PROTECTING LIFE

How Parliament Can Fully Ban Assisted Suicide Without Section 33

Author: John Sikkema, HON.B.A., J.D.

Editors: André Schutten, HON.B.A., LL.B., LL.M.
Mark Penninga, HON.B.A., M.A.

Association for Reformed Political Action
ARPA CANADA
www.arpacanada.ca
1-866-691-ARPA (2772)
info@arpacanada.ca
PO Box 1377, STN B, Ottawa Ontario, K1P 5R4

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About the Contributors

John Sikkema is a lawyer based in Toronto, Ontario. He completed an honours degree in political science at Brock University in 2011 and his law degree at Queen's University in 2014, and articled with Keel Cottrelle LLP in Toronto. He has experience in a variety of areas of law including administrative, human rights, employment, and constitutional law. Since his call to the bar in June, he has being working as a sole practitioner and has drafted substantive legal opinions on a number of constitutional issues.

André Schutten is general legal counsel with the Association for Reformed Political Action (ARPA) Canada. André completed his undergraduate degree in 2007, obtaining an Honours B.A. in Classics and Religion from McMaster University. He then moved to Ottawa to attend the Faculty of Law at the University of Ottawa where he completed his law degree in the Spring of 2010. He was called to the Ontario Bar on June 21, 2011. In January of 2012 André started part-time studies for a Masters degree in Constitutional Law through Osgoode Hall Law School, completing the degree in the summer of 2013. André has already represented ARPA Canada at the Supreme Court of Canada three times.

Mark Penninga is the executive director of ARPA Canada. Mark has a Master's degree in political science from the University of Lethbridge, a BA in philosophy from Trinity Western University, and a certificate in Leadership and Applied Public Affairs from the Laurentian Leadership Centre in Ottawa. Mark is the author of a critical analysis of the Supreme Court of Canada's last euthanasia decision. His book is called *Building on Sand: Human Dignity in Canadian Law and Society*. Mark has been published in the Toronto Star, National Post, Calgary Herald, Lethbridge Herald, Vancouver Sun and the Province.

Executive Summary

This report analyzes the Supreme Court of Canada's latest decision on euthanasia in *Carter v Canada*. The Supreme Court struck down Canada's total ban on assisted suicide on the basis of a very narrow interpretation of the purpose of that prohibition. By framing the purpose or object of the law so narrowly, the Supreme Court was able to rule that the prohibition was overbroad and therefore violated section 7 of the *Charter*. The constitution of Canada allows Parliament to redraft the law in order to comply with the Charter. One way to do that is to legalize assisted suicide. Another way to do that, as explained in this paper, is to clarify for the court the true purpose and object of a total ban on assisted suicide, namely to completely prohibit a social act that is intrinsically legally and morally wrong as a violation of the longstanding legal principle of the inviolability of life. Such a law would not require the use of the notwithstanding clause and would be constitutional. Such a law is also the best option from a public policy perspective.

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1. Carter v Canada

In *Carter v Canada (Attorney General)*[1], the Supreme Court of Canada (SCC) ruled that the existing blanket prohibition on assisted suicide in the *Criminal Code* violated the *Charter of Rights and Freedoms.*

Section 241(b) of the *Criminal Code* prohibits aiding or abetting a person to commit suicide. Section 14 of the *Criminal Code* states that no person is entitled to consent to have death inflicted on him and that the consent of a person upon whom death is inflicted is no defense for the person who inflicted death upon him. Put another way, the person who inflicts death upon another individual is not innocent of criminal wrong-doing simply because that person consented. The SCC declared that these two sections of the *Code* are void "to the extent that they prohibit physician-assisted death for a competent adult person who clearly consents to the termination of life and who 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."[2]

The case was decided based on the SCC's application of section 7 of the *Charter*, which states: "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." Section 7 is "*engaged*" when a person's life, liberty or security of the person—the "interests" protected by section 7—is adversely affected by the state in a manner that is not trivial or insignificant. Section 7 is *violated* where it is engaged and where the law or state action violates a principle of fundamental justice.[3]

