January 29, 2016

Physician-Assisted Dying Once Again Before the Supreme Court: What Just Happened?

By: Elliot Holzman

Case Commented On: *Carter v Canada (Attorney General)*, 2016 SCC 4

On February 6, 2015, the Supreme Court of Canada handed down its much-anticipated decision in *Carter v Canada (Attorney General)*, 2015 SCC 5 (*Carter I*), a landmark ruling where the criminal prohibition on physician-assisted dying was declared unconstitutional. Professor Jennifer Koshan wrote here about *Carter I*. In that decision, the Court did not immediately invalidate the relevant sections of the *Criminal Code*, RSC 1985, c C-46, rather the declaration of invalidity was suspended by one year, set to expire on February 6, 2016. Since February 6, a confluence of factors, including: Parliament not acting with much hurry on crafting new legislation to respond to *Carter I*, a historically long federal election that resulted in a change of government, and the four-month dissolution of Parliament, resulted in the Court once again hearing oral arguments in the case – this time an application by the Attorney General of Canada to extend the suspension of invalidity by another 6 months (see *Carter v Canada (Attorney General)*, 2016 SCC 4 (*Carter II*)).

In *Carter II*, the Court had to grapple with new issues since the *Carter I* decision – Quebec's National Assembly enacted its own legislation permitting physician assisted suicide – and the Court heard oral arguments from the Attorney General of Quebec seeking an exemption from the proposed extension. The Court granted the Attorney General of Canada a four-month extension, Quebec was given the green light to implement its legislation, and in the four-month window, individual patients can apply to the courts for a constitutional exemption to the suspension of invalidity. This comment will first look at the remedy the Court crafted in *Carter I*, and then move on to its decision in *Carter II*.

Carter I – February 6, 2015

After concluding that the relevant provisions of the *Criminal Code* infringed the petitioners' *Charter* rights to life, liberty, and security of the person in a manner that was not in accordance with the principles of fundamental justice, and that the infringement was not justified under section 1 of the *Charter*, the Court determined 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 these reasons" (*Carter I* at para 126).

The Court suspended the declaration of invalidity for 12 months, and denied any exemptions during the period of suspended validity (at paras 128-129). Suspensions are "extraordinary", since their effect "is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society" (*Carter II*, at para 2). However, the Supreme Court has granted similar suspensions of declarations of invalidity in other landmark *Charter* cases in recent years, to allow Parliament and provincial legislatures time to respond to complex policy contexts: (see

e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72 (invalidating Canada's prostitution laws) and *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 (invalidating legislation prohibiting the right to strike)).

***Carter II* – January 18, 2016**

The questions before the Court in *Carter II* were: (1) should the declaration of invalidity be extended, and if so, for how long, (2) is Quebec exempted from this extension and free to continue to allow citizens to access physician assisted dying if they so qualify, and (3) should individual Canadians, outside of Quebec, be able to get relief from the courts to access physician assisted dying if they meet the criteria of being terminally ill and suffering from unbearable pain during any extension to the suspension of invalidity?

Should the declaration of invalidity be extended?

The Court unanimously rejected the Attorney General of Canada's recommendation of a six-month extension, and granted four months instead. The Court's rationale is summarized in para 2, where the majority states: "Parliament was dissolved on August 2, 2015 and officially resumed on December 3 of that year. This four-month delay justifies granting an extension of the suspension of the declaration of invalidity, but only for four months."

I was left wondering why the Court did not simply grant the six-month extension as requested by the Attorney General. The Court inferred that Parliament was only 'interrupted' by four months due to dissolution of Parliament, the federal campaign period, and the swearing-in of the new Parliament. I was troubled by the SCC's interpretation of the legislative process. The Court determined that Parliament resumed its legislative process on December 3, 2015, when the House of Commons first sat. It heard arguments that the new federal government constituted a Special Joint Committee on Physician-Assisted Dying and understood the Committee's mandate to provide a recommendation to Parliament on a legislative response to *Carter I*. Shouldn't the question have been: when was this Committee constituted rather than Parliament as a whole?

