

Physician-Assisted Dying:

Is Your Home Ready?

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Together We Care Conference

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OVERVIEW

- *Criminal Code v. Charter*
- *Rodriguez v. British Columbia* (1993)
- *Carter v. Canada (Attorney General)* (2015 & 2016)
- *An Act respecting end-of-life care* (Quebec)
- Applications for Judicial Authorization
- Guidelines/Recommendations for Ontario
- Implications for LTC and retirement homes
- Key Considerations

Criminal Code v. Charter

- Everyone who counsels a person to commit suicide is guilty of an indictable offence and can be imprisoned for up to 14 years (s.241(b))
 - No person is entitled to consent to have death inflicted upon him, and consent does not mitigate criminal responsibility (s.14)
- Everyone has the right to life, liberty and security of the person (s.7)
 - Everyone has the right to equal protection and equal benefit of the law without discrimination (s.15(1))
 - These rights are guaranteed, subject only to such reasonable limits prescribed by law in a free and democratic society (s.1)

RODRIGUEZ V. BRITISH COLUMBIA (1993)

- Rodriguez suffered from ALS
- Challenged the constitutionality of the *Criminal Code* provisions prohibiting assisted suicide
- Argued that criminal prohibition violated s.7 (which included right to die with dignity) and s.15 of the *Charter*
- SCC was split in its decision
- Majority found that any infringement of ss.7 & 15 rights did not outweigh the protections afforded to vulnerable people under the *Criminal Code*
- SCC did not invalidate the *Criminal Code* provisions on assisted suicide

Carter v. Canada (Attorney General) (2015)

- Case commenced by a group of individuals
- Gloria Taylor (ALS) and family of Kathleen Carter (spinal stenosis)
- Trial judge found that prohibition against PAD violates s.7 of *Charter*
- BCCA found that trial judge erred in not following the binding ruling in *Rodriguez*
- SCC held that blanket prohibition on assisted death unjustifiably infringes *Charter* rights

Carter v. Canada (Attorney General) (2015)

- Unanimous decision
- *Rodriguez* could be reconsidered – new legal issues raised and social changes
 - Most end-of-life treatments now hasten death and this approach to palliative care no longer considered “active euthanasia”
 - Now we have sufficient means to protect the vulnerable – possible to have a legislative framework that ensures safeguards for the vulnerable

Carter v. Canada (Attorney General) (2015)

- Defined “PAD” as “the situation where a physician provides or administers medication that intentionally brings about the patient’s death, at the request of the patient”
- Sections 241(b) and 14 of the *Criminal Code* unjustifiably infringe s.7:
 - Interfere with fundamentally important personal medical decision-making
 - Deny opportunity to make a choice that is important to dignity and personal integrity
 - Security of person impaired by forced physical and psychological suffering
 - S.7 honours the value of life, and the role that autonomy and dignity play at the end of that life

Carter v. Canada (Attorney General) (2015)

- Absolute prohibition on assisted dying is overly broad
- Struck down *Criminal Code* provisions that stand in way of PAD
- Provisions are void insofar as they prohibit PAD for:
 - Competent adult person
 - Clearly consents to the termination of life
 - Has a grievous and irremediable medical condition (including an illness, disease or disability)
 - Condition causes enduring suffering that is intolerable to the individual in the circumstances of their condition
 - Suffering cannot be alleviated by treatment available and acceptable to the individual

Carter v. Canada (Attorney General) (2015)

- Operation of order suspended for 1 year – until February 6, 2016
 - To allow federal government to:
 - enact new law which does not offend *Charter*
 - coordinate with provinces about health law
- No physician can be forced to administer PAD if contrary to conscience or religious beliefs

Carter v. Canada (Attorney General) (2016)

- Federal government requested an extension – needed more time to respond to *Carter 2015*
- SCC suspended declaration of constitutional invalidity for another 4 months – until June 6, 2016
- In the interim period:
 - Persons seeking PAD can apply to superior court in their jurisdiction for an order allowing PAD based on meeting *Carter* criteria
 - Exemption from extension granted to Quebec

An Act Respecting End-of-Life Care (Quebec)