In *Carter*, the life interest was engaged because the prohibition on assisted suicide could "force" some people to take their own lives "prematurely" for fear that they would be incapable of doing so later, when their suffering became intolerable.[4] The liberty and security interests were engaged because the law interfered with "fundamental personal choices" and "control over one's bodily integrity".[5]

A law may interfere with the right to life, liberty, or security of the person only if it does so "in accordance with the principles of fundamental justice." One principle of fundamental justice developed by the SCC is that a law may not be overbroad, meaning it cannot interfere with the right to life, liberty, or security in ways not rationally connected to achieving the objective of the law.[6] The validity of the law under section 7 review depends on the relationship between means and objective. Therefore, as the Court said, the first step is "to identify the object of the prohibition on assisted dying."[7]

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[1] 2015 SCC 5 [*Carter*].
[2] *Ibid*, at para 127.
[3] Guy Regimbald and Dwight Newman, *The Law of the Canadian Constitution, 1st edition* (Markham: LexisNexis, 2013), at 618.
[4] *Carter*, *supra* note 1, at paras 57-58.
[5] *Ibid*, at para 64.
[6] Overbreadth is closely related to the principle of arbitrariness. A law is arbitrary if it deprives a person of life, liberty, or security of the person in a manner that is not rationally connected to the objective of the law. A law is overbroad where its application is connected to achieving the objective in some circumstances, but not in all circumstances to which the law applies. As the SCC says in *Carter*, *supra* note 1, at para 85, "The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object […]".
[7] *Carter*, *supra* note 1, at para 73. "Object" and "objective" are used interchangeably.

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The SCC characterized the objective of the criminal prohibition on assisted suicide very narrowly. It ruled that the objective was merely to protect vulnerable persons from being induced to commit suicide at a moment of weakness.[8] The objective was not, in the Court's view, to protect life broadly speaking, or even to prevent suicide.[9] This distinction effectively determined the outcome of the case.

Since not every person who wishes to commit suicide is vulnerable, the Court reasoned, it follows that the limitation on individual rights is, at least in some cases, not connected to the law's objective of protecting vulnerable persons. Consequently, the absolute prohibition was found to deprive some persons of their section 7 rights in a manner that did not accord with the principles of fundamental justice.[10] The prohibition was "overbroad" and therefore violated section 7.

The SCC found further that the violation of section 7 was not justified under section 1 of the *Charter*.[11] The law did not minimally impair the claimants' section 7 rights because a complete prohibition was found to be broader than necessary to achieve the government's objective of protecting the vulnerable. A complete prohibition was unnecessary, they reasoned, because the government could depend on physicians to determine whether or not someone seeking assisted suicide was actually vulnerable or subject to undue pressure to end his or her life.[12]

2. Re-enacting a complete prohibition on assisted suicide

Parliament can enact a complete prohibition on assisted suicide, *without* relying on the notwithstanding clause[13], by explicitly stating in a new law a purpose that is broader than merely protecting vulnerable persons. The objective of the existing law was a matter of debate and the Court's conclusion about its objective in *Carter* was not the only possible interpretation or even the most reasonable (see Part 3). Note, however, that the SCC acknowledges that it is *Parliament's* objective, embodied in the text of the legislation enacted by it, that is in question in the section 7 analysis.[14] Parliament can decide why to prohibit assisted suicide and communicate its objective to the courts through the text of the law.

Why prohibit assisted suicide? We agree in principle with the following points made by the Attorney General of Canada:

> Further, the prohibition on assisted suicide and euthanasia is based not on a failure to take into account the needs and circumstances of individuals with serious disabilities, but on the recognition that assisted suicide and euthanasia are inherently social acts and are, in this respect, fundamentally different than the act of suicide. Although it may be motivated by compassion, physician-assisted death involves intentional

[8] *Ibid*, at para 78.
[9] *Ibid*.
[10] *Ibid*, at para 86.
[11] This is not surprising. In the history of the Charter, a law that failed a section 7 analysis has *never* survived a section 1 justification analysis in a case before the Supreme Court of Canada. Section 1 of the Charter allows rights and freedoms in the Charter to be limited where to do so is "demonstrably justified in a free and democratic society."
[12] *Carter*, *supra* note 1, at paras 27, 15-106, 121.
[13] Section 33 of the *Charter of Rights and Freedoms*.
[14] As the SCC says in *Carter*, *supra* note 1, at paras 29 and 37, a carefully designed system of safeguards could obtain *Parliament's* objective of protecting the vulnerable, the objective the Court interprets as being embodied in s. 241(b).

