More Safeguards are needed for the Vulnerable

Special Joint Committee on Physician-Assisted Dying: Dissenting Report

This dissenting report reflects the views of the following Members of Parliament who served on the Special Joint Committee on Physician Assisted Dying (the "Committee"): Michael Cooper (Co-Vice Chair of the Committee, St. Albert-Edmonton), Mark Warawa (Langley-Aldergrove), and Gérard Deltell (Louis-St-Laurent), as well as, Harold Albrecht (Kitchener-Conestoga), who participated in a majority of the Committee meetings as an alternate member.

Background

On February 6, 2015 in its ruling *Carter v. Canada*, 2015 SCC 5, the Supreme Court of Canada (the "SCC") unanimously stuck down Canada's longstanding criminal prohibition against voluntary euthanasia and assisted suicide ("physician-assisted dying or PAD"), ruling that it was in contravention of the right to life, liberty, and security of the person guaranteed under Section 7 of the *Charter of Rights and Freedoms* (the "*Charter*"). Specifically, the SCC found the *Criminal Code* prohibition against PAD to be void because it deprived:

> A competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[1]

The SCC has stayed its ruling until June 6, 2016 to allow Parliament to craft a legislative response.[2]

The Committee has been tasked by Parliament to make recommendations to the Government on how to best respond to the *Carter* decision.

Reasons for a Dissenting Report

In *Carter*, the SCC aptly described the difficult task now before Parliament: "it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying."[3] The SCC agreed that there would be real risks to the vulnerable without a blanket proscription of PAD but that these risks could be managed "through a carefully designed and monitored system of safeguards."[4]

Additionally, the Committee heard from many groups representing healthcare professionals, including the Canadian Medical Association, about the need to protect

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1 *Carter v. Canada*, 2015 SCC 5, at para. 4

2 We note here our *significant* concern that under these timelines it will be virtually impossible to sufficiently analyze the far reaching consequences of allowing PAD in Canada. Quebec took six years and three different administrations to finally come to a model that they deemed acceptable.

3 *Carter v. Canada*, 2015 SCC 5, at para. 98

4 Ibid., para. 117

the *Charter* rights of health professionals and health institutions that may conscientiously object to taking part in PAD.

Unfortunately, the regime recommended in the Committee's main report falls ***far*** short of what is necessary to protect vulnerable Canadians and the *Charter* protected conscience rights of health professionals.

Moreover, the SCC gave a reasonably straightforward roadmap for Parliament to follow in its legislative response. Regretfully, the Committee failed to adhere to the roadmap contemplated in *Carter*. On the contrary, the Committee recommends a legal framework that does not conform to *Carter*.

Taken together, we as Members of Parliament on the Committee, therefore, feel that it is our duty to our constituents, to Canadians, and to future generations to respectfully present this dissenting report.

The Quebec Experience

Quebec is the only Canadian province to have adopted a law on end of life care. The Committee's main report presents the chronology of events leading to the adoption of Quebec's legislation but omits the most important factors.

In Quebec, only patients aged 18 and older, with severe and incurable physical illnesses and whose medical condition is characterized by an advanced and irreversible decline can request medical help to die. The law does not allow for advanced directives.

The attending physician must ensure that his or her patient has clearly consented to PAD, ensuring among other things that it is not the result of external pressure; provides the patient with a full prognosis on the condition and possible treatment options, along with likely consequences. The physician must also ensure the continuation of consent with interviews with the patient held at different times, spaced by a reasonable time, having regard for the patient's condition.

Quebec physicians are free to act according to their conscience. If they do not want to proceed, they must refer the patient to an independent body which will contact another physician. Two independent physicians must confirm that the patient meets all the criteria prescribed by the subject legislation.

The work leading to the adoption of the law took place over a period of six years under three different legislatures in a non-partisan working process. Ultimately, the legislation was passed in a free vote of members of the National Assembly: 94 members voted in favor of the legislation and 22 against. All votes against were from members of the governing party, including 11 cabinet ministers.

