CONVERTING THE ‘RIGHT TO LIFE’ TO THE ‘RIGHT TO PHYSICIAN-ASSISTED SUICIDE AND EUTHANASIA’: AN ANALYSIS OF *CARTER V CANADA (ATTORNEY GENERAL)*, SUPREME COURT OF CANADA

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ABSTRACT

In its landmark decision *Carter v Canada (Attorney General)*, the Supreme Court of Canada ruled that the criminal prohibition on physician-assisted suicide and euthanasia for certain persons in certain circumstances violated their rights to life, liberty, and security of the person in sec. 7 of the *Canadian Charter of Rights and Freedoms* and thus was unconstitutional. The Supreme Court in effect overruled its earlier decision, *Rodriguez v British Columbia (Attorney General)*, which upheld the prohibition as constitutionally valid, on the basis of changes in *Charter* jurisprudence and in the social facts since *Rodriguez* was decided. We argue that the Supreme Court’s *Carter* decision shows conceptual disagreements with its *Rodriguez* decision concerning the nature and scope of the sec. 7-protected interests and the accompanying principles of fundamental justice. Not only do these conceptual differences have little to do with the changes that the Court in *Carter* invoked for ‘revisiting’ *Rodriguez*, the Court’s articulation of the sec. 7 interests, particularly the right to life, and the principles of fundamental justice, especially the principle of over breadth, are problematic on their own terms. Furthermore, the way in which the Court dealt with evidence regarding abuses in permissive jurisdictions is also subject to criticism. We recommend that if, as now seems inevitable, legislation is introduced, it should mandate that assisted suicide and euthanasia be performed

by specially licensed non-medical personnel and only on the authorization of a Superior Court judge. We also reject the key recommendations recently issued by the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying.

KEYWORDS: Euthanasia, Individual autonomy, Medical ethics, Physician-assisted suicide, Right to life, Rights to liberty and security of the person, Suffering and the law

I. INTRODUCTION

*Carter v Canada (Attorney General)*¹ is likely to go down as one of the most significant decisions ever issued by the Supreme Court of Canada.² In a unanimous decision signed as ‘the Court’,³ all nine justices agreed that an absolute prohibition of ‘physician-assisted death’⁴ constituted a violation of sec. 7 of the *Canadian Charter of Rights and Freedoms* that could not be saved by sec. 1. As a result of this finding, the *Criminal Code* provisions prohibiting assisted death were struck down as void and of no legal effect in relation to people who fulfilled the conditions articulated by the Supreme Court. The Court has given the government of Canada 12 months from the date of the judgment, 6 February 2015, to enact legislation making physician-assisted death available to certain persons in certain situations. This landmark decision constituted at least a finessing and in effect an overriding of a previous Supreme Court decision delivered in 1993, *Rodriguez v British Columbia (Attorney General)*,⁵ which upheld as constitutional the very provisions struck down by the Court 22 years later. The Court in *Carter* reasoned that it was appropriate to revisit its previous ruling on the basis of the changes in social facts and *Charter* jurisprudence that had transpired since *Rodriguez* was handed down. This case commentary will challenge, with respect, both the Court’s reasoning and its conclusion.

In our background section, we set out the reasoning of both the *Carter* case and the *Rodriguez* case. We conclude this section by briefly summarizing the various legislative developments in the area of assisted death that occurred in the period between the *Rodriguez* and *Carter* decisions. There was no shortage of attempts by Members of Parliament to introduce legislation related to assisted death in the years leading up to the *Carter* decision. While a wide range of regulatory regimes were proposed, none received the support of Parliament.

Our critical analysis section will focus primarily on two questions. The first concerns the extent to which the Court’s analysis of sec. 7 is in fact founded on changes in the law and/or social facts. The second concerns whether the Supreme Court was

1 [2015] SCC 5, [2015] 1 SCR 331.

2 In the interest of clarity, we will refer to the British Columbia Supreme Court as the ‘trial court’ and the Supreme Court of Canada as ‘the Court’ or the ‘Supreme Court’.

3 This is an uncommon approach that emphasizes the heavy weight that the Supreme Court of Canada intends the judgment to carry.

4 The Supreme Court followed the trial court judge in using the terms ‘physician-assisted death’ and ‘physician-assisted dying’ to embrace both physician-assisted suicide and euthanasia. See *Carter v Canada (Attorney General)* [2012] BCSC 886 paras 39, 100, and *Carter SCC* (n 1) para. 40. We prefer the term ‘physician-assisted death’ over ‘physician-assisted dying’. The latter term may be ambiguous in that it may refer to the assistance of a physician during the process of dying (which presumably everyone wants) as well as to euthanasia and physician-assisted suicide. The former, on the other hand, unequivocally refers to intentional actions of a physician that bring about the patient’s death, ie, euthanasia and physician-assisted suicide.

5 [1993] SCR 519.

correct to accept the trial judge's findings that the prohibition on assisted suicide was not a minimal impairment of constitutional rights as would be required under sec. 1 to establish its constitutional validity.⁶ On the first question, we suggest that where the *Carter* Court departed from *Rodriguez* on sec. 7, it did so on the basis of conceptual disagreements that ultimately had little to do with changes in jurisprudence or social facts. This is true both for how the Court in *Carter* construed the various interests protected by sec. 7 and for the principles of fundamental justice that the Court invoked to show that the impugned provisions were unconstitutional. On the second question, we contend that the judgment is problematic in uncritically accepting the trial judge's inferences from foreign jurisdictions on the risks of decriminalizing assisted suicide and euthanasia in Canada while unjustifiably dismissing contrary evidence given by the Attorney General's expert witnesses, and by giving little if any weight to the evidence of the expert witness in the Supreme Court appeal, Belgium Professor Etienne Montero.⁷

We conclude with suggestions for next steps that Parliament could take in response to the Supreme Court's decision. We recommend that Parliament table legislation putting in place more stringent safeguards than those which have been proposed in previous bills and in a recently released report commissioned by the Provincial-Territorial Expert Advisory Group on Physician-Assisted Suicide. In particular, assisted death should be allowed only with the authorization of a Superior Court judge and, furthermore, should be performed only by specially licensed individuals who are not members of the medical profession. That assisted death will soon be an end-of-life option in Canada should not eclipse the continued and serious need to improve access to quality palliative care for all Canadians. Indeed, the legal requirements for informed consent to assisted death can only be fulfilled if individuals have the alternative choice of fully adequate palliative care, including pain management.⁸

II. *CARTER V CANADA (ATTORNEY GENERAL)*: FACTS AND REASONING

In 2011, Gloria Taylor, a British Columbia woman diagnosed with amyotrophic lateral sclerosis (ALS), challenged the constitutionality of the prohibition of assisted suicide in the *Canadian Criminal Code*⁹ and its nullification of any consent to the infliction of death.¹⁰ Ms Taylor's constitutional challenge was later joined by Lee

6 Owing to space constraints, the commentary will focus on the *Charter* issues and leave out discussion of the Court's rulings on federalism and costs. It will also limit discussion of ethical and moral issues surrounding physician-assisted death and analysis of relevant philosophical concepts such as protection of life, respect for life, inviolability of life, sanctity of life, preservation of life, quality of life, and so on. For a discussion of these ethical matters, see Chapter 4 of Margaret Somerville, *Bird on an Ethics Wire: Battles About Values in the Culture Wars* (McGill-Queens University Press, Montreal 2015).

7 It is worth noting that Prof. Montero's evidence was admitted only at the stage of Supreme Court of Canada appeal. The Attorney General of Canada sought leave to admit evidence showing where the factual findings of the trial judge were not consistent with the evidence but the Supreme Court refused. It has taken, in general, a strong stance that factual findings at trial must be given high degrees of deference.

8 A strong moral case can be made that pain relief should be offered to all who need it. See Margaret Somerville, *Death Talk* (2nd ed McGill-Queens University Press, Montreal 2014) 218–230.

9 RSC 1985, c C-46, sec. 241(b).

10 Ibid, sec. 14.

Carter and her husband Hollis Johnson. Ms Carter and Mr Johnson had arranged for the former's mother, Kay Carter, to obtain an assisted death at a clinic in Switzerland operated by the organization DIGNITAS at Kay Carter's request.¹¹ The British Columbia Civil Liberties Association also joined the challenge.

The trial judge at the British Columbia Supreme Court,¹² Justice Lynn Smith, identified secs 14, 21, 22, 222, and 241 of the *Criminal Code of Canada* as the impugned provisions.¹³ The core of the constitutional challenge was 241(b),¹⁴ which the plaintiffs claimed violated sec. 7 *Canadian Charter of Rights and Freedoms* rights to 'life, liberty and security of the person' with this violation not being in accordance with the requirements of 'the principles of Fundamental justice' as is required for the infringement to be constitutionally valid.¹⁵ They also claimed that the impugned provisions violated sec. 15 rights against discrimination¹⁶ and that neither violation could be justified under the saving provisions of sec. 1 of the *Charter*.¹⁷

In a 396-page judgment, the trial judge examined a plethora of evidence that included relevant laws and regulations in Canada, the evidence of numerous experts, and evidence that spoke to the effectiveness of regulatory safeguards in jurisdictions that permit physician-assisted death. She identified a societal consensus around the moral permissibility of certain end-of-life practices, namely the withholding and withdrawing of medical treatment.¹⁸ Smith J then reasoned by analogy between these practices and physician-assisted death. According to Smith J, the 'preponderance of the evidence from ethicists is that there is no ethical difference between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death'.¹⁹ The trial judge concluded that the safeguards in place in permissive jurisdictions were sufficiently effective in protecting vulnerable populations from being induced or coerced into assisted death and in preventing legalized euthanasia from being abused.²⁰

11 Carter SCC (n 1), paras 17 and 18.

12 Carter BCSC (n 4).

13 Ibid, para. 100.

14 *Criminal Code* (n 9): 'Everyone who . . . aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years.'

15 Carter BCSC (n 4), para. 22. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The enactment of the *Charter of Rights and Freedoms* in 1982 substantially expanded the grounds for judicial review. Subsumed in the 'Legal Rights' portion of the *Charter*, sec. 7 guarantees that: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' When a law engages any of the enumerated interests, the onus is on the government to demonstrate that these interests are not affected in such a way that contravenes fundamental principles that underlie the legal system.

