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Assisted Suicide and Adverse Effects Discrimination: Where Will the Supreme Court Go in Carter?

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Case Commented On: *Carter v Canada (Attorney General),* 2012 BCSC 886, rev'd 2013 BCCA 435, leave to appeal to SCC granted 2014 CanLII 1206 (SCC)

We recently posted a paper on SSRN that is forthcoming in the Review of Constitutional Studies, dealing with the Supreme Court of Canada's approach to adverse effects discrimination under section 15(1) of the *Charter*. Adverse effects discrimination occurs when laws that are neutral on their face have a disproportionate and negative impact on members of a group identified by a prohibited ground of discrimination. Although the Court has recognized adverse effects discrimination as key to the *Charter*'s guarantee of substantive equality, it has decided only 8 such cases out of a total of 66 section 15(1) decisions released since 1989, none since 2009. Only 2 of the 8 claims were successful (see Appendix I in our paper). Our analysis shows several obstacles for adverse effects discrimination claims, including burdensome evidentiary and causation requirements, courts' acceptance of government arguments about the "neutrality" of policy choices, narrow focusing on prejudice and stereotyping as the only harms of discrimination, and failing to "see" adverse effects discrimination, often because of the size or relative vulnerability of the group making the claim.

In light of the very small number of successful adverse effects claims and the problems in the case law, it is interesting to note that in October 2014 the Supreme Court heard 2 section 15(1) appeals involving adverse effects discrimination: *Carter v Canada (Attorney General)* and *Taypotat v Taypotat,* 2012 FC 1036, 2013 FCA 192; leave to appeal to SCC granted 2013 CanLII 83791 (SCC). This post will focus on *Carter*, a challenge to the ban on assisted suicide under the *Criminal Code*, RSC 1985, c C-46, and the adverse effects discrimination arguments the Supreme Court is considering in that case. We acknowledge that the Court is far more likely to decide *Carter* on section 7 grounds—much of the Court's focus during oral arguments was on whether the ban violates the rights to life and security of the person in ways that are arbitrary, overbroad or grossly disproportionate, contrary to the principles of fundamental justice (see Webcast of the Carter Hearing, October 15, 2014). Nevertheless, *Carter* raises important equality issues as well.

Many ABlawg readers will know that *Carter* is the second challenge to the assisted suicide provisions of the *Criminal Code.* The first challenge was dismissed 5:4 in *Rodriguez v British Columbia*, [1993] 3 SCR 519. *Rodriguez* included an adverse effects discrimination claim under section 15(1), which was denied by the majority on the basis that, even if there was a violation of

equality rights, it would be saved by section 1 of the *Charter* (at para 185). In contrast, a dissenting judgment by then Chief Justice Lamer (Cory J concurring) found that although the assisted suicide prohibition was neutral on its face, it prevented the choice of suicide, open to other Canadians, by terminally ill persons with disabilities that made them physically unable to end their lives unassisted (at para 48). This amounted to adverse effects discrimination on the basis of disability for those two judges. Justices L'Heureux-Dubé and McLachlin (as she then was), in a separate dissenting judgment, found that the prohibition on assisted suicide violated the right to security of the person under section 7 of the *Charter*. As for section 15, they stated that "this is not at base a case about discrimination … and … to treat it as such may deflect the equality jurisprudence from the true focus of s. 15 — 'to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society'" (at para 196). Their judgment reflects the difficulty that courts sometimes have seeing adverse effects discrimination.

In *Carter*, the new challenge to the constitutionality of the prohibition against assisted suicide was successful before Justice Lynn Smith of the British Columbia Supreme Court (BCSC) under sections 7 and 15(1) of the *Charter* (2012 BCSC 886). However, a majority of the Court of Appeal overturned her decision, finding that she should have dismissed the claim because of the precedent of *Rodriguez* (2013 BCCA 435). The Supreme Court is re-considering *Rodriguez* substantively, so it is useful to consider the parties' arguments at the BCSC and Justice Smith's reasons under section 15(1) in some depth.

***Carter* (BCSC)**

The section 15(1) claim in *Carter* was that the criminal prohibition against assisted suicide had an adverse impact on the terminally ill who are materially physically disabled. Under the first step of the current test for discrimination from *R v Kapp,* 2008 SCC 41, [2008] 2 SCR 483 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396, Justice Smith considered whether the law created a distinction based on a prohibited ground of discrimination. She found that this step was satisfied because the law, in effect, drew a distinction based on physical disability. Justice Smith rejected the federal and BC governments' argument that since *everyone* is precluded from committing suicide with assistance, there was no distinction, indicating that this argument "ignores the adverse impact/unintended effects discrimination analysis central to the substantive equality approach" (at para 1073). In addition, she noted that "[i]t is not necessary for every member of a disadvantaged group to be affected the same way in order to establish that the law creates a distinction based upon an enumerated or analogous ground" (at para 1074).

