

Supreme Court Assisted Suicide Decision

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For decades the assisted suicide question has captured the attention of the Canadian public. Those that don't recall the legal intricacies of the Supreme Court of Canada's 1993 decision in *Rodriguez*^[1] may well recall Sue Rodriguez's poignant media interviews at the time.^[2]

The latest legal event on the topic was the February 6, 2015 decision of the Supreme Court of Canada in *Carter v. Canada*^[3]. In a unanimous decision, the Court's nine judges held that the sections of the *Criminal Code* that make physician-assisted death a criminal offence^[4] are contrary to guarantees in *The Canadian Charter of Rights and Freedoms* to right to life, liberty and security of the person.

The Court determined that the current *Criminal Code* provisions prohibit physician-assisted death in circumstances where a competent adult person: (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 (the "proper circumstances"). Although these arguably narrow proper circumstances were the focus of the Court's decision, the result was a declaration that the sections in question are constitutionally invalid.

In declaring the *Criminal Code* provisions of no force and effect, the Court followed the frequently used procedure of suspending its declaration of invalidity for 12 months from the date of its decision (up until February 6, 2016). The one year suspension of the Court's decision allows the federal government an opportunity to consider the Court's decision.^[5] One option is for the government to table replacement legislation felt to be constitutionally compliant. Alternatively, the government could allow the 12 month deadline to come and go, in which case the *Criminal Code* prohibitions would by operation of the Court's decision, "disappear" from the books.

How the Supreme Court's decision plays out will be of great interest to Canada's health care

providers, particularly physicians, physician regulatory bodies, and physician associations; as well as other health care providers and health facilities and programs, patients and their advocates, and disability rights groups. Beyond the obvious question of the removal of criminal sanctions for physician-assisted death, the Supreme Court's decision in *Carter* has ramifications in a number of thorny areas of health care delivery and health-related legal matters, such as:

- What will be appropriate legal interpretation of the “proper circumstances” (underlined above)? Who gets to decide whether the medical condition is “grievous and irremediable”? Who will assess whether the person's suffering is expected to endure? Whose definition of “intolerable” will be applied? Will any of these questions matter if the law is simply removed from the books?
- Will there be access issues related to assisted death based on geography, for example in remote and rural areas of Canada? What is the interaction between the *Charter* right of a patient to access assisted death services, and any right of a physician to refuse to offer life-ending measures? What role, if any, will regulatory bodies and governments be expected to play in ensuring access to services?
- Will substitute decision makers for now legally *incompetent* patients be able to seek physician assisted death via a valid health care directive made while the patient was *competent*?
- Disability advocacy groups have raised concerns about “euthanasia on demand” and the general erosion of respect for lives lived by people with disabilities. What, if any, operational and other structures should be implemented by health facilities and regulators to ensure that the Court's “proper circumstances” are kept in mind?
- Health care institutions often find themselves caught in the middle of competing family wishes. Will facilities and caregivers be expected to now play an even greater role to mediate family disputes where a perceived “rogue” family member purports to act in the best interests of a loved one?
- What, if any, ramifications will a physician-assisted suicide regime have for suicide-related provisions in legal contracts, for example, life insurance policies? How will these new realities impact on trustees and personal representatives and the administration of the estates of those who choose the assisted suicide route?

As these matters unfold over the coming months and years, it will be certain that the topic of physician-assisted suicide will continue to occupy the attention of health care providers, health institutions and regulators, and Canadian patients; and percolate up through many areas of the law.

[1] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[2] See, eg.

<http://www.cbc.ca/archives/categories/politics/rights-freedoms/sue-rodriquez-and-the-right-to-die-debate/dying-on-her-own-terms.html>

[3] <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>;
<http://www.canlii.org/en/ca/scc/doc/2015/2015scc5/2015scc5.pdf>

[4] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 241(b)

[5] At publication, the federal Justice Minister has hinted that the government does not intend to invoke the “notwithstanding” clause of the *Charter*, section 33, in relation to the *Criminal Code* provisions declared unconstitutional.

<http://www.theglobeandmail.com/news/politics/mackay-appears-to-rule-out-overriding-right-to-die-decision/article22903042/>

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