16 Carter BCSC (n 4), para. 22. See *Charter* (n 15) sec. 15(1): 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

17 Carter BCSC (n 4), para. 22. See *Charter* (n 15), sec. 1: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

18 Carter BCSC (n 4), para. 357.

19 Ibid, para. 335.

20 Ibid, paras 682–685, 815, 843, and 1243.

The trial judge found that she was not bound by the Supreme Court of Canada judgment in *Rodriguez*, the then precedent governing physician-assisted death in which the Supreme Court of Canada upheld the constitutional validity of the *Criminal Code*'s prohibition of assisted suicide. Smith J reasoned that she could legitimately revisit *Rodriguez* primarily on the basis of social and legal developments since that judgment was handed down in 1993.²¹ Embarking on a fresh analysis of what she identified as the relevant considerations, the trial judge then found that the absolute prohibition of assisted suicide and even of inflicting death in certain circumstances violated the *Charter*'s sec. 15 provision against discrimination as well as each of the *Charter*'s sec. 7 rights to 'life, liberty and security of the person', and that these violations did not comply with the principles of fundamental justice as is required by sec. 7 for such violations to be constitutionally valid.²² She also found that none of the constitutional violations could be saved by sec. 1 of the *Charter*, which allows for restrictions on *Charter* rights that are within 'reasonable limits prescribed by law as can be demonstrated in a free and democratic society'.²³ As a result, the trial judge declared the *Criminal Code*'s absolute prohibition of assisted suicide unconstitutional and granted a 1-year suspension of invalidity to give the federal government time to draft legislation allowing for assisted suicide or euthanasia under certain circumstances. Gloria Taylor was personally given a constitutional exemption from this suspension of invalidity in order for her to have an effective remedy, that is, immediate access to physician-assisted death.²⁴

The Attorney General appealed, and the British Columbia Supreme Court decision was overruled by a two to one majority of the British Columbia Court of Appeal on the basis that the Supreme Court of Canada decision in *Rodriguez* was the governing law.²⁵ On further appeal, the Supreme Court of Canada in a unanimous decision and speaking as the Court overruled the Court of Appeal and upheld Smith J's rulings, affirming her reasons for revisiting *Rodriguez*.

Focusing its attention specifically on s. 241(b) of the *Criminal Code*, the Supreme Court of Canada endorsed the trial judge's finding that the impugned provision engaged the right to life protected by sec. 7 of the *Charter* by effectively forcing individuals to take their own lives prematurely when they were still able to do so without physical assistance. The Court found that such an act was compelled by the individual's fear of being rendered physically incapable of doing so when their suffering became intolerable.²⁶ The Court went on to deny that the existential formulation of the right to life under sec. 7 'requires an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life'.²⁷ Two brief reasons were given for this reading of the right to life. First, a prohibition on assisted death would create a duty to live and such a duty would be inconsistent with the legality of consenting to the withdrawal or refusal of life-sustaining treatment.²⁸ Second, the Supreme Court ruled that sec. 7 must

21 *Carter BCSC* (n 4), para. 942.

22 *Ibid*, 1371.

23 *Charter*, sec. 1.

24 *Carter BCSC* (n 4), para. 19.

25 *Carter v Canada (Attorney General)* [2013] BCCA 435.

26 *Carter SCC* (n 1), para. 57.

27 *Ibid*, para. 63.

28 *Ibid*.

encompass not only the right to life but also the rights to liberty and security of the person.²⁹ The Supreme Court essentially endorsed Smith J's conversion of the sec. 7 right to life into a right to assisted suicide and/or euthanasia.

In its analysis of whether the sec. 7 liberty and security of the person interests were violated, the Supreme Court treated these interests as a combination to consider the effects of the prohibition on them. The Court followed the trial judge in noting that an 'individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy', the protection of which is central to the right to the 'security of the person'.³⁰ A prohibition on assisted death contravenes the person's dignity and autonomy in the suffering that the prohibition allows and thus violates the right to the 'security of the person'.³¹ The Court appropriated the majority ruling in *Blencoe v British Columbia (Human Rights Commission)*³² that state interference with important and fundamental life choices engage the sec. 7 liberty interest. Operating on this general principle, the Court directly invoked Binnie J's remarks in *AC v Manitoba (Child and Family Services)*³³ in support of its conclusion that prohibitions on assisted suicide violate the liberty interest: it noted that just as Binnie J was correct in recognizing that religiously motivated rejections of blood transfusions flow from deeply personal and fundamental beliefs about life,

it is clear that anyone who seeks physician-assisted death because they are suffering intolerably as a result of a grievous and irremediable medical condition does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live.³⁴

In short, the Supreme Court ruled that insofar as a law interferes with 'fundamental personal choices', which include choices concerning one's body, then the liberty interest has been violated.³⁵

Moving on to the principles of fundamental justice, the Supreme Court concurred with the trial judge that the impugned provisions failed to comply with the requirement

29 Ibid, para. 64.

30 Ibid, para. 66.

31 Ibid: '... by leaving people like Ms. Taylor to endure intolerable suffering, [the law] impinges on their security of the person'.

32 [2000] SCC 44, [2000] 2 SCR 307. In this case, the plaintiff claimed that the British Columbia Human Rights Commission violated his right to liberty in failing to dispose of two sexual harassment complaints against him within a reasonable delay. As the Human Rights Tribunal's delays in processing complaints did not interfere with fundamental life choices, there was no impairment of the plaintiff's sec. 7 interests and thus no remedy was granted.

33 [2009] SCC 30, [2009] 2 SCR 181. This was a case involving whether medical authorities, on the basis of acting in the 'best interests of the child' under sec. 25 of Manitoba's *Child and Family Services Act*, could impose a blood transfusion on a 14-year-old Jehovah's Witness member against her religion-based objection. The Supreme Court ruled that the 'best interests of the child' standard should be interpreted in a way that reflects and respects the adolescent's developing autonomy interest.

34 *Carter* SCC (n 1), para. 68.

35 At the same time, in *Malmo-Levine*, a case challenging the constitutionality of the criminal prohibition on the simple possession of marijuana, the Supreme Court dismissed the argument that all lifestyle choices merited protection under the sec. 7 liberty interest. See *R v Malmo-Levine* [2003] SCC 74, [2003] SCR 571, para. 86.

for constitutional validity that a law must not be overly broad.³⁶ Here the Court appealed to its recent articulation of this principle of fundamental justice in *Bedford*, a decision striking down the criminal prohibitions surrounding prostitution that was released 1 year after the British Columbia Supreme Court rendered its judgment in *Carter*. According to *Bedford*, determining whether a law is overbroad requires a comparison of the law's violation of the sec. 7 right in issue and the objectives of the impugned law, with legislative objectives being construed narrowly.³⁷ Working off of this new development in the law, the Supreme Court in *Carter* identified the purpose of the prohibition on assisted suicide as protecting 'vulnerable persons from being induced to commit suicide at a moment of weakness'.³⁸ Given this particular objective of sec. 241(b), the Court ruled that a blanket prohibition was overbroad in its application to competent, fully informed, and un-coerced individuals.³⁹ The Court found it unnecessary to consider the principle of gross disproportionality, the infringement of which could also have resulted in a finding of non-compliance with the principles of fundamental justice.⁴⁰

The Court found that the prohibition could not be saved under sec. 1 of the *Charter* as it failed the minimal impairment requirement.⁴¹ In other words, the prohibition's deprivation of *Charter* rights went beyond what was necessary to achieve the state's objectives. The Court accepted fully the trial judge's findings that 'properly designed and administered safeguards [were] capable of protecting vulnerable people from abuse or error',⁴² that persons with disabilities did not face heightened risk from having access to physician-assisted death in permissive regimes, and that a permissive regime in Canada would not necessarily result in a practical slippery slope (ie expansions of the people for whom and circumstances in which 'physician-assisted death' would be permitted).⁴³ In addition, the Court rejected as irrelevant to the Canadian context expert witness Professor Etienne Montero's damning critique, based on both professional and personal experience, of the euthanasia regime in Belgium.⁴⁴ In light of the violations of sec. 7, the Supreme Court found it unnecessary to determine

36 The principle of overbreadth was first developed in *R v Heywood* [1994] 3 SCR 761, a case involving a constitutional challenge to the *Criminal Code* provision prohibiting individuals convicted of sexual assault from 'loitering in or near a school ground, playground, public park or bathing area'. The objective of such a prohibition, according to Cory J, was to protect children. The Court found this prohibition overbroad in (1) applying to places where children may not be found, (2) applying for life without possibility of review, and (3) applying to a broader class of people than necessary to achieve the legislative objective. As such, the Court found the prohibition an infringement of the liberty interest that was contrary to a principle of fundamental justice.

37 *Carter* SCC (n 1), paras 72, 73, and 85.

38 *Ibid*, para. 78.

39 *Ibid*, para. 86.

40 *Ibid*, para. 90. The principle of gross disproportionality states that a law's impacts on the sec. 7 interests cannot be so extreme as to be grossly disproportionate to its beneficial effects. See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Irwin Law, Toronto 2012) 149–150.

41 *Ibid*, paras 102–107.

42 *Ibid*, para. 105. Lady Hale and Lord Kerr take similar positions in *R (On the Application of Nicklinson and another) (AP) v Ministry of Justice* [2014] UKSC 38, paras 314–316 and 352–356.

43 *Ibid*, para. 107.

44 *Carter* SCC (n 1), paras 111–113.

whether any of the prohibitions of discrimination in sec. 15 of the *Charter* were violated by the prohibition on assisted suicide.⁴⁵

III. BACKGROUND

A. *Rodriguez v British Columbia (Attorney General)*

Prior to Carter, the leading case on physician-assisted suicide was *Rodriguez*.⁴⁶ Like Gloria Taylor, Sue Rodriguez was a woman diagnosed with ALS and argued before the Court that sec. 241(b) of the *Criminal Code* violated her rights to 'life, liberty and security of the person' under sec. 7 of the *Charter* in a way that was not in conformity with the principles of fundamental justice. In addition, she claimed that the provision violated the sec. 12 provision against cruel and unusual treatment or punishment as well as the sec. 15 prohibition against discrimination, thus rendering the infringement unconstitutional. In particular, Ms Rodriguez argued that sec. 241(b) violated these constitutionally protected interests by preventing her from dying at the time and in the manner that she wished.⁴⁷

By a five to four majority, the Supreme Court upheld the constitutionality of the prohibition on aiding and abetting suicide. The majority, under the pen of Sopinka J, accepted that sec. 241(b) violated sec. 7 interests but that these violations were in accordance with the principles of fundamental justice. In particular, the Supreme Court ruled that sec. 241(b) was neither arbitrary nor unfair as it was related to the state interest in protecting vulnerable people and in upholding the 'sanctity of life'. Sopinka J highlighted the work of the Law Reform Commission of Canada and invoked the consensus among Western democracies that a blanket prohibition on assisted suicide was necessary to protect vulnerable people.⁴⁸

Sopinka J declined to elaborate on the sec. 15 challenge as he did not believe resolving the difficult issues related to the scope of the protections against discrimination provided by sec. 15 would have a bearing on the outcome of the case. Rather, he assumed that if there were a sec. 15 violation, it would be justified under sec. 1 as the prohibition was rationally connected to a pressing legislative objective of protecting vulnerable people, and grounded in the respect for and the desire to protect human life.⁴⁹ On the minimal impairment requirement under sec. 1 of the *Charter*, Sopinka J dismissed arguments that the law was overbroad in its impacts on *Charter* rights given that the legislative 'purpose extends to protecting the life of the terminally ill'.⁵⁰ The

45 Ibid, 93. In contrast to the Supreme Court's silence on sec. 15, the European Court of Human Rights explicitly ruled in *Pretty v United Kingdom*, App. No. 2346/02, (2002) 35 EHRR 1, that the English prohibition on assisted death was compatible with the European Convention's Article 14 prohibition on discrimination. The reason why the prohibition did not discriminate between able-bodied and incapacitated persons was that there was an 'objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide' related to the difficulty in accurately making this distinction. As such, to grant an exemption to those judged to be incapable of committing suicide would undermine the Act's objective of protecting life as well as increase the risk of abuse (paras 84–89).