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> acts of a third party to bring about the death of another and necessarily involves an affirmation of the subject's conclusion that his or her life is not worth living. It leads to the normalization of assisted suicide and euthanasia and denormalization of physical dependence. The re-enforcement of the societal message that death is preferable to physical dependence must be taken into account in assessing whether the protection provided by the impugned provisions creates a discriminatory distinction.[15]

And:

> Furthermore, it is the very regulatory scheme proposed by the trial judge that, by defining which kinds of lives may be taken, sends the message which is antithetical to Parliament's objective of confirming the value of every life. Allowing for defined exceptions to the prohibitions results in some people who say that they want to die receiving suicide intervention, while others receive suicide assistance. Those who fall into the latter category will be defined by their health or disability status, sending the message that such lives are less worthy of protection.[16]

The SCC formulated the existing prohibition's objective in a way that favoured the plaintiffs. In doing so, of course, the SCC effectively determined the outcome of the case. But the Court's interpretation of section 241(b) does not shackle Parliament. *It is the interpretation of an ordinary statute that is in question here*, not the Court's interpretation of the *Charter*. The Court simply plugged its preferred interpretation of the assisted suicide prohibition into the framework it has developed over the years for applying section 7 of the *Charter*.

Altering the framework by which judges interpret and apply section 7 of the *Charter* would require a constitutional amendment, but all Parliament needs to do in response to the *Carter* ruling is amend a normal federal statute, the *Criminal Code*. Courts must interpret and apply statutes to the facts of individual cases. Legislatures cannot tell courts how to apply a statute in a given case, but legislatures can and do give courts direction on how to interpret a statute in the statute itself. The SCC's interpretation of the objective of s. 214(b) is binding only with respect to that provision, not with respect to future amendments, enactments, or even re-enactments of the same prohibition for a different or broader purpose.

We therefore propose that Parliament pass a bill amending the *Criminal Code* to include a complete ban on all forms of assisted suicide and euthanasia with a purpose clause stating that the purpose of the law is to protect every human life, to maintain respect for the sanctity and inviolability of life, to affirm the equal worth of every life, and to prohibit as a public wrong the participation of any person in the deliberate, active participation in another person's suicide with or without the latter person's consent.[17]

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[15] *Ibid* (Factum of the Respondent at para 134).
[16] *Ibid* (Factum of the Respondent at at para 156).
[17] Most important of these is the latter. Active, deliberate participation in another person's suicide is, to borrow a phrase from Justice Sopinka in *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at 601, "intrinsically morally and legally wrong" [*Rodriguez*]. Justice Sopinka's phrase, "intrinsically morally and legally wrong" captures the longstanding legal principle of the *inviolability of life*—that the *intentional* taking of human life is exceptionlessly wrong, no matter whose life it is, no matter what the circumstances. Inviolability is not the same as vitalism, the latter being the belief that society must take every possible step to prolong life. For further explanation of inviolability, see *Carter*, *supra* note 1, (Factum of the Intervenor, Christian Legal Fellowship, at paras 3-9).

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3. A critical look how the Court interpreted the existing law's objective

Whether the SCC got the objective of the existing prohibition in the *Criminal Code* right or wrong, Parliament has the power enact a new prohibition on assisted suicide that states a broader objective.

Nevertheless, it is worth examining how the SCC arrived at its narrow formulation of the law's objective. In our view, the SCC gives little weight to the text of the law itself and creates uncertainty not only by overturning the result in *Rodriguez* (1993), but by not following its own rule from *Bedford* (2013) for deciphering a law's objective. This calls for correction.

a) The text of the section 241(b)

The SCC's interpretation ignores (or at least treats too lightly) the absolute nature of the prohibition in section 241(b) of the *Criminal Code*.