As this Committee did not exist in the last Parliament, there were various procedures it had to go through before being formally constituted. The first order of business was electing joint Chairs – one from the House of Commons and one from the Senate – and the joint Chairs were not elected until January 18, 2016. Thus, if the Court was focused on when the legislative process was back up and running, the January 18 date is more germane than December 3. It struck me as odd that the Court, which emphasized so strongly in *Carter I* that the legislative branch ought to have time to craft new legislation, hamstrung Parliament by not allowing the 6-month extension.

Should Quebec be exempted?

In June 2014, before the Supreme Court had even decided the *Carter I* case, Quebec's National Assembly passed the *Act respecting end-of-life care*, RSQ, c S-32.0001 ("ARELC"), which offered terminally ill and suffering individuals the possibility of requesting a physician's assistance in dying. The legislation did not take effect until December 2015 – after the *Carter I* case had been decided – and was immediately litigated in court.

On December 1, 2015, Justice Pinsonnault of the Quebec Superior Court suspended the implementation of the ARELC, finding that the law conflicted with sections 14 and 241 of the *Criminal Code*, which had been struck down in *Carter I*, but were still unchanged by Parliament:

D'amico c Quebec (Procureure generale), 2015 QCCS 5556. The province appealed on the grounds that the issue was a matter related to health, which falls under provincial jurisdiction. The Quebec Court of Appeal agreed and on December 22, 2015, overturned the Superior Court's ruling and allowed ARELC to be implemented: *Quebec (Procureure generale) c D'Amico*, 2015 QCCA 2138.

In *Carter II*, the Supreme Court had to grapple with this new reality: should Quebec, having enacted ARELC, be exempted from the four-month extension? The Attorney General of Quebec argued that an exemption was necessary to avoid a chilling effect of the threat of possible violations of the criminal prohibition or potential civil liability during the four-month extension and that the intervening Attorneys General of the other provinces did not oppose Quebec's application.

A majority of the Supreme Court exempted Quebec, while four justices dissenting in part would not have. I found both arguments non-compelling. It seemed that the majority accepted Quebec's arguments primarily on the basis that the other provinces and the federal government did not oppose Quebec's application (at paras 3-4), which seems devoid of any substantive legal reasoning.

I was similarly unconvinced by the dissenting opinion. The four dissenting justices latched onto a directive issued by the Minister of Justice of Quebec ordering the Director of Criminal and Penal Prosecutions not to prosecute any physician who follows ARELC even if the Supreme Court did not grant an exemption to Quebec. According to the dissenters, this rendered Quebec's application moot (at para 10). The dissenters seemed satisfied with the notion of prosecutorial discretion. I am skeptical of courts using prosecutorial discretion as the justification for legal reasoning and found the dissent similarly lacking in any substantive legal reason for denying or rejecting Quebec's application.

Should individual Canadians be exempted under certain conditions?

One of the more curious conclusions from *Carter II* was the idea of a 'constitutional exemption' – that judges may grant relief to individuals on a case-by-case basis – carved out by the majority. In *Carter I*, a unanimous Court explicitly rejected the notion that there ought to be exemptions for petitioners who meet the '*Carter* conditions' (i.e. terminally ill and in intolerable pain) but who nonetheless are subject to the suspension of invalidity (*Carter I* at para 129). In *Carter II*, the majority seemingly reversed itself by permitting individuals to apply for exemptions during the four-month extension period by applying to a court for judicial review (at paras 6-7).

The question is: with the possibility of exemptions, do we really have an extension of the suspension at all?

Carter II was written in four days and the majority's opinion is only seven paragraphs long. It is hard to predict its impact; whether it will be viewed as a ruling on a unique set of circumstances brought about by a once-in-a-generation confluence of political events or whether the exemptions and extensions granted will have impacts on other areas of *Charter* jurisprudence in the future.

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**