46 *Rodriguez* (n 5).

47 Ibid, 532.

48 *Rodriguez* (n 5), 596–605.

49 Ibid, 613.

50 Ibid, 614.

inherent difficulty of guaranteeing consent in a regime where terminally ill persons enjoy a limited exemption from the prohibition on assisted death meant that there was 'no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose', part of which 'is to discourage the terminally ill from choosing death over life'.⁵¹ Consequently, an absolute ban on assisted suicide was justified and not unconstitutional.⁵²

In the primary dissenting opinion, McLachlin J (as she then was) took the view that sec. 241(b) violated the fundamental principle that a law should not be arbitrary. The prohibition limited sec. 7 interests in a way that 'bears no relation to, or is inconsistent with, the objective that lies behind the legislation'.⁵³ The arbitrariness of the absolute criminal prohibition on physician-assisted suicide consisted in its preventing people with disabilities from ending their lives while allowing able-bodied people to do so with impunity.⁵⁴ McLachlin J rejected Sopinka J's claim that only a blanket prohibition can protect those who may be pressured into suicide. Her reasoning was that the plaintiff should not be denied her choice of assisted death in order to protect others.⁵⁵

B. History of Proposed Assisted Death Legislation in the Parliament of Canada

In 1995, shortly after the Supreme Court handed down its decision in *Rodriguez*, the Senate special committee on euthanasia and assisted suicide released a report entitled *Of Life and Death*.⁵⁶ The committee came to the following conclusions: governments at all levels should make palliative care programs a priority, and develop national guidelines and standards for palliative care; patient autonomy should be respected in cases of both withholding and withdrawing life-sustaining treatment. A majority recommended that the *Criminal Code* provisions proscribing aiding and abetting suicide be maintained and also recommended that voluntary euthanasia remain a criminal offense but with a less severe penalty where there was an element of mercy/compassion. A minority of the committee recommended that the *Criminal Code* be amended to permit voluntary euthanasia for competent adults incapable of committing suicide.

As Table 1 shows, there was firm legislative opposition to legalizing assisted suicide during the 1990s and the first decade of the 2000s. During this period, there were no fewer than nine attempts using private members' bills or motions to introduce physician-assisted

51 Ibid. The European Court of Human Rights expressed agreement with the majority in *Rodriguez* on this point in *Pretty* (n 45), para. 74.

52 The sec. 12 challenge was dismissed on the basis that the *Criminal Code* prohibition did not constitute 'treatment' within the meaning of sec. 12.

53 Ibid, 619.

54 Ibid, 620: 'the physically able person is legally allowed to end his or her own life; he cannot be criminally penalized for attempting or committing suicide. But the person who is physically unable to accomplish the act is not similarly allowed to end her life.'

55 Ibid: 'it does not accord with the principles of fundamental justice that Sue Rodriguez be disallowed what is available to others merely because it is possible that other people, at some other time, may suffer, not what she seeks, but an act of killing without true consent.'

56 Senate of Canada, *Of Life and Death: Report of the Special Senate Committee on Euthanasia and Assisted Suicide* (1995) <<http://www.parl.gc.ca/Content/SEN/Committee/351/euth/rep/LAD-TC-E.HTM>> accessed 26 December 2015.

Table 1. Timeline and overview of proposed assisted death legislation in the Parliament of Canada

Date	Name of bill (sponsor)	Key proposals	Result
May 1991	Bill C-203 'An Act to amend the Criminal Code (terminally ill persons)' (Wenman, MP)	Protects physicians who withdraw treatment in certain circumstances from criminal liability	Reviewed by legislative committee after second reading; adjourned <i>sine die</i>
June 1991	Bill C-261 'An Act to legalize the administration of euthanasia under certain conditions to persons who request it and who are suffering from an irremediable condition and respecting the withholding and cessation of treatment and to amend the Criminal Code' (Axworthy, MP)	Allows individuals to die by withholding or withdrawing treatment under certain circumstances Allows individuals to die from being administered a lethal dose of a drug A person suffering from an irremediable condition could apply to an 'euthanasia referee' for a 'euthanasia certificate' giving permission for the process	Dropped from <i>Order Paper</i> after second reading
December 1992	Bill C-385 'An Act to amend the Criminal Code (aiding suicide)' (Robinson, MP)	Legalization of physician-assisted suicide	Expired with prorogation of parliament
March 1993	Motion (Waddell, MP)	Called upon government to consider introducing legislation on euthanasia	Motion defeated
February 1994	Bill C-215 'An Act to amend the Criminal Code (aiding suicide)' (Robinson, MP)	Amends <i>Criminal Code</i> provision on aiding suicide	Debated then dropped from <i>Order Paper</i>
November 1996	Bill S-13 'An Act to amend the Criminal Code (protection of health care workers)' (Senator Carstairs)	Amends <i>Criminal Code</i> to protect from criminal liability healthcare providers who withhold/withdraw treatment from competent person who request that treatment be withheld/withdrawn	Expired with prorogation of parliament

November 1997	Motion M-123 (Robinson, MP)	Establishment of special committee dealing with euthanasia and physician-assisted suicide and to prepare a bill	Motion rejected
April 1999	Bill S-29 'An Act to amend the Criminal Code (Protection of Patients and Health Care Providers)' (Senator Lavoie-Roux)	Amends Criminal Code to protect patients and healthcare providers from criminal responsibility for withholding or withdrawing life-sustaining medical treatment under certain conditions	Expired with prorogation of parliament
October 1999	S-2 'An Act to facilitate the making of legitimate medical decisions regarding life-sustaining treatments and the controlling of pain' (Senator Carstairs)	Protects healthcare providers from criminal liability in withholding/withdrawing treatment on basis of patient consent	Referred to Senate Committee on Legal and Constitutional Affairs in February 2000
June 2005	Bill C-407 'An Act to Amend the Criminal Code (right to die with dignity)' (Lalonde, MP)	Amends relevant provisions of the Criminal Code such that, subject to certain criteria, assisted death would not be homicide nor counseling or aiding suicide Requirement that an individual be in severe physical or mental pain without any prospect of relief or terminally ill Requirement of two lucid and informed requests more than 10 days apart Requirement that the person assisting death be a medical practitioner or assisted by a medical practitioner	Debated in the House of Commons; vote did not take place due to dissolution of parliament

Continued

Table 1. Continued

Date	Name of bill (sponsor)	Key proposals	Result
June 2008	Bill C-562 'An Act to amend the <i>Criminal Code</i> (right to die with dignity)' (Lalonde, MP)	Same as C-407, except for requirement that the medical practitioner must always comply with the conditions set out in the bill	Died on the Order Paper with the dissolution of parliament
May 2009	Bill C-384 'An Act to amend the <i>Criminal Code</i> (right to die with dignity)' (Lalonde, MP)	Identical to Bill C-562	Negated in April 2010 at second reading (vote of 228 to 59)

Information in the table is taken from Library of Canada, Euthanasia and Assisted Suicide in Canada: Background Paper (2013).

suicide debates into Parliament. Of all these attempts, only Bill C-384 made it to a vote. We note, in particular, the strong negative vote that this bill received in April 2010, 228 against 59 for it, just 2 years before the trial court decision in *Carter* struck down the broad prohibition of assisted suicide and euthanasia.

The political winds began to blow the other direction, however, in 2009 when the Collège des médecins du Québec published a discussion paper that called for euthanasia as appropriate end-of-life care in certain circumstances.⁵⁷ This paper led the *Assemblée nationale* (the Quebec provincial legislature) to convene the Select Committee on Dying with Dignity that same year. After consultations with members of the public and numerous expert witnesses, the Committee released their final report, favoring the legalization of euthanasia which the committee called 'medically assisted death', in 2012—the same year that the *Carter* trial court decision was released.⁵⁸

IV. SECTION 7 RIGHTS TO LIFE, LIBERTY, AND SECURITY OF THE PERSON

Key to the Supreme Court of Canada ruling was its claim that the trial judge was not bound by its previous decision in *Rodriguez* which had previously ruled on the constitutionality of sec. 241(b). The trial judge was not bound by this ruling on the grounds that lower courts are permitted to deviate from *stare decisis* under certain conditions:

[t]rial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate' [citations omitted].⁵⁹

In this case, the Supreme Court found that the trial judge was not bound by *Rodriguez* owing to (1) a change in the sec. 7 law, particularly in the development of the doctrine of overbreadth,⁶⁰ and (2) a fundamental change in the factual matrix with regard to the emergence of permissive jurisdictions where assisted death is legal and regulated.⁶¹ The Supreme Court in *Carter* deemed that the conditions for reconsidering settled rulings were fulfilled and, as such, that the trial judge was free to reach a different conclusion than the one adopted by the Supreme Court in *Rodriguez*.

The Supreme Court's ruling did not constitute an overruling of *Rodriguez* in the usual and strict sense of correcting an error committed by a previous court.⁶² Indeed, the Supreme Court saw itself engaged in the exercise of updating *Rodriguez* without

57 Collège des médecins du Québec, *Physicians, Appropriate Care and the Debate on Euthanasia – A Reflection* (2009).

58 Assemblée nationale du Québec, Select Committee on Dying with Dignity, *Dying with Dignity* (Report) (2012).

59 *Carter* SCC (n 1), para. 44.

60 *Ibid*, para. 46.

61 *Ibid*, para. 47.

62 See *Ontario (Attorney General) v Fraser* [2011] SCC 20, [2011] 2 SCR 3, para. 130 where the Court ruled that 'in order to overrule its own precedent, the Court must be satisfied, based upon substantial reasons that the precedent was wrongly decided. It is not appropriate simply because of a change in the composition of the Court that precedent should be overturned, because of the views of newly appointed judges'.

repudiating any of the legal principles and reasoning established in that decision that are unaffected by the developments in sec. 7 jurisprudence and social facts. What the trial court was permitted to do was to review 'the constitutionality of the impugned provisions'⁶³ or revisit the decision in *Rodriguez* in light of these developments.⁶⁴ Indeed, the Supreme Court was careful to avoid any language of 'overruling' or 'overturning' its decision in *Rodriguez*. Nevertheless, a close analysis of the Court's reasoning will reveal a subtle undermining of Sopinka J's reasoning and conclusions on sec. 7 that, moreover, are based on considerations which have no relation to the Supreme Court's stated grounds for revisiting *Rodriguez*. As the authors hope to make evident, the Supreme Court in *Carter* in effect supplanted *Rodriguez*'s interpretation of sec. 7 with a different interpretation and, in some cases, even turned *Rodriguez*'s reasoning on its head.

A. Life Interest

As the death penalty was abolished prior to the introduction of the Charter, no law has been challenged on the basis of its having directly deprived an individual of the right to life.⁶⁵ In recent landmark cases, however, the Supreme Court has found infringements of the sec. 7 right to life in situations where a law *indirectly* increases the risk of death, with *Chaoulli v Quebec (Attorney General)*,⁶⁶ *Canada (Attorney General) v Bedford*,⁶⁷ and *Canada (Attorney General) v PHS*⁶⁸ being the most notable cases on this point. While one might think that this line of jurisprudence—together with the Supreme Court's ruling in *Rodriguez*—would have provided a strong justification for maintaining the prohibition on assisted suicide, the Supreme Court in *Carter* essentially reinterpreted the life interest to reach the opposite result. Smith J located the violation of the sec. 7 right to life in the response that might be provoked in certain individuals by the criminal prohibition on assisted suicide. She ruled that the impugned legislation

63 *Carter* (n 1), para. 28.