On the basis of the text of section 241(b) alone it is reasonable to conclude that the objective of the law is broader than merely protecting "vulnerable persons from being induced to commit suicide in a moment of weakness."[18] Section 241(a), which was not struck down in *Carter*, prohibits counselling a person to commit suicide. Counselling a vulnerable person to commit suicide might *induce* them to do so. In this sense, "to protect a vulnerable person from committing suicide in a time of weakness" more accurately describes the objective of section 241(a) than section 241(b).

Section 241(b) goes further than inducement. It targets *any* direct or indirect *participation* in the suicide of another person. The person who aids in the commission of another's suicide may not have induced the latter person's decision to commit suicide, but section 241(b) would still apply. For example, a person who has decided to end his life might approach a friend who owns a gun, asking to borrow his friend's gun in order to kill himself. His friend would be aiding in his suicide, in violation of s. 241(b), if he handed over his gun with knowledge of its intended use, just as he would be guilty of aiding armed robbery if he gave his gun to a friend who asked to borrow it to rob a bank. Aiding or abetting is broader than inducing.

The SCC's *Carter* judgement violates the Court's own stated rule for determining the objective of a legislative provision. In *Carter*, the Court cites *Bedford*[19]—its 2013 decision invalidating the prostitution-related provisions of the *Criminal Code*—as precedent for determining the objective of a law. The provisions in question in *Bedford* prohibited living on the avails (profits or benefits) of prostitution, operating a bawdy house, and communicating in public for the purposes of prostitution.[20] The Crown in *Bedford* argued that the objective of those laws was to suppress prostitution generally, even though prostitution itself was not illegal. The SCC rejected this broad characterization of the law's purpose, saying of the bawdy-house provision, for example, "On its face, the provision is only directed at in-call prostitution, and so cannot be said to aim at deterring prostitution generally."[21]

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[18] *Carter*, *supra* note 1, at para 86.
[19] 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].
[20] *Criminal Code*, ss. 210, 212(1)(j), and s. 213(1)(c).
[21] *Bedford*, *supra* note 19, at para 132.

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Bedford is cited in *Carter* as the basis for the rule that "the object of the prohibition should be confined to measures directly targeted by the law." If there was a legal principle at work in *Bedford*, the Court strays from it strikingly in *Carter*. On its face, the blanket prohibition against aiding or abetting suicide applies regardless of circumstances or persons involved. On its face, the prohibition is not concerned with the autonomy, capacity, or vulnerability of the one wishing to kill himself, but with the public wrong of actively helping him carry out that wish. As explained above, the actions or measures directly targeted by section 241(b) of the *Code* include any willful participation in the suicide of another person. The text of section 241(b) would indeed suggest an objective broader than the prostitution-related provisions at issue in *Bedford*, because the prohibition at issue in *Carter* was, unlike the prohibitions in question in *Bedford*, a blanket prohibition.

The SCC's formulation of the law's objective also ignores the inherently social nature of assisted suicide. In its written arguments to the SCC in *Carter*, the Attorney General of Canada argued that the absolute prohibition "is based not on a failure to take into account the needs and circumstances of individuals with serious disabilities, but on the recognition that *assisted suicide and euthanasia are inherently social acts* and are, in this respect, fundamentally different than the act of suicide."[22]

The Court, however, declared in response that the law "is not directed at preserving life, or even at preventing suicide [because] attempted suicide is no longer a crime"[23]—thus disregarding that assisted suicide is a social act, that attempted suicide was decriminalized to help prevent suicide, and that the conduct targeted by the law is *any* aiding or abetting of suicide.

b) The text of section 14

Section 14 of the *Criminal Code* states: "No 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."