Overall, we acknowledge that the Quebec experience is a result of a careful, thoughtful and serious approach that better respects individual autonomy and better protects vulnerable persons than the proposal set out in the main report of the Committee.

The Committee's Report Fails to Respect *Carter*

The *Carter* decision is the law of the land. Any legislative response must adhere to the parameters set out in *Carter*. Unfortunately, the Committee has recommended a legal framework that fails to adhere to *Carter*.

Opening the door to minors contrary to *Carter*

The Committee, in Recommendation 6b of the main report, has recommended allowing PAD in cases expressly excluded by *Carter*, including the possibility of mature minors at a future date. The SCC was clear in saying that PAD should be available to "competent adult persons".[5] If the SCC wished to extend PAD to mature minors, it would have said so. Instead, the SCC went out of its way to expressly preclude this. This is supported by the evidence of Professor Peter Hogg, Canada's foremost constitutional scholar who said:

> The Supreme Court, in its order, spoke of a "competent adult person". I don't think it would be open to you, for example, to have 16 as an age of consent for this purpose, because that would not be a competent adult person. Between 18 and 21, I would think you would have some leeway within the word "adult" to decide that.[6]

Likewise, a senior official from the Department of Justice concurred with Professor Hogg, stating "the court clearly limited its ruling to mentally competent adults."[7]

Further, the Committee heard important evidence about policy reasons for why PAD should be available only to adults. The Canadian Pediatrics Society, whose opinion on this matter carries significant weight, was unequivocal: "I think for the purposes of your legislation, I would say 18 is an adult. I would be as conservative as you can possibly be;"[8] and again: "today I am here to speak to the matter of children, and with respect to children I would argue that you should not go beyond the Supreme Court's pronouncement."[9]

No Safeguards for the Mentally Ill

Additionally, the Committee's proposed legislative framework fails to sufficiently balance respect for individual autonomy with the need to protect vulnerable persons, as Parliament was called upon to do by the SCC in *Carter*. For example, shockingly, neither in Recommendation 3 of the main report, nor anywhere else in the Committee's main report is there are requirement forpatients diagnosed with an underlying mental health challenge to undergo a psychiatric assessment by a psychiatric professional to determine whether they have the capacity to consent to PAD. This, notwithstanding that the Canadian Psychiatric Association was of the opinion, and we think that the vast

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5 *Carter v. Canada*, 2015 SCC 5, at paras. 4, 68, 127, and 147

6 Peter Hogg, *Special Joint Committee on Physician-Assisted Dying* (January 25, 2016).

7 Joanne Klineberg, *Special Joint Committee on Physician-Assisted Dying* (January 18, 2016).

8 Dr. Dawn Davies, *Special Joint Committee on Physician-Assisted Dying* (February 3, 2016).

9 Dr. Mary Shariff, *Special Joint Committee on Physician-Assisted Dying* (February 3, 2016).

majority of Canadians would strongly agree, that in instances where a person seeking PAD has a mental condition a "psychiatrist needs to be involved to do a proper assessment as soon as the request is made."[10]

The SCC ruled that PAD *could* be practiced in a way that protects the vulnerable *provided* it is accompanied by stringent safeguards. A regime that is not rigorous enough to protect the vulnerable, if challenged, would almost certainly be found to violate the *Charter* as well. There is little sense in replacing a law that was found to violate the *Charter* in one way with a law that violates the *Charter* in another way. Unfortunately, the Committee in its main report fails to strike the right balance between individual autonomy and the need to protect vulnerable persons.

Other Concerns with the Main Report

We are of the view that the Committee's main report should have placed greater concern in three other areas: (1) palliative care; (2) conscience protections for physicians and health institutions; and (3) advanced directives.