64 *Ibid.*, para. 45.

65 That being said, the Court has treated cases of extradition to face the death penalty as engaging the life and liberty interest. See *Stewart* (n 40), 63.

66 [2005] SCC 35, [2005] 1 SCR 791. Here the Supreme Court was faced with the question of whether a Quebec law prohibiting the purchase of private insurance was an infringement of the right to life. Finding excessive waiting times in public health care may increase the risks of death, it ruled that to prohibit patients from seeking protection through private insurance was, on this interpretation, an infringement of the right to life.

67 [2013] SCC 72, [2013] 3 SCR 1101. This case involved a challenge to the constitutionality of the *Criminal Code*'s provisions on prostitution. The Court ruled that the *Criminal Code* prohibitions on the being present in common bawdy houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution constituted infringements of the right to life of sex workers. The reasoning here was that by preventing sex workers from taking measures to protect themselves (ie by working in the company of other sex workers, by hiring drivers and bodyguards, and by assessing in broad daylight the riskiness of potential clients), the impugned provisions forced prostitutes into situations that increased the risk to their lives.

68 [2011] SCC 44, [2011] 3 SCR 134. At issue was the minister's denial of request for an exemption from the *Controlled Drugs and Substances Act* made by Insite, a safe injection site located in Vancouver's Downtown Eastside. The Court found that the minister's denial of an exemption deprived Insite's clients of potentially lifesaving medical care, thus engaging their sec. 7 right to life.

... affects [Ms Taylor's] right to life because it may shorten her life. Ms. Taylor's reduced lifespan would occur if she concludes that she needs to take her own life while she is still physically able to do so, at an earlier date than she would find necessary if she could be assisted.⁶⁹

The logic here is that by preventing an individual in Ms Taylor's position from access to assisted death, the law may provoke an unassisted suicide while the person was still able to do this which would constitute a shortening of her life and thereby a violation of her right to life. The consequence of this unprecedented ruling is clear: the law can only be compliant with the right to life if it allows assisted death. As such, Smith J essentially converted the right not to have one's life taken or threatened by state action into a right to death by physician-assisted suicide or euthanasia. It is surprising that the Supreme Court endorsed this approach without question⁷⁰ despite its being, at the very least, a novel way of construing how the Criminal Code prohibition of assisted suicide breaches Ms Taylor's *Charter* right to life. The effect of such an interpretation of the right to life is to open the floodgates to other groups of individuals who might claim that their lives are 'shortened' by the restrictions in place.⁷¹

It is equally worth noting that the Supreme Court sided with the trial judge in rejecting the plaintiffs' calls to endorse a 'qualitative' approach to the right to life that would have encompassed considerations of a person's quality of life and their right to autonomy.⁷² Under such a 'qualitative' interpretation, the right to life would be infringed by prohibiting a person with a poor quality of life, capable of providing informed consent, access to assisted suicide. Making reference to its ruling in *Chaoulli*, the Court affirmed a narrower 'existential formulation' of the right to life whereby 'the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly'.⁷³ The Supreme Court ruled, however, that this existential formulation of the right to life can be compatible with the right to assisted death. The Court justified this ruling by way of a *reductio ad absurdum* which can be broken down into the following premises and conclusion:

1. Nobody accepts that there is a duty to live or questions the legality of justified withdrawals/refusals of life-support treatment that will allow natural death to occur.⁷⁴
2. If the existential formulation of the right to life prohibited assisted death, then the existential formulation of the right to life would create an implicit

69 *Carter BCSC* (n 3), para. 17.

70 *Carter SCC* (n 1), para. 57.

71 For example, individuals who wish to act in advance of future disabilities and claim that they would otherwise consider suicide earlier if not given the right to request assisted death. See Dwight Newman, 'Judicial Method and Three Gaps in the Supreme Court of Canada's Assisted Suicide Judgment in *Carter*' (2015) 78 *Sask L Rev* 217, 221.

72 *Ibid*, para. 59.

73 *Ibid*, para. 62.

74 This premise is implicit in the Court's ruling in *Carter SCC* (n 1), para. 63.

‘duty to live’, which would, as well, threaten the legality of consenting to the withdrawal/refusal of treatment that would result in death.⁷⁵

3. Therefore, the existential understanding of the right to life does not require prohibition of assisted death. In other words, allowing physician-assisted suicide and euthanasia can be consistent with the existential reading of the right to life.⁷⁶

While the first premise is uncontroversial, the second premise is false on two accounts.

First, an existential formulation of the right to life that prohibits assisted death does not, strictly speaking, impose any duty to go on living on the person who wishes to access assisted suicide. The sec. 241(b) prohibition imposes, rather, a negative content duty on every other person in the form of a duty not to aid or abet a person to commit suicide. Construed positively, one might call it a duty incumbent on everyone to allow an individual requesting assisted death to continue living regardless of any desire the recipient of the request might have to accede to it. Simply put, such a prohibition on assisted death that forecloses certain options for ending one’s life does not impose any legal duty on individuals to continue living.

Second, the argument that the prohibition is ‘inconsistent’ with the legality of consent to the withdrawal of life-sustaining treatment is also subject to criticism. At the heart of the argument is the premise that the withdrawal of treatment is ethically and legally indistinguishable from assisted death, or what can be called the ‘no difference’ argument.⁷⁷ The problem here is that the Court failed to recognize that there are compelling moral reasons to draw a line between the withdrawal/refusal of treatment and assisted death. The long-standing moral distinction between natural death and inflicted death, as a species of the more general distinction between foresight and intention, respectively, was recognized as legally valid by the Law Reform Commission in its 1983 report and affirmed by Sopinka J in *Rodriguez*.⁷⁸ As such, that death results in both instances does not make the two interventions morally or (in most common law jurisdictions) legally the same.⁷⁹ Furthermore, the Court failed to recognize that while the right to inviolability (the right not to be touched without one’s informed consent) supports the right to refuse treatment, the scope of this right is limited to just that and cannot be convincingly extended to encompass a right to die, let alone a right to be killed.⁸⁰

75 Ibid.

76 Ibid.

77 The trial judge relies on a version of this argument provided by Professor Wayne Sumner (*Carter BCSC* (n 4), paras 234–237). For further criticism of this approach, see Somerville 2015 (n 6).

78 *Rodriguez* (n 5), 601, 606, and 607.

79 As Georgetown University professor of law and ethics John Keown notes, Smith J failed to recognize that the principle of the inviolability of life, which opposes measures that intentionally shorten life, is of ‘foundational importance to Canadian criminal law and beyond’. See John Keown, ‘A Right to Voluntary Euthanasia? Confusion in Canada in *Carter*?’ (2014) 28 *Notre Dame JL Ethics & Pub Pol’y* 1, 16. The Supreme Court of the United States also affirmed the validity of this distinction in *Vacco v Quill* 521 U.S. 793 (1996), 806.

80 See Somerville 2015 (n 6); see also *Cruzan v Director, Missouri Department of Health*, 497 U.S. 261 (1990), 278 and 279 cited in *Vacco v Quill*, *ibid*, 807.

It is also unclear from a legal point of view how bootstrapping assisted death to the legality of the right to withdraw/refuse treatment is supposed to show that sec. 241(b) infringes specifically the right to life. The Court seemed to assume that if the right to life allows for the legal acceptability of the withdrawal/refusal of treatment, and there is no ethically relevant difference between these practices and assisted death, then consistency would dictate that assisted death should be legal as well. What the Court failed to recognize is that the 'no difference' argument cannot show that the impugned provision violates the right to life. This is because the legality of the right to refuse/withdraw treatment has no logical bearing on the specific question of whether the prohibition on assisted death violates the sec. 7 right to life. Put otherwise, the no difference argument—even if accepted—would only demonstrate that the decriminalization of assisted suicide (like the legality of the right to refuse/withdraw treatment) is consistent with the right to life rather than demonstrate that its (continued) criminalization constitutes a violation of this right. As such, the no difference argument is silent on the question of whether the sanctity of life or respect for life⁸¹ can be a legitimate basis on which the government may elect to prohibit specifically assisted death. To this particular question, Sopinka J provided a clear answer in *Rodriguez*:

Sanctity of life . . . has been understood historically as excluding freedom of choice in the self-infliction of death and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the state to regulate the involvement of others in exercising power over individuals ending their lives.⁸²

Sopinka J's point, applicable today as it was when *Rodriguez* was decided, was that the sanctity of life had never been used as a basis for legitimating suicide or assisted death. On the contrary, as Sopinka J suggested, the sanctity of life is properly understood as a broad social value that can be invoked for legitimating prohibitions on practices that inflict death. Not only did this traditional common law conception of the sanctity of life go unmentioned and undisputed by the Supreme Court in *Carter*, the Court cited no new jurisprudential developments in support of its radical departure. In the end, we are left with little more than the Court's bare assertion of an opposition between the right to life and the prohibition on assisted death that the Court saw itself as resolving by interpreting the right to life as allowing for the infliction of death in certain circumstances.

The Supreme Court in *Carter* seemed also to suppose erroneously that the opposition to assisted death is necessarily rooted in a view that life must be preserved at all cost, a position that virtually no ethicist who is opposed to assisted death holds.⁸³ Moreover, in *Rodriguez*, Sopinka J expressly rejected equating the 'sanctity of life' (or, as we prefer, the 'respect for life') with any absolute requirement to preserve life.⁸⁴

81 We prefer the latter formulation as it avoids the connotation that the value is only to be found in religion, whereas it is a fundamental value common to all civilized societies. See Somerville (n 6).

82 *Rodriguez* (n 5), 585.

83 See John Keown's distinction between what he calls the inviolability of life and vitalism. Keown (n 79).

84 *Rodriguez* (n 5), 595.

Nor does any legal system espouse such a position; virtually all jurisdictions that enforce prohibitions on assisted death allow for the right to withdraw and refuse treatment. Indeed, neither the Attorney General of Canada nor any of the interveners taking a position against assisted death argued for legal restrictions on the right to refuse/withdraw treatment. Thus, the Court failed to articulate on what legal basis the right to withdraw or refuse treatment could be called into question (and called into question by whom) in maintaining the prohibition on assisted death.

It seems likely that the Supreme Court did not believe that its ruling on sec. 241 (b)'s infringement of the right to life would be sufficient on its own to find the prohibition on assisted suicide unconstitutional. This is evidenced by the fact that the Court moved swiftly to the claim that sec. 7 not only established a profound respect for the value of human life expressed in the right to life, but also encompassed rights to liberty and security of the person during the passage to death.⁸⁵ While this point seems reasonable enough when taken at a certain level of abstraction, the mixing of the other sec. 7 interests with the right to life at the right to life stage of the analysis can be criticized as a dangerous move toward an exclusionary understanding of the right to life whereby the extent of an individual's right to life becomes contingent on her possession and exercise of other interests. As the BC Court of Appeal insightfully noted,

[i]f 'life' were regarded as incorporating various qualities which some persons enjoy and others do not, the protection of the Charter would be expanded far beyond what the law can 'guarantee', while conversely, a slippery slope would open up for those who are unable to enjoy the blessings [of individual autonomy and liberty].⁸⁶

Furthermore, collapsing all the sec. 7 interests opens the door to a flood of conceptual conundrums. For example, what reason is there to think that these interests are *more* intertwined during the passage to death than at other points in a person's life? How does such an approach sit with the Court's statement in the previous paragraph of its judgment that concerns about liberty and security rights be treated separately from the right to life?⁸⁷ Importantly, it is unclear how reading the sec. 7 interests together would lead automatically to the conclusion that an individual's choice about the end of her life should be unqualifiedly entitled to respect, especially when such a choice runs directly counter to the sec. 7 right to life interest as understood prior to the Carter case.⁸⁸ We are still left with the deep conceptual question of how to balance

85 *Carter* SCC (n 1), para. 63.