In *Carter*, the SCC invalidated both section 14 and section 241(b), both of which in effect prohibit assisted suicide.[24] However, when it came to determining the law's objective, the Court only gives attention to section 241(b). The Court interpreted the objective of section 241(b) as protecting vulnerable people from being induced to commit suicide in a moment of weakness, but the Court offers no interpretation of the objective of section 14. This raises the question: on what basis did the Court also invalidate section 14? It appears that the Court simply foregoes an independent analysis of section 14, opting instead to invalidate it and section 241(b) *only insofar as* those provisions prevent capable adults who experience grievous and irremediable suffering from receiving "aid in dying".[25] The Court

[22] *Carter*, *supra* note 1 (Factum of the Respondent at para 134).
[23] *Ibid*, at para 78.
[24] *Ibid*, at para 20: "In our view, two of these provisions are at the core of the constitutional challenge: s. 241(*b*), which says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14, which says that no person may consent to death being inflicted on them. It is these two provisions that prohibit the provision of assistance in dying."
[25] *Ibid*, at para 127. The Court's declares that both section 14 and 241(b) are "void 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

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appears to invalidate section 14 simply because that is necessary in order to give effect to its invalidation of section 241(b).

What is the purpose of section 14? In any case involving the death of the victim of the offence, section 14 makes it unnecessary for the Crown to prove that the deceased did *not* consent to being killed. Proving beyond a reasonable doubt that a deceased person did not consent to his or her own death would be next to impossible in most situations.[26] This can be contrasted with the law of assault for example, in which the Crown must prove lack of consent and the victim of the alleged assault is normally a primary witness. Legalizing assisted suicide raises serious concerns when it comes to consent, an issue the Court resolves by concluding that adequate safeguards can ensure that only those who clearly consent receive "aid in dying". The challenge of ensuring consent would require a carefully designed and scrupulously monitored system, and even then there are no guarantees of eliminating abuse entirely.[27]

The difficulty of proving absence of consent, however, is not the only or even the primary concern of section 14 or section 241(b). Justice Sopinka, writing for the majority of the Supreme Court in *Rodriguez*, (the 1993 assisted suicide decision) uses section 14 to illustrate the point that the scope of individual self-determination in our society is never absolute.[28] Individual autonomy is balanced with and limited by other principles, such as the sanctity of life. It strains credibility to suggest that consent was never a defence to homicide or assisted suicide only because we had not yet found a way of reliably determining the presence or absence of consent.

Returning to the example of assault, physical contact with another person is generally not assault where there is consent, but this rule has limits that are not based on evidentiary concerns. The common law recognizes that a person cannot consent to the infliction of serious bodily harm. As Justice Gonthier, writing for the majority of Supreme Court in *R v Jobidon*[29], explained, this rule acts as a deterrent against consensual fighting and, by discouraging fighting in general, also helps to protect those who do not consent to a fight from physical aggression.[30] But Gonthier J. recognized another reason to vitiate consent to serious bodily harm: "Wholly apart from deterrence, it is most unseemly from a moral point of view that the law would countenance […] the sort of interaction displayed by the facts of this appeal. The sanctity of the human body should militate against the validity of consent to bodily harm inflicted in a fight."[31] The law can and does limit autonomy for moral reasons, while simultaneously promoting

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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."

[26] The accused may be the only witness to have any knowledge of what occurred and has a right against self-incrimination. The Crown would be left with no way to prove that the deceased did not consent.

[27] The SCC in *Carter*, *supra* note 1, at para 105, cites approvingly the following sentence from the trial judge: "My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially *minimized* through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced" (emphasis added).

[28] *Rodriguez*, *supra* note 17, at 560; this was the only time section 14 is mentioned in the judgement. The plaintiffs in *Rodriguez* did not challenged section 14—see also the trial decision, *Rodriguez v British Columbia (Attorney General)*, [1992] BCJ No 2739 (BC Supreme Court).

[29] [1991] SCJ No 65 (QL) [*Jobidon*].

[30] *Ibid*, at para 114.

[31] *Ibid*, at para 115.

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various policy objectives. The "moral point of view" appears to be the primary basis for vitiating consent in the context of assault causing serious bodily harm in *Jobidon*. Yet by deterring aggression in general, it has the beneficial effect of protecting the autonomy and bodily integrity of those who would not consent to a fight. In Part 4, we discuss further the legitimacy of moral objectives in criminal law.