- Assented to on June 10, 2014
- The Act:
 - regime for end-of-life care (terminal palliative sedation and medical aid in dying (MAID))
 - established Commission to oversee the specific requirements for MAID
 - framework for a system of advance medical directives (format, validity and registration)
- End-of-life care must be offered in every institution providing healthcare
- Institutions must have a policy on end-of-life care
- Institutions must collect and report statistics (requests and refusals)

An Act Respecting End-of-Life Care (Quebec)

- Terminal palliative sedation can be requested by patient or SDM
- MAID can only be requested by adult capable patient who meets specific criteria (which are more rigorous than *Carter* criteria)
- Does not allow MAID to be requested through an advance directive
- Health care professional can refuse to take part in end-of-life care
- Complaints regarding treatment or service can be made to the Commission

Applications for Judicial Authorization on PAD

- Until June 6, 2016, persons can apply to superior court in their jurisdiction for an order allowing PAD based on meeting *Carter* criteria (other than Quebec)
- At least 4 such applications in Canada to date:
 - Alberta
 - Manitoba
 - Ontario
 - British Columbia

A.B. v. Attorney General of Canada et al. (Ontario)

- March 17, 2016 decision
- First case in Ontario
- 81 year old man with advanced-stage aggressive lymphoma
- Court found that he satisfied *Carter* criteria
- PAD administered the following day

A.B. v. Attorney General of Canada et al. (Ontario)

- Competent adult → capacity must be proven, no presumption of capacity
 - Should have evidence from consulting psychiatrist
- Grievous medical condition → range of critical, life threatening, or terminal
- Medical condition must be predominant source of grievous pain
- Pain and suffering (not medical condition) which cannot be alleviated by treatment acceptable to person

A.B. v. Attorney General of Canada et al. (Ontario)

- Court entitled to take a flexible approach to the evidence
 - Affidavits from applicant, attending physician, consulting psychiatrist, physician proposed to assist with death
- If *Carter* criteria are satisfied, person entitled to PAD → court has no discretion
- Coroner need not be notified
- Cause of death is the medical condition → PAD is a form of treatment

Guidelines/Recommendations for Ontario

- CPSO Interim Guidance on PAD
- CMA Principles-based Recommendations
- Ontario Practice Advisory
- Discussion Papers by Joint Centre for Bioethics, U of T
- Provincial-Territorial Expert Advisory Group on PAD
- Report of the Special Joint Committee on PAD
- Palliative and End-of-Life Care Provincial Roundtable Report

Implications for LTC and Retirement Homes

- Available wherever a person lives → LTC and retirement homes
 - Objections by faith-based facilities?
 - Advise of home's position and all end-of-life options
 - Transfer of patient to a non-objecting institution for assessment and administering PAD
- Religious/conscientious objections by physicians allowed
 - Involvement of various health professionals (physicians, nurses, pharmacists)
- PAD may be available to residents with terminal and non-terminal grievous and irremediable medical conditions
 - Including psychiatric conditions (psychological suffering)
 - Will residents with dementia be excluded?

Implications for LTC and Retirement Homes

- Advance requests for PAD may be permitted (after diagnosis)
 - Unlikely to accept consent from SDM
- No prior judicial review or approval → who determines eligibility? (e.g. 2 physicians)
 - Appeal process?
- Reporting requirements (Coroner, Ministry/RHRA, national reports)
- Development of new policies and procedures
- Training for staff
- Complaints to Ministry/RHRA about PAD services

Key Considerations in the Interim

- Prior to Inquiries/Requests:
 - Know your legal and professional obligations
 - Review guidelines (e.g. CPSO, OCP, CMA, JCB)
 - Form an internal advisory group who can deal with resident and family inquiries/requests
 - Medical director, DOC, social worker, head office representative, lawyer
 - Identify health practitioners willing to support PAD
 - Resource, document, provide medical opinions/consultations, guide discussions with residents and families, administer PAD
 - Allow for conscientious objections and effective referrals
 - Compile general information for residents (available upon request, provide to Residents Council and Family Council)

Key Considerations in the Interim

- If Inquiries/Requests are Received:
 - Refer all inquiries/requests to internal advisory group
 - Inform resident of requirement for a Court order and advise resident to obtain independent legal representation
 - Refer to guidelines
 - Consult with insurer (e.g. CMPA) and legal counsel
 - Court order to exempt health practitioners and home
 - Maintain confidentiality and open communication between resident and health practitioners involved