent on behalf of the patient must receive prescribed information about terminal palliative sedations before they can consent to that treatment



Medical Aid in Dying

- Patients must meet criteria (“section 26 criteria”):
 - Adult and capable of giving consent;
 - Suffer from incurable serious illness;
 - Suffer from an advanced state of irreversible decline in capability; **and**
 - Suffer from constant and unbearable physical or psychological pain which cannot be relieved in a manner the person deems tolerable.



Medical Aid in Dying

- Patient must request medical aid in dying themselves*, in a free and informed manner
- Patient may, at any time and by any means, withdraw their request for medical aid in dying



Medical Aid in Dying

- Physician must (s.28):
 - Be of the opinion that patient meets section 26 criteria after, among other things;
 - Making sure that the request is being made freely and without any external pressure;
 - Making sure that the request is an informed one;
 - Verifying the persistence of suffering and that the wish to obtain aid in dying remains unchanged, by talking to the patient at reasonably spaced intervals given progress of the patient's condition;
 - Discussion request with patient's care team;
 - Discuss patient's request with close relatives if the patient to wishes;



Medical Aid in Dying

- Obtain the opinion of a second physician confirming that the criteria set out in section 26 have been met



Medical Aid in Dying

- If a physician determines, pursuant to s.28, that medical aid in dying may be administered, the physician must administer such aid personally and take care of the patient until their death.



The Commission

Among other things:

- A physician who administers medical aid in dying must give notice to the Commission within 10 days and send the Commission all [prescribed information].
 - A physician who fails to comply with this section is guilty of an offence and is liable to a fine of \$1,000 to \$10,000.
 - The Commission will review the information produced and assess compliance with section 28 and if it determines that section 28 was not complied with, it reports that conclusion to the physician, the institution, the Quebec College of Physicians, and any other authority concerned.



Miscellaneous

- A person's decision to refuse to receive treatment, to withdraw consent to life-sustaining treatment or to request terminal palliative sedation or medical aid in dying may not be invoked as a reason to refuse to pay a benefit or any other sum due under a contract.
- This Act does not limit the right of health professionals to refuse, in accordance with their code of ethics, to provide or take part in providing end-of-life care for reasons of conscience.



Advance Medical Directives

- Advance Care directives cannot include a request for medical aid in dying

ASSISTED DEATH:



WHAT CAN GO WRONG?

ENTITLED TO DIE IF YOU ARE 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.

DEFINE:



- Competent adult
- Clearly consents
- Grievous and irremediable medical condition
- Enduring suffering
- That is intolerable ... in the circumstances

COMPETENT



- “Capable:” Able to understand information relevant to the decision, able to appreciate the reasonably foreseeable consequences of the decision.
- 80% of physicians DO NOT understand “capacity,” what it means or how to assess it...
- While I am capable, can I direct my life be ended at some point *after* I lose capacity?



- Ontario law of treatment decisions [The *Health Care Consent Act*] contains no age distinctions or limitations – regardless of your age, you are entitled to make your own treatment decisions if you are “capable.”
- Is the Court discriminating against “non-adults” – age discrimination is prohibited by the *Charter* unless the discrimination is “*demonstrably justifiable in a free and democratic society.*”

CLEARLY CONSENTS



- “CONSENT” REQUIRES:
 - An informed decision
 - Given voluntarily
 - Without misrepresentation or fraud

Is consent voluntary if given because Dad doesn't think his family should suffer through his illness any longer?

WHAT DO THESE PHRASES MEAN?



- Grievous and irremediable medical condition
- Enduring suffering
- That is intolerable ... in the circumstances

JUDICIAL INTERPRETATION IS SLOW!



- How will the “right to die” achieve consistency across Canada?
- You still cannot get an abortion in Prince Edward Island!
- Can we trust health practitioners to get it right?

QUEBEC STUDY



Health care professionals' comprehension of the legal status of end-of-life practices in Quebec
Study of clinical scenarios

Canadian Family Physician April 2015 vol. 61 no. 4
e196-e203

QUEBEC STUDY in 2012



- 45.8% of physicians and nurses wrongly thought that it was not permitted to withdraw a potentially life prolonging treatment at the patient's request;
- Only 39.5% believed that, in the event that medical aid in dying were legalized, the use of lethal medication would be permitted at the patient's request, and 34.6% believed they would be able to give such medication to an incompetent patient upon a relative's request.

...



- a Belgian study has shown that, 7 years after Belgium legislated euthanasia, many physicians still had difficulty identifying which medical practices constituted euthanasia and must be declared to monitoring authorities..

What's Next?



Panel Discussion



Questions?