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Supreme Court of Canada Strikes Down Ban on Physician Assisted Death

By: Jennifer Koshan

Case Commented On: *Carter v Canada (Attorney General)*, 2015 SCC 5

In a landmark decision, on February 6, 2015 the Supreme Court of Canada unanimously struck down the criminal prohibition against physician assisted death (PAD) in *Carter v Canada*, 2015 SCC 5. By declining to follow its 1993 decision in *Rodriguez v British Columbia*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519, which had upheld the prohibition, *Carter* marks the third time in the first few weeks of 2015 that the Court has overruled previous *Charter* decisions (see also *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, which will be the subject of a future ABlawg post). In *Carter*, the Court held that the ban on PAD violates the rights to life, liberty and security of the person contrary to the principles of fundamental justice under section 7 of the *Charter*, and could not be justified as a reasonable limit under section 1. As predicted, however, the Court declined to deal with the claim that the ban on PAD also violates equality rights contrary to section 15(1) of the *Charter*.

The Decision

Carter focuses on persons who have a grievous and irremediable medical condition causing suffering that is intolerable to them, and who clearly consent to the termination of life. The Court indicated that for such persons, denial of PAD presents a "cruel choice" – they can take their own lives prematurely, or suffer until they die from natural causes (at para 1). This choice engaged the right to life under section 7 of the *Charter*, which protects individuals from government actions that increase the risk of death directly or indirectly (at para 62). While the Court took no position on whether the right to life also includes a more qualitative right to die with dignity, it did affirm that section 7 does not create a "duty to live" (at para 63). The prohibition against PAD also violated the right to liberty, which protects individual autonomy and life choices, and the right to security of the person, which protects physical and psychological integrity free from state interference. As noted by the Court, "an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy" (at para 66).

Section 7 of the *Charter* requires proof that the violation of life, liberty or security of the person is contrary to the principles of fundamental justice. In *Carter*, the Court considered several arguments concerning these principles. First, it held that the prohibition against PAD was not arbitrary, as the objective of the prohibition – to protect the vulnerable from ending their lives in

times of weakness – was furthered by a total ban on PAD (at para 84). However, the ban was seen to be overbroad, as its objective went further than necessary given that not all persons seeking PAD are vulnerable to such inducements (at paras 86-88). In light of this conclusion, the Court found it unnecessary to deal with the argument that the ban violated the principle of fundamental justice concerning gross disproportionality (at para 90). It also declined to consider the argument that a new principle of fundamental justice, parity between criminal sanctions and moral blameworthiness, should be recognized (at paras 91-92).

The overbreadth of the law also led to the finding that it could not be justified as a reasonable limit under section 1 of the *Charter*. While protecting the vulnerable – including persons with disabilities and the elderly – was seen as a pressing and substantial objective, the Court rejected the government's argument that an absolute ban on PAD was reasonably necessary to achieve this objective. The justification argument thus failed the minimal impairment stage of the *Oakes* test (*R v Oakes*, [1986] 1 SCR 103). The evidence showed that a regime permitting PAD with safeguards to allow physicians to ensure patient competence, voluntariness, and the absence of coercion, undue influence and ambivalence was feasible and would minimize the risks associated with PAD (at para 106). Evidence of risks of a "slippery slope" from other jurisdictions permitting PAD – such as Belgium and the Netherlands – was not considered persuasive in the Canadian context. The Court clarified that some of the controversial cases arising in these jurisdictions, including euthanasia for minors and for persons with psychiatric conditions, would not fall within the scope of its decision (at para 111). It also clarified that its decision was not intended to compel physicians to provide PAD, noting that their freedom of conscience and religion – protected under section 2(a) of the *Charter* – would need to be reconciled with the rights of patients (at para 132).

The relevant sections of the *Criminal Code,* RSC 1985, c C-46, were declared void as applied to persons with grievous and irremediable medical conditions causing suffering intolerable to them who consent to the termination of life (at para 127). The Court suspended this remedy for 12 months to allow Canadian lawmakers to respond with legislation meeting the requirements of its decision in *Carter*. In keeping with the Court's reasons for rejecting the argument of inter-jurisdictional immunity put forward by the claimants and the government of Quebec (at para 53), new laws governing PAD could be passed by the federal and/or provincial governments in light of their shared jurisdiction over the regulation of health. The Court declined to grant exemptions during the period of suspended validity given that none of the claimants were in need of immediate relief (at para 129).

Commentary

Carter is consistent with other recent decisions of the Supreme Court giving broad scope to section 7 of the *Charter* (see e.g. *Canada (Attorney General) v PHS Community Services Society,* [2011] 3 SCR 134, 2011 SCC 44 and posts on that case here, here and here; *Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101, 2013 SCC 72 and a post on that case here). In that context, *Carter* was not an unexpected decision. While its ultimate conclusion on the constitutionality of the ban on PAD is hugely significant, the Court's reasons do not add much to the existing jurisprudence defining the scope of section 7.

It is therefore unfortunate that the Court did not find it necessary to consider the claim under section 15 of the *Charter* that the ban on PAD had an adverse impact on persons with physical disabilities who were unable to take their lives without physician assistance (see para 93). As Jonnette Watson Hamilton and I have argued, consideration of the equality dimension of the case would have allowed the Supreme Court to clarify the law of adverse effects discrimination in Canada. It may also have allowed the Court to engage more deeply with the competing arguments of disability rights groups who intervened in *Carter*. Those arguments and the literature supporting them did not get very much attention from the Court – in fact it does not reference any of the arguments of these groups, and only cites one academic article from 1995 (Thomas J. Singleton , "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can Bar Rev* 446). Given that new legislation for PAD is now in the hands of government, it can be expected that the debates about PAD and its implications for the rights of persons with disabilities will continue in that realm.

An earlier version of this post was published on the Oxford Human Rights Hub blog.