86 *Carter* BCCA (n 25), para. 280.

87 *Carter* SCC (n 1), para. 62.

88 The BCCA made a similar point in rejecting a broad interpretation of the right to life: 'We therefore disagree that "life" in s. 7 was set to one side, or that, as Chief Justice Finch suggests, "life" includes the freedom to make the kinds of decisions or experience the pleasures he describes. On the contrary, we find inherent in the majority's reasons in *Rodriguez* that "life" in the context of s. 7 has a narrow compass and does not include a right to die in the manner and at the time of one's choosing' (*Carter* BCCA (n 25), para. 281).

these various interests in the event of a conflict and where to draw limits on the demands of each.⁸⁹

B. Liberty and Security of the Person Interests

The Court's ruling regarding the liberty interest seems to be simple enough: insofar as the liberty interest encompasses patient autonomy in medical decision-making, then any law that interferes with such decision-making will also be an infringement of the liberty interest. Quite predictably, the Court invoked its decision in *AC v Manitoba*—the leading case on patient autonomy—as jurisprudential support for this point. While the Court helped itself to the passages extolling the importance of patient autonomy, it passed over McLachlin CJ's and Rothstein J's concurring opinion that 'the s. 7 liberty or "autonomy" right is not absolute, even for adults'.⁹⁰ In this concurring opinion, McLachlin CJ noted with approval the unanimous view of the Court in *Rodriguez* that the sec. 7 right to autonomy will not be violated if the impugned law serves a genuine state interest. In particular, she notes that the limits that Parliament places on personal autonomy will be upheld so long as the limits are based on rational rather than arbitrary grounds.⁹¹ The overriding importance that the Court in *Carter* attributed to the liberty interest is thus difficult to reconcile with McLachlin CJ's and Rothstein J's repudiation of an absolutist interpretation of the liberty interest in *AC v Manitoba*.

The *Carter* court's more absolutist interpretation of the liberty interest is grounded, we believe, in a multidimensional conception of autonomy that is stronger and more demanding than the conception of autonomy present in previous jurisprudence. This is evidenced by the Court's decision to run together two distinct conceptions of the right to liberty. The first conception of liberty, which Sopinka J was primarily concerned with in *Rodriguez*, consists of the ability to exercise control over one's body.⁹² Under this conception, the liberty interest is engaged by a prohibition on assisted suicide simply by virtue of the fact that the prohibition imposes restrictions on what an individual may do or can have done to his or her body. The Court's second conception of the liberty interest, drawing heavily from its *Blencoe* decision, is premised on an individual's freedom to act out of deeply held convictions. This mixing together of the two is evidenced by the following passage:

... it is clear that **anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition 'does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live.** The trial judge, too, described this as a decision that, for some people, is 'very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experiences'. **This is a decision that is rooted in their control over**

89 Lord Sumption in *Nicklinson* (n 42) at para. 210 recognized the conflict between autonomy and the sanctity of life as being an 'ancient dilemma'.

90 *AC Manitoba* (n 33), 137.

91 *Ibid.*

92 *Carter SCC* (n 1), para. 66; *Rodriguez* (n 5), para. 136.

their bodily integrity; it represents their deeply personal response to serious pain and suffering (emphasis added).⁹³

The first highlighted passage tracks the conception of liberty present in *Blencoe*, while the second highlighted passage tracks the conception of liberty present in *Rodriguez*. The underlying idea in this passage from *Carter* is that the two conceptions of liberty are inseparable from each other such that to interfere with one's bodily integrity (through imposing treatment or prohibiting assisted suicide) necessarily entails a violation of the individual's choice to live out his or her fundamental beliefs.

The preceding passage brings into sharp relief the deep discord between the *Carter* and the *Rodriguez* courts with regard to the importance of the autonomy interest vis-à-vis the life interest. As *Rodriguez* had already decided that the right to exercise control over one's body gave way to the state's interest in the preservation of life and the protection of vulnerable persons, the Court in *Carter* endeavored to get around this finding by ruling that there exists an additional dimension to the liberty interest that is affected by the impugned provision though overlooked by the Court in *Rodriguez*. The Supreme Court's implicit reasoning seems to be that insofar as a law violates the right to bodily control which, *ipso facto*, violates the right to act on one's fundamental beliefs, the liberty interest as a whole is more deeply impacted by the impugned provisions than originally envisioned by Sopinka J. Thus conceived, the autonomy interest can be more compellingly mobilized to countervail the life interest in the context of assisted death.⁹⁴

If this is correct, then the Court's mingling of distinct conceptions of liberty may ultimately have little to do with any new change in the law or in the factual matrix. On the contrary, it may have more to do with the Court's implicit premise that Canadian jurisprudence (and, by extension, the common law tradition as a whole) had hitherto ascribed an unjustifiably large importance and scope to the right to life and an unjustifiably limited scope to the autonomy interest. At the very least, this truncating of the right to life in favor of establishing a more demanding right to autonomy constitutes nothing less than a radical departure from Sopinka J's conception of the nature of sec. 7 interests and the internal relationship of these interests to one another.

It is unclear, moreover, whether the Supreme Court is justified in drawing such a tight connection between these two aspects of liberty. The Court refers to no evidence that *every* request or even a substantial proportion of requests for assisted death flows from the requester's deep-seated values and fundamental beliefs.⁹⁵ Indeed, no evidence can be offered for its blanket statement that everyone who seeks physician-assisted death as a result of intolerable suffering and irremediable illness

93 Ibid, para. 68.

94 Cf. the European Court of Human Rights in *Pretty* where they ruled, 'The more serious the harm involved the more heavily will weigh in the balance considerations of public health and safety against the counter-vailing principle of personal autonomy' (*Pretty* (n 45), para. 74).

95 It is worth noting that in contrast to the applicant in *Pretty* who claimed (unsuccessfully) that the Suicide Act 1961's prohibition on assisted suicide violated her freedom of conscience pursuant to art. 9 of the *European Convention on Human Rights* (*Pretty* (n 45), paras 80–82), the claimants in *Carter* did not claim any violation of art. 9's equivalent in the *Canadian Charter*, sec. 2(a), which guarantees the freedom of conscience and belief.

does so out of deep-seated life convictions. For many individuals, the desire to exercise complete control over the time and manner of their death may not necessarily flow from some deep-seated, fundamental belief but come, for example, from feeling as though they are a burden on others,⁹⁶ experiencing a perceived loss of community,⁹⁷ or depression.⁹⁸ The only support the Court provided for its blanket claim was a reference to the trial judge who, in contrast, had offered a more qualified and defensible statement ('for *some* people . . .').⁹⁹ The point here is that the factors driving individuals to request assisted death often have little to do with a person's fundamental beliefs or values. Indeed, to suggest that the requests for assisted death flow necessarily from one's fundamental beliefs risks minimizing the complex web of psychological, interpersonal, and social factors that contribute to the desire for suicide, assisted or unassisted.¹⁰⁰

The Court's treatment of the security of the person¹⁰¹ was also premised on a conceptual departure from *Rodriguez* that had little to do with any change in the law or in the factual matrix subsequent to that case. Both the majority in *Rodriguez* and the Supreme Court in *Carter* held that sec. 241(b) violated the security of the person by imposing psychological and emotional stresses.¹⁰² The conceptual disagreement between the majority in *Rodriguez* and *Carter* can be understood as relating to the conclusions that can be drawn directly from the fact of this violation. For Sopinka J, the suggestion that the right to assisted suicide flowed from an interest in protecting individuals from state-induced psychological or emotional stress is a non-starter owing to the close conceptual connection between the right to security of the person and the right to life:

96 See McPherson and others, 'Feeling Like a Burden to Others: A Systematic Review Focusing on the End of Life' (2007) 21 *Palliat Medicine* 115.

97 See, for example, Lavery and others, 'Origins of the Desire for Euthanasia and Assisted Suicide in People with HIV-1 or AIDS: A Qualitative Study' (2001) 358 *Lancet* 362.

98 See, for example, O'Mahony and others, 'Desire for Hastened Death, Cancer Pain and Depression: Report of a Longitudinal Observational Study' (2005) 29 *J Pain Symptom Manage* 5.

99 *Carter BCSC* (n 4), para. 1326, cited in *Carter SCC* (n 1), para. 68.

100 For example, the Interpersonal Theory of Suicide posits that the simultaneous presence of two interpersonal constructs—thwarted belongingness and perceived burdensomeness—is central to the desire to engage in suicidal behavior. See Van Orden and others, 'The Interpersonal Theory of Suicide' (2010) 117 *Psychol Rev* 2. While the authors have developed their theory with reference to suicide outside the context of physician assisted death, their hypothesis finds support from studies done in the context of euthanasia and assisted suicide (See McPherson and others (n 96)).

101 As the security of the person interest has traditionally focused on the freedom from physical restraint, non-consensual state interference with a person's physical integrity will certainly engage this interest. See Stewart (n 40), 84, for examples. Indirect interference has also been found to engage the security of the person interest; the Court in *Chaoulli* held that the prohibition on purchasing private health insurance combined with the delays in obtaining treatment may have a negative impact on a patient's health, impairing his or her sec. 7 security of the person interest. See *Chaoulli* (n 66).

102 *Rodriguez* (n 5), para. 136. Perhaps the most famous case of state interference with psychological security is the *Morgentaler* case, in which the Supreme Court struck down as unconstitutional the requirement that women seeking abortions must first obtain the approval of a therapeutic abortion committee. Insofar as this requirement restricted access to abortion or caused delay in obtaining access to the procedure, the law interfered with bodily integrity and imposed psychological stress. See *R v Morgentaler* [1988] 1 SCR 30, para. 56. For how the right to security of the person arrived to include the right to psychological integrity, see Stewart (n 40), 82.

... security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person.¹⁰³

According to Sopinka J, then, security of the person is rooted in and cannot be understood apart from the sanctity of life/respect for life. That the Court used the security interest to drastically circumscribe the scope of the life interest while passing over the aforementioned passage in *Rodriguez* signaled a quiet but direct repudiation of Sopinka J's conception of security of the person.

