

## PHYSICIAN-ASSISTED SUICIDE [CARTER V. CANADA (ATTORNEY GENERAL), 2015 SCC 5]

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In its landmark decision issued in February 2015, the Supreme Court of Canada struck the Criminal Code provisions that make physician-assisted suicide (“PAD”) illegal. It suspended the effect of its ruling for twelve months. This decision essentially reversed its earlier decision in *Rodriguez v. British Columbia (Attorney General)*, 1993 (SCC), in which it upheld the blanket prohibition on PAD.

This case arose when Gloria Taylor, suffering from ALS, brought a constitutional challenge of the *Criminal Code* provisions prohibiting PAD. She wished to end her life on her terms, but feared that her family members would be prosecuted if they assisted her in committing suicide. She argued that the law infringed on her constitutional right to life, liberty, and security of the person and amounted to unequal treatment.

The Supreme Court held that *the law interpreting the Charter had shifted* since *Rodriguez*. It also looked to other countries noting that the Netherlands, Belgium, Luxembourg, Switzerland, Columbia, and some states in the USA permit some form of assisted dying. It found that the *Criminal Code* provisions infringed the right to life because they might force individuals to take their own lives prematurely for fear that they would be incapable of doing so later. The Supreme Court held the provisions infringed the right to liberty and security of the person by interfering with “fundamentally important and personal medical decision-making.”

The Supreme Court noted that the law already allows people to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment. Physicians are already equipped to be able to reliably assess a patient’s competence, which they do to assess the adequacy of consent for any medical procedure. Furthermore, factors such as undue influence or coercion, which many fear would force certain individuals to “choose” the option of PAD, are detectable in these sorts of situations. Thus, the potential risks associated with legalizing PAD can be adequately addressed by safeguards.

The Supreme Court made the following declaration:

*Section 241(b) and s. 14 of the Criminal Code 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 (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.*

Apparent in this declaration are limits to the unconstitutionality of the anti-PAD provisions. They are only unconstitutional with respect to those individuals who (1) are adults; (2) are competent (3) clearly consent to the termination of life; and 4) who have a grave and impossibly incurable medical condition that causes enduring suffering that is intolerable. Therefore, it arguably would be constitutional for Parliament to continue to criminalize PAD for all other individuals.

This case may lead to some uncertainty and further litigation. Some examples of foreseeable issues are as follows:

- 1 Discrimination against minors. The Supreme Court recognized that death may be in a person's best interests. It is foreseeable that someone might challenge the constitutionality of a law that discriminates against minors' ability to choose PAD under s.15 of the *Charter*.
- 2 What is a "grievous and irremediable" condition? Who decides whether that test has been met? People might be denied requests for PAD because physicians deem an illness to not be grievous enough. This may give rise to health policy issues and further litigation.
- 3 Can a person direct a representative to request PAD through a personal directive? This instrument contemplates that a person is mentally competent to give a direction at the time a personal directive is executed, but is no longer competent when ill. If a person is able to direct a representative to consent to the removal of life support, could he not direct a request for PAD? This may also give rise to health policy issues and further litigation.

The Supreme Court suspended its declaration of invalidity for twelve months to allow Parliament to draft legislation. We will be watching with interest to see what legislation will be drafted and the impact it will have on health policy and provincial health legislation across Canada.

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