The governments also argued that the claim should fail at the first step of the test because some people who desire assisted suicide are motivated by lack of will, rather than disability. The governments suggested that the physically disabled could still commit suicide by refusing food or drink. This argument could be seen as going to causation because it implies that it is not the law that creates the adverse impact but rather the choices made by some of the claimants. Justice Smith dismissed this argument, saying that "there are means of suicide available to non-disabled persons that are much less onerous than self-imposed starvation and dehydration, and it is only physically disabled persons who are restricted to that single, difficult course of action" (at para 1076).

Step two of the *Kapp / Withler* test focuses on "whether the distinction perpetuates disadvantage or prejudice, or stereotypes people in a way that does not correspond to their actual

characteristics or circumstances", which requires "consideration of the actual impact of the law" (at paras 1080, 1081). The claimants argued that that the assisted suicide provisions perpetuated disadvantage, because "those with grievous illnesses suffering from physical disabilities are disadvantaged and … the law disadvantages them further" (at para 1087). They also argued that the law stereotyped them by implying that physically disabled persons "lack sufficient autonomy or agency to make such momentous decisions" (at para 1088).

The governments argued that the law should be seen as a "neutral and rationally defensible policy choice," relying on the Supreme Court's decision in *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 SCR 567 (for posts on that decision see here and here). This argument was dismissed by Justice Smith, who noted that *Hutterian Brethren* "included no discussion of adverse impact discrimination" and concluded that "[i]t would be mistaken … to read the … decision as a repudiation of the adverse impact analysis approved in the long line of cases I have referred to…" (at para 1093).

Under step two of the *Kapp / Withler* test, Justice Smith considered the contextual factors relevant to whether discrimination perpetuates prejudice or stereotyping. The most contentious factors were, first, the correspondence between the grounds of discrimination and the actual need, capacity, or circumstances of the claimants and, second, ameliorative purpose.

On the correspondence factor, the governments argued that the ban on assisted suicide was in line with the actual needs and circumstances of persons with physical disabilities, who faced "heightened risk" of being persuaded to ask for assistance in dying "in an 'ableist' society" (at paras 1115, 1118 and 1128). The claimants replied that to treat all persons with physical disabilities as vulnerable would deny their autonomy to make fundamental decisions about death, a denial amounting to paternalistic stereotyping (at para 1122). Justice Smith agreed with the claimants, concluding that the assisted suicide prohibition had the effect of depriving non-vulnerable people "of the agency that they would have if they were not physically disabled" (at para 1130). She also dismissed the governments' argument that the law was not discriminatory because it had an ameliorative purpose, noting that this factor is only relevant where "the person or group excluded from ameliorative laws or activities is more advantaged in a relative sense," which was not the case here (at para 1140).

Justice Smith's overall conclusion was that the ban on assisted suicide "perpetuates and worsens a disadvantage experienced by persons with disabilities" and therefore violates section 15(1) of the *Charter* (at para 1161). The law failed the minimal impairment stage of the section 1 analysis because "a less drastic means of achieving the objective of preventing vulnerable persons from being induced to commit suicide at times of weakness would be to keep the general prohibition in place but allow for a stringently limited, carefully monitored system of exceptions" (at para 1243). Justice Smith granted the claimants a declaration that the provisions banning assisted suicide were of no force and effect "to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship" (at para 1393).

In our opinion, Justice Smith's judgment in *Carter* appropriately rejects the government arguments that rely on claims of neutrality, rigid analysis of distinctions and grounds, and adherence to narrow understandings of discrimination.

***Carter* (SCC hearing)**

As noted above, one of Justice Smith's findings at trial was that "[i]t is not necessary for every member of a disadvantaged group to be affected the same way in order to establish that the law creates a distinction based upon an enumerated or analogous ground" (at para 1074). This point is well accepted in section 15 cases. In *Carter*, there was a lot of debate about the composition of the relevant group in the Supreme Court of Canada's hearing of oral arguments. Joe Arvay, counsel for the Appellants, indicated that while his clients' section 15(1) claim applied only to terminally ill persons who were physically unable to commit suicide, their section 7 claim encompassed the larger group of persons desiring physician assistance to commit suicide even if they were not physically unable to take their lives (see Webcast of the Carter Hearing). The Appellants indicated that they preferred the claim to be decided under section 7 for this reason and, in fact, did not prioritize their section 15(1) arguments at the oral hearing, relying on their factum for those submissions when the clock ran out.