Palliative Care

During Committee hearings witness after witness highlighted the importance of palliative care in the context of PAD. We also heard about the overall lack of proper palliative care services across Canada. The Canadian Cancer Society highlighted the "serious gaps in palliative care across the country."[11] The Canadian Society of Palliative Care Physicians also described the training given to providers of palliative care as "woefully inadequate."[12]

The importance of palliative care in the context of PAD is effectively stated in the *Final Report of the External Panel on Options for a Legislative Response to Carter v. Canada*: "a request for physician-assisted death cannot be truly voluntary if the option of proper palliative care is not available to alleviate a person's suffering."[13] A genuinely autonomous choice for a person to end their life is not possible if they are not offered palliative care as they will see their choice as only intolerable suffering or PAD. Testimony by the Canadian Cancer Society confirmed this: "any responsible policy on assisted dying must guarantee access to quality palliative care for all Canadians."[14]

We therefore believe that it is essential that the federal government work with the provinces and territories and provincial/territorial medical regulatory authorities to ensure that the option of palliative care is offered and available to any person contemplating PAD.

Conscience Protections

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10 Dr. K. Sonu Gaind, *Special Joint Committee on Physician-Assisted Dying* (January 27, 2016).

11 Gabriel Miller, *Special Joint Committee on Physician-Assisted Dying* (February 1, 2016).

12 Dr. Monica Branigan, *Special Joint Committee on Physician-Assisted Dying* (January 27, 2016).

13 Dr. Harvey Max Chochinov, Professor Catherine Frazee, Professor Benoît Pelletier, "Final Report on Options for a Legislative Response to *Carter v. Canada*" (December 15, 2015), page vii.

14 Gabriel Miller, *Special Joint Committee on Physician-Assisted Dying* (February 1, 2016).

Section 2 of the *Charter* guarantees all Canadians "freedom of conscience and religion."[15] There was near unanimous agreement amongst witnesses that physicians who object to taking part in PAD for reasons of conscience should not be forced to do so. Unfortunately, the Committee in its main report does not sufficiently protect the *Charter* rights of physicians and health institutions.

The Committee recommends that physicians who conscientiously object to PAD be obliged to refer patients through an "effective referral". We believe that such a regime is unnecessary and would infringe on the *Charter* rights of physicians. We note that Canada would be first jurisdiction in the world to require an effective referral regime. Instead, we believe that there are better models which protect *Charter* rights of physicians and provide access to PAD for patients in other jurisdictions, including Quebec. Physicians who conscientiously object to PAD are required to provide information to patients on how to access PAD, and to advise a government agency of the patient's request. The government agency then connects the patient to a physician willing to provide PAD.

Likewise, healthcare institutions that object to offering PAD should be exempted in accordance with the Supreme Court's determination that individual and collective aspects of freedom of religion and conscience guaranteed under the *Charter* are "indissolubly intertwined".[16]

Advanced Directives

We are concerned about the advanced directive regime proposed in the Committee's main report. The regime proposed falls outside the parameters set by *Carter*. Moreover, several witnesses recognized that from a policy perspective the type of regime proposed is inadvisable, including the Canadian Medical Association.[17]

We further note that issues respecting advanced directives are extremely complicated. Significant more time than was given to the Committee is required to explore the legal and policy implications of advanced directives.

Conclusion

We strongly encourage the Government to craft legislation that takes full stock of the abovementioned thoughts, concerns, and recommendations. We recognize the need for law to comply with the *Charter* as interpreted by the SCC in *Carter*. The Committee failed to adhere to the parameters set out in *Carter*, and likewise failed to propose meaningful safeguards, as Parliament was called upon to do in *Carter*. In light of the foregoing, the Committee's main report is not supportable. We hold out hope, however, that the Government will take note of the glaring flaws contained in the Committee's main report and do much better when it introduces its legislative response to *Carter*.

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[15] *Constitution Act* (1982), s.2a

[16] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at paras. 92 to 94

[17] Dr. Jeff Blackmer, *Special Joint Committee on Physician-Assisted Dying* (January 27, 2016).

Respectfully submitted,

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