The dissent in *Jobidon* insisted that lack of consent was a component of the offence, stressing that the *Criminal Code* provisions on assault state explicitly that it is the use of force against another person "without consent". Therefore, in the dissent's view, the majority was wrong to continue to apply the longstanding common law rule that one cannot consent to serious bodily harm. The majority, however, concluded that Parliament did not intend to eradicate the common law rule by codifying the law of assault in the *Criminal Code*. The law of assault was about more than protecting personal autonomy. By contrast, in *Carter*, although section 241(b) says nothing about consent,[32] the SCC decided that provision is about protecting the autonomy of vulnerable persons and nothing more.

Justice Sopinka in *Rodriguez* recognized that s. 241(b) of the *Criminal Code*, like s. 14, is grounded in the state's interest in protecting life and not allowing human life to be depreciated by allowing life to be taken.[33]

c) The Rodriguez precedent

In *Rodriguez*, Justice Sopinka, writing the majority of the SCC, accepted that the law was designed to protect vulnerable persons from being induced to commit suicide *and* to support the broader objective of preserving life, maintaining respect for life, and prohibiting an intrinsically wrong act.

Overbreadth, the crucial principle on which the outcome of *Carter* turned, was not yet established as a principle of fundamental justice when *Rodriguez* was decided. Nevertheless, competing characterizations of section 241(b)'s purpose or objective were an important part of *Rodriguez*.[34]

In her dissenting opinion in *Rodriguez*, Justice McLachlin (who later became Chief Justice McLachlin) posed this question: "What is the difference between suicide and assisted suicide that justifies making the one lawful and the other a crime, that justifies allowing some this choice, while denying it to others?"[35] The difference should be obvious, namely the participation of another person, which Justice McLachlin disregarded. Not prohibiting suicide does not mean that a person has a "right to choose" suicide that is denied to those who cannot commit suicide without assistance. Criminal law consists of prohibitions with penalties—what penalty can be imposed for killing oneself? Prohibiting a person from assisting in another person's suicide, however, recognizes the difference between suicide and assisted suicide and targets not the suicide victim but the assister. It is an enforceable prohibition with a deterrent effect.

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[32] Section 14 stated explicitly that consent is no defence to homicide offences, which the Court ignores, focusing its overbreadth analysis on section 241(b).
[33] *Rodriguez*, *supra* note 17, at 595.
[34] As Justice Sopinka stated the nature of the complaint, *ibid*, at 590: "The complaint is that the legislation is over-inclusive because it does not exclude from the reach of the prohibition those in the situation of the appellant who are terminally ill, mentally competent, but cannot commit suicide on their own."
[35] *Ibid*, at 620.

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Justice McLachlin's answer to her question in the paragraph above was that the only justification for prohibiting assisted suicide is the fear that "people may wrongfully abuse the power they have over the weak and ill, and may end the lives of these persons against their consent."[36] "Viewed thus," Justice McLachlin continued, "the objective of the prohibition is not to prohibit what it purports to prohibit, namely assistance in suicide, but to prohibit another crime, murder or other forms of culpable homicide."[37] Thus, in her view, "In Canada it is not clear that [section 241(b)] is necessary; there is a sufficient remedy in the offences of culpable homicide."[38] However, absence of consent has never been an element of homicide offences. The difference between homicide and assisted suicide, therefore, has nothing to do with consent, but with the identity of the person committing the primary act. Homicide is the act of killing another; suicide is the act of killing oneself. The law prohibits doing the former or helping someone do the latter. [39]

So Justice McLachlin found that the assisted suicide law's objective was to prevent homicide of the weak and ill. She held that the dangers of legalizing assisted suicide are relevant only under section 1 of the *Charter*, not section 7. Denying the plaintiff the right to aid in dying in the circumstances of this case was enough to establish a violation of section 7 because doing so was arbitrary in light of the law's objective:

> When one is considering whether a law breaches the principles of fundamental justice under s. 7 by reason of arbitrariness, the focus is on whether a legislative scheme infringes a particular person's protected interests in a way that cannot be justified having regard to the objective of this scheme. The principles of fundamental justice require that each person, considered individually, be treated fairly by the law. […] In short, 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.[40]