V. SECTION 7 PRINCIPLES OF FUNDAMENTAL JUSTICE

As explained previously, breaches of sec. 7 rights can be justified if they are in 'accordance with the principles of fundamental justice'.¹⁰⁴ The 'principles of fundamental justice' have developed alongside and in conjunction with the Court's interpretation of the life, liberty, and security of the person interests.¹⁰⁵ Soon after the *Charter* was enacted, the Supreme Court rejected a purely procedural reading of fundamental justice. The majority in *BC Motor Vehicles Reference*, under the pen of Lamer J (as he then was), wrote that fundamental justice 'cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of sec. 7'.¹⁰⁶ Over time, three substantive principles of fundamental justice have emerged as particularly important in the adjudication of alleged violations of sec. 7 interests: arbitrariness, overbreadth, and gross disproportionality. As the first two are the most relevant to the Supreme Court's ruling in *Carter*, they will be the focus of the following discussion.

A. Arbitrariness

In her dissent in *Rodriguez*, McLachlin J (as she then was) applied the doctrine of arbitrariness to capture what she perceived was a fundamental inconsistency in the law; the criminal law did not penalize able-bodied people for committing suicide but simultaneously prevented those physically incapable of committing suicide from requesting assistance. She held that the *Criminal Code* prohibition on assisted death was arbitrary in limiting the sec. 7 interests of some people but not others in such a way that does not directly further the legislative scheme of protecting vulnerable people.¹⁰⁷ Under this

103 *Rodriguez* (n 5), 585.

104 *Charter* (n 15).

105 As constitutional law professor Peter Hogg has noted, the term 'fundamental justice' did not have an established meaning in Anglo-Canadian law at the time the *Charter* was introduced. The legislative history of the *Charter* does reveal, however, that the framers sought to limit 'fundamental justice' to issues of procedure, similar to 'fundamental justice' as referenced by sec. 2(e) of the *Canadian Bill of Rights*. 'Fundamental justice' in this latter context was understood as an equivalent to the established notion of 'natural justice', which generated requirements of a fair hearing, unbiased adjudication, and a fair procedure. The framers opted for the language of fundamental justice instead of 'due process' in order to avoid the importation of the American doctrine of substantive due process, a doctrine notoriously invoked by American judges in the 1930s to strike down a series of legislation favoring the protection of workers and unions. See Peter Hogg, *Constitutional Law of Canada* (8th ed Carswell, Toronto 2014) 47–20.

106 [1985] 2 SCR, para. 67.

107 *Rodriguez* (n 5), 620.

conception of arbitrariness, an impugned provision will be found arbitrary even if it imposes a single restriction on sec. 7 interests that fails to further the legislative objectives.

McLachlin J's rather broad understanding of arbitrariness in *Rodriguez* was not the one adopted by the Court in *Bedford*, the case that provided the definitive statements of the principles of fundamental justice. A law will be found arbitrary only if it imposes limits on the sec. 7 'interests in a way that bears *no connection* to its objective' (emphasis added).¹⁰⁸ It was this more narrow formulation of arbitrariness that the Court applied in *Carter*. Since a blanket prohibition cannot be said to be entirely unconnected to the objective of protecting vulnerable people, the Court in *Carter* declined to find the law arbitrary.¹⁰⁹ This more deferential understanding of arbitrariness was grounded in the recognition that courts should show a substantial (though not unlimited) degree of deference to democratically chosen means of protecting and furthering important social values. McLachlin CJ herself echoed this sentiment in her concurrent opinion in *AC v Manitoba*, in which she stated that 'limits on personal autonomy that advance a genuine state interest do not violate s. 7 if they are shown to be based on rational, rather than arbitrary grounds'.¹¹⁰ While the principle of arbitrariness has evolved in a deferential direction, the same cannot be said for all the principles of fundamental justice. As will be made evident shortly, many of McLachlin J's arbitrariness-based critiques in *Rodriguez* reappeared in the *Carter* Court's discussion of overbreadth.

B. Overbreadth

The Court's finding that sec. 241(b) was overbroad arguably dealt the fatal blow to the prohibition on assisted death. Whether a law survives an overbreadth analysis will depend on how a reviewing judge construes its objective. As Hogg notes, 'the purpose of the law is a judicial construct, which can be defined widely or narrowly as the reviewing court sees fit'.¹¹¹ If the objective is broad and important enough, even substantial violations of the sec. 7 interests brought about by the law may in theory be considered consistent with the principles of fundamental justice. On the other hand, a narrow objective will render a law more susceptible to being struck down as overbroad, as the law will be more likely to catch persons and situations that fall outside the objective, thus rendering it in breach of the principles of 'fundamental justice'.¹¹²

Key to the Supreme Court's reasoning was its endorsement of the trial judge's reading of *Rodriguez* on the purpose of sec. 241(b). Following the trial judge Smith J, the Court read *Rodriguez* as standing for the proposition that the protection of vulnerable persons who might be induced in moments of weakness to commit suicide was

108 *Bedford* (n 67), paras 98 and 111. The Court took this definition from constitutional law professor Hamish Stewart who writes that '[a]t minimum, to avoid being arbitrary, a law or decision must have some positive effect on the purposes it is supposed to serve; otherwise, the section 7 interests will have been affected for no good reason'. Stewart (n 40), 136. See also *Chaouilli* (n 66), para. 134 and *PHS* (n 68), para. 132.

109 *Carter* SCC (n 1), paras 83 and 84.

110 *AC v Manitoba* (n 90), para 137. This was what McLachlin CJ held to be the point of agreement between all justices in *Rodriguez* on the question of the principles of fundamental justice.

111 Hogg (n 105), 47–53.

112 See Hamish Stewart, 'Bedford and the Structure of Section 7' (2015) 60 McGill LJ 3.

the purpose of the prohibition on assisted suicide, while the preservation of life was the state interest that grounded the purpose.¹¹³ This, however, is hardly a satisfactory or complete reading of *Rodriguez*. The Supreme Court neglected to mention that for Sopinka J, the legislative objective was grounded in the policy of preserving life which, in turn, upholds the fundamental value of the sanctity of life:

This policy [of preserving life] finds expression not only in the provisions of our Criminal Code which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment, and until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life.¹¹⁴

While one may take issue with Sopinka J's flexible use of different terms in capturing the objective and policy of sec. 241(b),¹¹⁵ it would be a mistake to think that he saw the legislative objective as entirely external to or distinct from upholding the preservation of life (the state policy) and the sanctity of life/respect for life (the fundamental value). The fact that a law's purpose is grounded in a certain policy that, in turn, upholds a fundamental value suggests that such a value is constitutive of both the law's animating policy and its purpose. Indeed, it would be difficult to make sense of *why* a law would seek to prevent vulnerable people (or any group of people) from committing suicide unless the legislator saw the lives of vulnerable people as being intrinsically valuable and thus worthy of preservation or, alternatively, that the prohibition was necessary to uphold the value of sanctity of life/respect for life in society in general.¹¹⁶

Insofar as the prohibition against assisted suicide succeeded in protecting vulnerable people from taking their own lives, it fulfilled the state policy in preserving human life. The fulfillment of this interest, in turn, affirmed the fundamental value of the sanctity of human life/respect for human life, a value that underpins other legislation. Thus, Sopinka J's aim in categorizing one aspect of the law as the 'purpose' and another aspect as the 'policy' was not to draw a conceptual wedge between the two.

113 *Carter SCC* (n 1), para. 77: '[Sopinka's] remarks about the preservation of life in *Rodriguez* are best understood as a reference to an animating social value rather than as a description of the specific object of the prohibition', with reference to *Carter BCSC* (n 4), para. 1190.

114 *Rodriguez* (n 5), 595.

115 In *Rodriguez* (n 5), Sopinka J used the expressions 'preserving life' (590) and 'upholding the respect for life' (608) interchangeably when referencing the objective and policy of the criminal prohibitions on assisted suicide. One problem is that 'preservation of life' is not an absolute value, as Sopinka J conceded in *Rodriguez* (596). The Court in *Carter* used this non-absoluteness to find assisted suicide within the exceptions inherent to the 'preservation of life'. The 'respect for life', on the other hand, is an absolute value that is more conceptually proximate to the notion of the 'sanctity of life', which Sopinka J consistently referred to as the fundamental value underlying the prohibition's objective and policy. The Court might not have been able to read *Rodriguez* in support of assisted death had Sopinka J limited himself to stating 'respect for life' as the objective of the prohibition. See Somerville 2015 (n 6).

116 As Sopinka J noted, the question of whether there is a constitutional right to assisted dying must reckon with the fact that we are 'members of a society based upon respect for the intrinsic value of human life and on the inherent dignity of every human being' (*ibid*, 585).

On the contrary, the aim was to show that laws with purposes that are putatively distinct (eg a law against capital punishment and the prohibition on assisted death) relate to each other by way of a common policy and, ultimately, by way of a common fundamental value.

The decriminalization of suicide did not signal Parliament's rejection of the sanctity of life/respect for life as an important value in both the common law and Canadian society.¹¹⁷ Nor can the decriminalization of suicide be plausibly interpreted as Parliament's way of completely subordinating respect for life or the sanctity of life to the primacy of respect for autonomy. As Hogg observes, the modern Criminal Code's decriminalization of suicide already constituted

a substantial liberalization of the common law. The effort to further liberalize the law should surely be characterized as directed to *changing* the basic tenets of the legal system rather than vindicating them.¹¹⁸

The Court's move to divorce the value of sanctity of life/respect for life from the purpose of sec. 241(b) suggests that the Court was indeed willing, at the very least, to reduce the import of this basic tenet of the legal system.

The Court's second ruling against construing the purpose of the law as the 'preservation of human life' is also subject to interrogation. Here, the Court drew from *RJR-Macdonald v Canada (Attorney General)*¹¹⁹ and *Bedford* to reason that the object of the law should not be interpreted too broadly, lest the law be immunized from *Charter* challenge:

If the object of the prohibition is stated broadly as the 'preservation of life', it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.¹²⁰

The idea seems to be that an overbroad construal of a law's purpose would justify any and all infringement of the sec. 7 rights. As a principle of statutory interpretation, the Court's remarks seem eminently sensible. Any law will bear some relation to a broader social policy or value such as collective well-being, individual autonomy, or the preservation of life. In order for the sec. 7 rights to have any meaning, the government cannot always have recourse to some grand social policy or value that is (however vaguely) furthered by the impugned law. At the same time, an interpretive preference for a narrow interpretation should not license courts to artificially narrow the purposes of a law. The purposes of many laws are unintelligible without a direct reference to a broad social policy or fundamental value. How would the objective of a prohibition against theft, for instance, be narrowed to exclude any reference to the

117 See *R v Malmo-Levine* [2003] SCC 74, [2003] 3 SCR 571, para. 123: 'The offence of attempted suicide was removed from the *Criminal Code* because Parliament came to prefer other ways of addressing the problem of suicide.' It was for similar reasons that suicide ceased to be a criminal offence in English law; see *Nicklinson* (n 42), para. 212, per Lord Sumption.

118 Hogg (n 105), 47–25.

119 [1995] 3 SCR 199.

120 *Carter* SCC (n 1), para. 77.

importance of property rights and social ordering? If the outcome is 'foreordained', it may be because the purpose of the law bears such a tight conceptual proximity to the fundamental value that any 'narrowing' that excises reference to such a value risks emptying the law itself of its content. Both the prohibition on stealing and the prohibition on assisted suicide may indeed fall into such a category of laws.