The Attorney General of Canada and some interveners raised questions about whether the claimants and others in their position constituted a vulnerable group as compared to persons with disabilities who might be taken advantage of if an exemption to the criminal law was created (see Factum of the Attorney General of Canada at para 137; Factum of the Intervener Council of Canadians with Disabilities and the Canadian Association for Community Living at para 20). Nevertheless, Canada conceded that the law created a distinction for the purposes of section 15(1) (Factum of the Attorney General of Canada at para 125). As a result, it is not surprising that the government did not maintain its "neutral policy choice" argument at the Supreme Court (although that argument was put forward by the Euthanasia Prevention Coalition in its intervention).

As we have indicated, causation problems are also common in adverse effects discrimination cases. The Attorney General of Canada did not maintain its causation argument at the Supreme Court level in *Carter* either but the Euthanasia Prevention Coalition did contend in its factum (at para 19) that the assisted suicide prohibition "is not the cause of any adverse treatment of people with disabilities." A response to this argument can be found in the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101, 2013 SCC 72, where the Court held that a challenge to the prostitution provisions of the *Criminal Code* could not be defended on the basis that the laws were not the sole cause of the harms related to prostitution. *Bedford* confirms that *Charter* claimants are only required to show a sufficient causal connection between government action and the harms they suffered (at para 75). This kind of connection is clearly present in *Carter*.

Although many adverse effects claims involve unintentional discrimination, it is important to recognize that *Carter* is a claim of intentional adverse effects discrimination. Canada has maintained the prohibition against assisted suicide in spite of the evidence and argument in *Rodriguez* that the law has a disproportionate and potentially discriminatory impact on some terminally ill persons with physical disabilities. It is the intentional nature of the government's actions in ignoring the impact of the assisted suicide law that makes it possible to argue stereotyping in this case, even though stereotyping is usually difficult to prove in adverse effects discrimination claims. Whether the law engaged in stereotyping was a major focus of the parties' and interveners' arguments at the Supreme Court, with debate focusing on whether the government made inappropriate assumptions about the vulnerability of the relevant group. For the Appellants and some interveners, the blanket prohibition against assisted suicide stereotyped

persons with disabilities as "incapable of demonstrating rationality and autonomy" (Factum of the Appellants at para 124) as well as "patronizing and infantilizing" them (Factum of the Intervener Dying with Dignity at para 15). For the Attorney General of Canada and other interveners, the law appropriately took the vulnerability of persons with disabilities into account and had an "ameliorative purpose" (Factum of the AG Canada at paras 135,137; Factum of the Euthanasia Prevention Coalition at paras 23-24).

The decision in *Carter* on whether the law is discriminatory may turn on whether there is evidence of stereotyping, but the Court's recent section 15(1) decision in *Quebec (Attorney General) v A,* 2013 SCC 5, [2013] 1 SCR 61 allows it to focus on disadvantage more broadly (see our comments on that case here). If it takes this broader approach, it should not be difficult for the Court to find that the assisted suicide prohibition perpetuates the disadvantage experienced by some persons with disabilities.

Carter also raises the question of whether the category of adverse effects discrimination should be retained under section 15(1) of the *Charter.* The existence of a distinction between direct and adverse effects discrimination has been called into question under human rights legislation (see *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* [1999] 3 SCR 3 at paras 27-30). This issue is a live one, as one of the interveners in *Carter* maintained that "this is not at base a case about discrimination" (Factum of the Council of Canadians with Disabilities and the Canadian Association for Community Living at para 21). We agree with those commentators who argue that retaining the category of adverse effects discrimination is important to the courts' ability to recognize systemic discrimination (see e.g. Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4 McGill J L & Health 17; Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2000-2001) 46 McGill L J 533). The fact that in *Rodriguez* only two judges found the assisted suicide prohibition violated section 15(1) suggests that the adverse effects category is a useful lens for determining whether a law has discriminatory effects.

Given the issues arising under adverse effects discrimination cases, and the strong connection between adverse effects discrimination and substantive equality, we hope that the Supreme Court will take the opportunity to decide *Carter* under section 15(1) of the *Charter,* rather than deciding the case solely on the basis of section 7.