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Ethical considerations in the regulation of euthanasia and physician-assisted death in Canada

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ABSTRACT

On February 6th 2015 the Supreme Court of Canada (SCC) released their decision on Carter v Canada (Attorney General) to uphold a judgment from a lower court which determined that the current prohibition in Canada on physician-assisted dying violated the s. 7 [Charter of Rights and Freedoms] rights of competent adults whose medical condition causes intolerable suffering. The purpose of this piece is to briefly examine current regulations from Oregon (USA), Belgium, and the Netherlands, in which physician-assisted death and/or euthanasia is currently permitted, as well as from the province of Quebec which recently passed Bill-52, "An Act Respecting End-of-Life Care." We present ethical considerations that would be pertinent in the development of policies and regulations across Canada in light of this SCC decision: patient and provider autonomy, determining a relevant decision-making standard for practice, and explicating challenges with the SCC criteria for assisted-death eligibility with special consideration to the provision of assisted-death, and review of assisted-death cases.

[It is not the goal of this paper to address all questions related to the regulation and policy development of euthanasia and assisted death in Canada, but rather to stimulate and guide the conversations in these areas for policy makers, professional bodies, and regulators.]

1. Introduction

On February 6th 2015 the Supreme Court of Canada (SCC) released their decision on *Carter v Canada* (Attorney General) upholding a judgment from a lower court that the long-standing "prohibition of physician-assisted dying violates the section 7 [Charter of Rights and Freedoms] rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition" [1]. In particular, the SCC recognized that creating an absolute prohibition in the Criminal Code both through Section 14, where "[n]o person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given" (pg. 3) [2], and through Section 241 (b), where it is claimed that one commits a criminal act for which they are liable if they "aid or abet a person to commit suicide" (pg. 5) [2], is an unjustifiable limitation on the right to life, liberty and security of the person. These criminal code provisions were invalidated

> insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that

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> is intolerable to the individual in the circumstances of his or her condition. (pg. 74) [1]

This declaration of invalidity was suspended for twelve months in order for Parliament, provincial governments, professional bodies and regulatory colleges to reflect on how they ought to approach the decriminalization and regulation of physician-assisted death in legislation and in practice.

In their decision, the SCC made no attempt to explicitly define either physician-assisted death or euthanasia, but presupposed the Canadian Medical Association definitions. But since they have declared both Section 14 and Section 241 (b) unjustifiable infringements on a competent individual's Section 7 rights, it can be reasonably inferred that both physician-assisted death and euthanasia, as commonly understood, ought to be considered permissible.

Euthanasia as understood by the Canadian Medical Association refers to the practice of

> knowingly and intentionally performing an act, with or without consent, that is explicitly intended to end another person's life and that includes the following elements: the subject has an incurable illness; the agent knows about the person's condition; commits the act with the primary intention of ending the life of that person; and the act is undertaken with empathy and compassion and without personal gain. (pg. 2) [3]

Physician-assisted death refers to a situation in which "a physician knowingly and intentionally provides a person with the knowledge or means or both required to end their own lives, including counselling about lethal doses of drugs, prescribing such lethal doses or supplying the drugs." (pg. 2) [3]

The purpose of this article is to briefly examine current regulations from Oregon, Belgium, and the Netherlands, jurisdictions in which physician-assisted death and/or euthanasia is currently permitted, as well as a newly-created Bill from the province of Quebec, and present ethical considerations that would be pertinent in the development of regulations across Canada in light of the recent *Carter v Canada* decision. Oregon, Belgium and the Netherlands were chosen as representative jurisdictions for this analysis because of their established and relatively successful regulations, whereas Quebec was chosen in order to illuminate the current state in Canada prior to the SCC decision.

It may seem peculiar to readers unfamiliar with Canada's health-care landscape that the authors of this work chose to examine the way in which assisted-death might be regulated across Canada, when there is already significant progress in this area in the province of Quebec. While health care across Canada guarantees to be universal, portable, and accessible, it is nonetheless a system that is provincially/territorially regulated. For this reason, while Quebec may be well-positioned to implement a regulatory framework, the remaining nine provinces and three territories have just begun their deliberations. Although we speak of Canada broadly in much of this work, examples and queries from our experience in the province of Ontario will frame much of our discussion. We believe that these examples will be relevant to the development of regulations in the remaining provinces and territories.

It is the goal of this piece to stimulate and guide the conversations surrounding regulation for policy makers, professional bodies, and regulatory colleges. While we recognize that Canada is a pluralist liberal society encompassing many differing values and positions, the authors sought to identify a reasonable consensus over ethical issues that could be supported by Canada's institutional order as a liberal democracy. Just as the *Carter v Canada* decision and other documents [4] have done, this work will refer to the *Canadian Charter of Rights and Freedoms*, as well as to the substantial ethical and legal discourse that it has given rise to in the last three decades, to explicate relevant ethical considerations for the development of regulations on euthanasia and physician-assisted death in Canada.

2. Assistance in dying: International perspectives

Euthanasia and assisted death regulations around the world have taken various approaches to determining the scope of practices to be permitted, the set of patients to whom those practices will be applied, the requirements to be met for eligibility of assistance in death, and precautionary measures needed to limit possible abuse of such interventions. In the abovementioned *Carter v Canada* decision, the SCC took into consideration each of these criteria and determined that,

> On the basis of evidence from scientists, medical practitioners and others who are familiar with end-of-life decision-making in Canada and abroad. . .a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. (pg. 10) [1]

It is for this reason that we first consider those international regimes that have demonstrated properly designed and administered processes. The following section briefly outlines the application and requirements of euthanasia and/or assisted death in several jurisdictions in which it is permitted, in order to place Canada in the relevant landscape.

2.1. Oregon, U.S.A.—Death with Dignity Act

2.1.1. Application

The Oregon *Death with Dignity Act* (1997) was created to allow terminally-ill, capable adults who are residents of Oregon and have a prognosis of less than six months to live to obtain a prescription for medication for the purpose of committing suicide [5]. This particular statute is only applicable to obtain medication for ending one's own life ('Physician-assisted death' in our terminology, 'Physician-aid-in-dying' in theirs), and does not allow euthanasia. Physician-assisted death in Oregon is limited to capable adults, defined as 18 years of age or older, and is not likely to extend to advance care wishes, given that the patient must have a prognosis of less than six months to live.

2.1.2. Requirements

All of the current regulations for euthanasia or physician-assisted death appear to follow well-structured