VI. SECTION 1

After having concluded that the sec. 241(b) prohibition on assisted suicide violated the sec. 7 interests in a way that that was inconsistent with the principles of fundamental justice, the Supreme Court considered whether this prohibition could be justified in a 'free and democratic society' as required by sec. 1 of the *Charter*. The focus of the Court's sec. 1 analysis was on whether the prohibition was the least impairing means of achieving the legislative objective behind sec. 241(b). As the Court itself noted, this was the 'heart of the case and was the focus of much of the evidence at trial'.¹²¹ Upon hearing expert testimony on the practice of assisted death in the Netherlands, Belgium, and Oregon, the trial judge was satisfied that a well-designed regulatory regime in Canada could protect 'vulnerable people from abuse and error'.¹²²

What was notable about the Supreme Court's reasoning at this stage was its unequivocal acceptance of the trial judge's analysis of the evidence regarding the effectiveness of safeguards and the possibility of both a practical slippery slope (abuse of the law) and a logical slippery slope (expansion of the persons for whom and the situations in which assisted suicide is permitted).¹²³ As Professor John Keown has pointed out, however, the trial judge's analysis of assisted death laws, regulations, and practices in these jurisdictions was highly selective in favor of finding no slippery slopes, and purposely omitted or minimized contrary evidence.¹²⁴ The Supreme Court passively accepted the trial judge's selective treatment of the evidence from other jurisdictions and rejected Canada's request to bring evidence to correct the trial judge's findings of fact, with one exception: Belgian law professor and ethicist Professor Etienne Montero was allowed to testify as an expert witness for Canada in the appeal proceedings. The Supreme Court engaged, however, in its own selective analysis of his evidence.

The Court offered two reasons for why Professor Montero's critique of Belgium's euthanasia regime was of limited relevance in the Canadian context. First, Belgium's low rate of euthanasia reporting stemmed from the fact that, unlike Canada, practices of assisted death had long been embedded in the country's medico-legal culture; and, second, the controversial cases of euthanasia documented in Professor Montero's affidavit resulted from the Belgium government's not restricting the discretion exercised

121 *Carter* SCC (n 1), para. 104.

122 *Ibid.*, para. 105.

123 The Supreme Court noted, 'The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of life will prove impotent against abuse' (*Carter* SCC (n 1), para. 120).

124 Keown (n 79), 29–32. For a similar critique of the evidence from permissive jurisdictions, see *Nicklinson* (n 89), paras 224 and 225.

by the body responsible for overseeing euthanasia.¹²⁵ The Court's overarching finding seemed to be that any worrisome evidence regarding Belgium's euthanasia regime was unique to Belgium and hence no inferences applicable to Canada could be drawn from it.

The Court's treatment in *Carter* of Professor Montero's evidence is problematic for several reasons. Not only did the Court's position assume a double standard in that positive or favorable aspects of assisted death regimes in foreign jurisdictions were inferable for Canada while negative or unfavorable aspects were not inferable, but it also overlooked the fact that many of Professor Montero's observations had general applicability beyond Belgium. The affidavit noted at least three difficulties inherent to the regulation of assisted suicide and euthanasia that have emerged from the Belgium experience and may be generalizable to other jurisdictions considering a similar regime.¹²⁶

First, Professor Montero noted the difficulty in measuring 'the sometimes unconscious constraints and pressures that most patients face'.¹²⁷ Second, Belgium's experience of regulating euthanasia demonstrates that a system of physician self-reporting and *a posteriori* or *ex-post facto* control renders it virtually impossible to determine whether the legislative guidelines are being followed, and even more difficult to enforce these guidelines in an effective way.¹²⁸ Third, Professor Montero noted the influence that the logical slippery slope exerted on the legal analysis of novel situations once euthanasia is decriminalized.¹²⁹ The problems identified by Professor Montero seemed to be a function of the Belgium regime's institutional parameters rather than exclusively a product of any cultural or historical particularity. There was nothing particularly Belgian, for instance, in the realization of a logical slippery slope as scholars have also identified this phenomenon in other jurisdictions.¹³⁰ Likewise, the Belgium parliament's legislative inaction with regard to imposing more restrictions on euthanasia seems hardly unique to Belgium; as Canada's experience with abortion shows, once a controversial practice has been decriminalized, it may be politically difficult to introduce new restrictions.¹³¹

For these reasons, the Supreme Court's blanket dismissal of Professor Montero's affidavit based on the supposed cultural, historical, and legislative particularities of the Belgium experience comes across as unjustifiable and we believe very unwise. At the very least, Professor Montero's affidavit should have been appreciated for providing concrete evidence that even well-thought-out regulatory regimes will bring with them

125 *Carter* SCC (n 1), para. 112.

126 Affidavit of Professor Etienne Montero.

127 *Ibid*, para. 47.

128 *Ibid*, para. 77.

129 *Ibid*, para. 98: ' . . . it was logical that a tendency developed to consider very close, even "slightly different," situations to be similar and to invoke the principles of equality and non-discrimination to claim euthanasia . . . [I]n the name of the same principles, it quickly becomes difficult to refuse euthanasia to a person who reports only unbearable psychological suffering but is not able to show a serious and incurable disorder.'

130 See, for example, Keown's discussion of the Dutch *Chabot* case. Keown (n 79), 25–26.

131 For a list of recent failed attempts to introduce federal legislation relating to the issue of abortion, see Library of Parliament, *Abortion in Canada: Twenty Years after R v. Morgentaler* (2008) 20–23.

a degree of risk, as indeed, the trial judge herself recognized.¹³² Given the clear relevance of Professor Montero's affidavit, it is difficult to see how the Supreme Court could have unqualifiedly accepted the trial judge's conclusion that 'a permissive regime with properly designed and administered safeguards [is] capable of protecting vulnerable people from abuse and error'.¹³³ The evidence presented by Professor Montero showed that a blanket prohibition on assisted suicide remains, as much today as it was when *Rodriguez* was decided, a legitimate response to the significant risks that accompany decriminalization. The question, then, becomes *who* is in a better position to determine whether such a risk is acceptable. On this point, it is hard to disagree with Gonthier J's point in the *Malmo-Levine* case that the wisdom of a particular criminal measure should be left up to Parliament.¹³⁴

VII. NEXT STEPS

In response to the government's request for more time to draft legislation permitting physician-assisted death, the Supreme Court decided on 15 January 2016 to extend the declaration of invalidity of secs 241(b) and 14 for 4 months.¹³⁵ We believe, however, that much more time is necessary to research and design a system of safeguards that respond to the numerous concerns associated with decriminalizing assisted death. While some consider any delay in drafting a law unacceptable,¹³⁶ we find much more wisdom in Schipper's and Lemmen's warning that people will be put at risk of 'dying too quickly [if] the process followed is rushed, ill-considered and poorly administered'.¹³⁷ One way to address this concern would be for the government to invoke the *Charter's* sec. 33 'notwithstanding clause', which allows Parliament to adopt legislation overriding rights guaranteed in secs 2 and 7–15 of the *Charter* for a 5-year period. While the notwithstanding clause has only been invoked on a relatively small number of occasions,¹³⁸ the 5-year period would at least provide the government ample time to consider in detail various regulatory possibilities.

132 *Carter BCSC* (n 4), para. 854: 'This review of the evidence permits no conclusion other than that there are risks inherent in permitting physician-assisted death, and that the utmost care would be needed in designing and managing a system which would allow it, in order to avoid those risks.'

133 *Carter SCC* (n 1), para. 105.

134 *Malmo-Levine* (n 117), para. 123. Lord Sumption provides a particularly concise explanation as to why the legislative branch is better-equipped to decide whether to relax an absolute ban on assisted suicide: '... the Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range or expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic "polycentric problem"' (*Nicklinson* (n 89), para. 233).

135 *Carter v Canada (AG) Order Motion*, [2016] SCC 4, para. 2. The *Order Motion* also grants an exemption to individuals who have a grievous, intolerable, and irremediable medical condition from being subject to the extended suspension of a declaration of invalidity (para. 6).

136 See, for example, Robert Leckey, 'There's No Room for Delay When Charter Rights Are Being Violated' *Globe and Mail* (11 January 2016) <<http://www.theglobeandmail.com/globe-debate/theres-no-room-for-delay-whencharter-rights-are-being-violated/article28114342/>> accessed 14 January 2016.

137 Harvey Schipper and Trudo Lemmens, 'Why We Must Move Cautiously on Doctor-Assisted Dying' *Globe and Mail* (11 January 2016) <<http://www.theglobeandmail.com/globe-debate/why-we-must-move-cautiously-on-doctor-assisted-dying/article28090946/>> accessed 14 January 2016.

138 For a list of occasions when sec. 33 has been invoked, see Library of Parliament, *The Notwithstanding Clause of the Charter* (2012) 7–8.

When it finally comes time for Parliament to table legislation, any regulatory scheme that Parliament puts in place will have to respect the Court's ruling that assisted death be made available to an individual who

1) clearly consents to the termination of life; and 2) has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.¹³⁹

A legislative response would, however, have to set down much more detailed guidelines than these two conditions. As it currently stands, the judgment is open to many interpretations as to what it allows and for whom. Although a panel appointed by the Federal Government was mandated to consult Canadians in this regard,¹⁴⁰ pro-euthanasia advocates believed the three members of that panel might not adequately represent their views and position.¹⁴¹ In response, they convinced 11 provinces and territories to appoint the Provincial-Territorial Expert Advisory Group on Physician Assisted Dying (Advisory Group), which included well-known euthanasia advocates, to consult with stakeholders and issue legislative recommendations on the regulation of assisted death. The Advisory Group released their final report on 30 November 2015.¹⁴² While it is beyond the scope of our commentary to engage with all the Advisory Group's recommendations, we would like to voice our objections to several recommendations that we find particularly problematic and offer alternative proposals.

First, the Advisory Group recommends that the federal government amend the Criminal Code to allow for the provision of assisted dying by a regulated healthcare professional such as a physician or a registered nurse.¹⁴³ We believe that this is a very serious mistake as there are compelling social and public policy reasons to keep assisted suicide and euthanasia out of medicine.¹⁴⁴ Physician-assisted suicide and physician-enabled euthanasia would do great damage to medicine as an institution that, in a secular society, carries the value of respect for human life for society as a whole. In particular, allowing physicians to be involved in assisted death, whether it be euthanasia or assisted suicide, would have a negative effect on the physician-patient relationship and result in a loss of trust in physicians in general. Physicians already have unique opportunities to inflict death in the course of discharging their usual functions, and, as such, it is not prudent to augment the power that physicians have over life and death.

139 Carter SCC (n 1), para. 127.

140 The Federal government had yet to release the results of the advisory panel's consultation at the time of this article's submission (16 January 2016).

141 See K Kirkup, 'Advocacy Groups Call For Federal Assisted-Death Panel to Be Disbanded' *Globe and Mail* (29 October 2015) <<http://www.theglobeandmail.com/news/national/advocacy-groups-call-for-federal-assisted-death-panel-to-be-disbanded/article27027938/>> accessed 3 January 2016.

142 Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying: Final Report, coordinated by the Ontario Minister of Health and Long-Term Care and Attorney General (30 November 2015) <http://www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf> accessed 22 December 2015 [Advisory Group Report].

143 Advisory Group Report, Recommendation 8 (Ibid, 26).

144 See J Donald Boudreau and Margaret Somerville, 'Euthanasia Is Not Medical Treatment' (2013) 106 Br Med Bull 45; J Donald Boudreau and Margaret Somerville, 'Euthanasia and Assisted Suicide: A Physician's and Ethicist's Perspectives' (2014) 4 *Medicolegal Bioeth* 1.

There is also a less immediately obvious, though equally compelling, reason why physicians should not be involved in assisted death. Physician-assisted suicide and euthanasia are not medical treatment as evidenced by the medical profession's nearly two and a half thousand years rejection of those interventions and present reluctance to accept them. This rejection and reluctance has much to do with physicians' conception of the medical mandate, especially as it relates to healing. Boudreau and Somerville accept the definition of healing as 'a relational process involving movement towards an experience of integrity and wholeness' or, in operational terms, as 'the personal experience of the transcendence of suffering'.¹⁴⁵ A counter-intuitive feature of healing is that it does not require biological integrity; a sick person who is able to construct new meaning from the circumstances in which she unavoidably finds herself can thus achieve a sense of wholeness such that she 'dies healed'.¹⁴⁶ Most physicians accept the healer role as fundamental to the practice of medicine. Moreover, they believe that it is impossible to act as a 'healer', ie as one who is focused on accompanying the patient on a transformational journey toward personal integrity that transcends the embodied self, if one is also a collaborator in inflicting death (and even if death is requested).¹⁴⁷ For these reasons, a regulatory regime should prohibit physicians or other healthcare professionals from administering assisted suicide or euthanasia. Instead, this task should be left to specially trained and licensed individuals who are not members of the healthcare professions.¹⁴⁸

Second, the Advisory Group recommends an *ex post facto* system of review by specialized review committees to ensure that each instance of assisted dying complies with existing policies and procedures.¹⁴⁹ As we have seen, however, the Belgium experience has put into question the reliability of such a system.¹⁵⁰ Following Lord Neuberger's proposal in *Nicklinson*¹⁵¹ and McLachlin J's (as she then was) suggestion in her *Rodriguez* dissent,¹⁵² the authors recommend legislating safeguards that include requiring the authorization of a Superior Court judge in each individual case to ensure that all legal conditions have been met. This is in fact the requirement that the Supreme Court has recently imposed on individuals who wish to access physician-assisted death during the 4-month period that the declaration of invalidity is suspended.¹⁵³ As the majority opinion notes, '[r]equiring judicial authorization during that interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people'.¹⁵⁴ We see no compelling reason why such a safeguard should not be built into a permanent regulatory regime. Having the courts play a direct role in authorizing and supervising assisted death would underline the gravity of the decision to utilize

145 Ibid, 11.

146 *ibid.*

147 Ibid, 12.

148 The Supreme Court in *Carter* never explains why it is constitutionally required for assisted suicide/euthanasia to be administered by physicians. See Newman (n 71), 222.

149 Advisory Group Report, Recommendations 29 and 39 (n 143).

150 See *Montero Affidavit* (n 126); see also Étienne Montero, *Rendez-vous avec la mort* (Anthemis, Belgium 2013) 29–35.

151 *Nicklinson* (n 89), para. 108.

152 *Rodriguez* (n 5), 627.

153 *Carter Order Motion* (n 135), para. 6.

154 Ibid.

assisted death and is likely to be a more reliable safeguard than *ex post facto* supervision performed by a non-judicial commission.

Third, many of the Advisory Group's recommendations would establish eligibility and formal criteria that are looser and wider than those in virtually every other permissive jurisdiction, such that it would be near impossible to deny assisted death to huge swaths of the population. For instance, the Advisory Group recommends a broad reading of the 'grievous and irremediable' condition to include any condition that cannot be alleviated by means 'acceptable to the patient' and rejects any legislative or regulatory attempts to limit the scope of these terms.¹⁵⁵ Moreover, the Advisory Group recommends that patients who have been deemed ineligible for assisted death by two physicians should be allowed to seek assistance from other physicians.¹⁵⁶ Finally, the Advisory Group also opposes the establishment of mandatory waiting periods and mandatory age limits, meaning that children could be candidates for assisted suicide or euthanasia.¹⁵⁷ If enacted, these policy measures would constitute a huge step in the 'normalization' of assisted death whereby euthanasia will be treated as just another medical treatment in a routine 'continuum of care' available to anyone (including children, those who are mentally ill but not physically ill, those with chronic diseases but not terminally ill, those who consider themselves as having a low quality of life). As such, the implementation of these measures would so utterly subordinate the value of the sanctity of life/respect for life to the value of individual autonomy as to constitute a complete and explicit repudiation of the principles and concerns set out by Sopinka J in *Rodriguez*.

As it now seems a foregone conclusion that the provincial and federal legislatures will enact legislation allowing physician-assisted suicide and euthanasia, we recommend that they reject these particular recommendations in favor of more stringent and prudent safeguards. In addition to excluding physicians from involvement in assisted death and requiring judicial authorization, safeguards should include (a) limiting assisted dying to terminally ill people in accordance with a precise and objective definition of what constitutes a 'terminal' illness,¹⁵⁸ (b) limiting assisted death to people with physical illness, (c) limiting assisted death to competent adults above 18 years of age,¹⁵⁹ (d) a minimum waiting period of at least 15 days from the time of the initial request (as is the law in Oregon),¹⁶⁰ and (e) a moratorium on individuals requesting assisted death

155 Advisory Group Report (n 142), Recommendation 18.

156 Ibid, Recommendation 25.

157 Ibid, Recommendations 27 and 26.

158 For an argument on the importance of defining 'terminal illness' and limiting assisted dying to patients who fall into this category, see Martin Gunderson and David J Mayo, 'Restricting Physician-Assisted Death to the Terminally Ill' (2000) 30 *Hastings Center Report* 17.

159 This is consistent with the guidelines in Oregon, though more stringent than the restrictions in Belgium which allow children as young as 12 years to request euthanasia. Oregon's requirements should be preferred to the Belgian requirements since, as Smith J noted, 'the experience of compliance in Oregon is more likely to be predictive of what would happen in Canada if a permissive regime were put in place' (*Carter BCSC* (n 4), para. 683). For an argument on why palliative care for terminal children is a more ethically suitable intervention for children than euthanasia, see Andrew M. Siegel, Dominic A. Sisti, and Arthur L. Caplan, 'Pediatric Euthanasia in Belgium: Disturbing Developments' (2014) 311 *JAMA* 1963.

160 Oregon Health Authority, 'Death with Dignity Act Requirements' (2015) <<https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/requirements.pdf>> accessed 3 January 2016. For why it is reasonable to use Oregon's requirements as a basis for formulating the requirements in a Canadian regime, see Ibid.

after refusals from two doctors.¹⁶¹ While Parliament may wish to draft more restrictive and detailed laws, we believe that these are the outer limits of what they can reasonably allow.

VIII. CONCLUSION

Canada, like other secular western democracies, is engaged in battles about what our shared values should be, sometimes called, collectively, the culture wars.¹⁶² Prominent among those battles is the debate on legalizing physician-assisted suicide and euthanasia. The two sides in this debate can be characterized as those espousing 'progressive values' who advocate for legalization of euthanasia based on the overriding importance of individual autonomy and those who hold fast to more conservative values by giving priority to values such as respect for life. The recent ruling by the Supreme Court of Canada in *Carter v Canada (Attorney General)* can be interpreted as a victory for the progressives and a defeat for the conservatives. The *Carter* judgment constitutes radical change, not only for individual Canadians, but also to the institutions of both law and medicine, because the law is changed to allow physicians to inflict death on their patients and medicine is changed by physicians inflicting death. In a secular society, such as Canada, law and medicine carry the value of respect for life for society as a whole. Their capacity to do that is seriously compromised by this decision's almost exclusive focus on individual autonomy and self-determination to the exclusion of consideration of what upholding the value of respect for life requires.

In the end, the Supreme Court's focus on the overriding importance of autonomy may risk distracting us away from the imperative to improve access to quality palliative care. While the Court required that informed consent to physician-assisted death was essential, this is not possible unless all reasonable alternatives to the proposed 'treatment' are offered.¹⁶³ This means that fully adequate palliative care must be available before a patient's consent to assisted death would be valid. We know, however, that only 16–30% of Canadians who need palliative care have access to it, a situation many Canadians are calling to be remedied.¹⁶⁴ Furthermore, we know that there are significant barriers to improving the quality of palliative care in Canada.¹⁶⁵ We also know that many patients who ask for euthanasia change their minds when given good palliative care.¹⁶⁶ And since the Canadian Medical Association (CMA) is a key adviser to the government on how to respond to the *Carter* judgment, it is immensely worrying

161 This is to discourage the practice of 'doctor shopping', a practice that has been noted in other permissive jurisdictions. See, eg, Wendy E Hiscox, 'Physician-Assisted Suicide in Oregon: the "Death with Dignity" Data' (2007) 8 *Med L Int'l* 197, 209.

162 See Somerville 2015 (n 6).

163 See *Reibl v Hughes* [1980] 2 SCR 880 and *Hopp v Lepp* [1980] 2 SCR 192.

164 See Parliamentary Committee on Palliative and Compassionate Care, 'Not to be Forgotten: Care of Vulnerable Canadians' (2011) 21, <<http://pcpcc-cpspsc.com/wp-content/uploads/2011/11/ReportEN.pdf>> accessed 12 January 2016.

165 See Canadian Cancer Society, 'Right to Care: Palliative care for all Canadians' (2016) <<http://www.cancer.ca/~media/cancer.ca/CW/get%20involved/take%20action/Palliative-care-report-2016-EN.pdf?la=en>> accessed 12 January 2016.

166 See Harvey Max Chochinov, *Dignity Therapy: Final Words for Final Days* (Oxford University Press, Oxford 2012) 224.

that the CMA expressly said that the non-availability of palliative care should not be a reason to refuse physician-assisted suicide or euthanasia.¹⁶⁷

Making euthanasia and assisted suicide part of medical practice is not, as pro-assisted death advocates claim and the Supreme Court's reasoning affirms, a small incremental change consistent with accepted interventions such as honoring patients' refusals of life-sustaining treatment. Allowing physicians to inflict death on their patients is different in kind—and not just different in degree—from other interventions we accept as ethical and legal. On this point, Sopinka J's observation in *Rodriguez* remains as valid today as it was when he penned it:

Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it.¹⁶⁸

But the Supreme Court has now eviscerated that precedent. Rather than implementing an incremental change, their legalizing physician-assisted suicide and euthanasia represents a seismic shift in our fundamental societal values, not just another step on a path we have already taken.

ACKNOWLEDGEMENTS

We are grateful to Dean Daniel Jutras of the McGill Faculty of Law for providing us with funding for this project from his discretionary fund. We would also like to thank two anonymous reviewers for their insightful comments.

167 Factum of the Canadian Medical Association, para. 20. Quebec's *An Act Respecting End-of-Life Care*, CQLR, c. S-32.0001, which will allow euthanasia in the province, expressly provides that '[a] person may not be denied end-of-life care for previously having refused to receive a treatment or procedure or having withdrawn consent to a treatment or procedure' (sec. 7). In other words, access to euthanasia does not require the patient to have first tried palliative care.

168 *Rodriguez* (n 5), 607–608.