Chief Justice McLachlin is the only judge remaining today on the SCC from the time *Rodriguez* was decided. Her analysis takes a form very similar to an "overbreadth" analysis, although that principle had not yet been formally recognized. In *Carter*, however, the SCC did *not* cite McLachlin's J.'s opinion in *Rodriguez*—it cited Justice Sopinka's majority opinion. *Carter* does not adopt Justice McLachlin's conclusion in *Rodriguez* that the objective of the assisted suicide prohibition is really to prevent homicide; it adopted Justice Sopinka's statement about preventing vulnerable people from being induced to commit suicide as the law's objective for the sake of the overbreadth analysis.

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[36] *Ibid*, at 621.
[37] *Ibid*, at 625.
[38] *Ibid*.
[39] Where any person intentionally causes another person' death, the former is guilty of homicide under section 222 of the *Criminal Code*, regardless of consent. Where, however, the victim carries out the act of suicide and another person aids or abets the victim in doing so, the assister is guilty not of homicide but of assisted suicide. McLachlin is contemplating homicide, but the offence in question in *Rodriguez* is assisted suicide, not homicide. Suicide is the act of killing oneself, homicide the act of killing another. Of course, consent is not a defence to either offence, unless and until the *Carter* ruling comes into effect. See, for example, *R v Elton*, 2012 BSCS 315, for a discussion of the distinction between homicide and assisted suicide.
[40] *Rodriguez*, *supra* note 17, Justice McLachlin at 621. Note that Justice McLachlin distinguishes assisted suicide from "killing without true consent", though consent makes no difference in the law of homicide.

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Justice Sopinka said a whole lot more about the purpose of section 241(b):

> Section 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy 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.[41]

The SCC in *Carter* used the decriminalization of attempted suicide to refute the argument that section 241(b) had a broader objective of preventing suicide or protecting life.[42] In *Rodriguez*, however, Justice Sopinka explained the reasons for decriminalizing attempted suicide:

> […] [T]he decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens. Rather, the matter of suicide was seen to have its roots and its solutions in sciences outside the law, and for that reason not to mandate a legal remedy. Since that time, there have been some attempts to decriminalize assistance to suicide through private members bills, but none has been successful.[43]

Justice Sopinka noted that assisted suicide was prohibited by common law until 1892, when the prohibition was enshrined in the *Criminal Code*. He then goes on to explore why assisted suicide, unlike attempted suicide, is still prohibited, and how active assistance in causing death is distinguishable from withdrawing treatment. Both the Law Reform Commission of Canada and the House of Lords in the UK examined these issues and were decidedly against legalizing assisted suicide. As Sopinka J. noted:

> It can be seen, therefore, that while both the House of Lords, and the Law Reform Commission of Canada have great sympathy for the plight of those who wish to end their lives so as to avoid significant suffering, neither has been prepared to recognize that the active assistance of a third party in carrying out this desire should be condoned, even for the terminally ill. The basis for this refusal is twofold it seems—first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and second, there is no certainty that abuses can be prevented by anything less than a complete prohibition.[44]

Just as the SCC in *R v Jobidon* recognized that a legal rule vitiating consent in the context of assault causing serious bodily harm serves multiple objectives, so Sopinka J. recognized that the prohibition on assisted suicide serves multiple objectives. We believe the primary purpose of an assisted suicide prohibition is not to incidentally prevent homicide, but to prevent the active participation by one individual as intrinsically morally and legally wrong. Of course, harmful side effects—abuse of the vulnerable, devaluing of human life, changing of cultural norms, etc.—inevitably result from permitting something that is intrinsically wrong, but we should not mistake the side effects with the wrong itself.

[41] *Ibid*, at 595.
[42] *Carter*, supra note 1, at para 78.
[43] *Rodriguez*, *supra* note 17, at 597.
[44] *Ibid*, at 601 (emphasis added).

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d) Explaining the result in Carter

So how can the SCC's narrow characterization of the objective of 241(b), the linchpin of its decision, be explained? In short, the Supreme Court gave the claimants the benefit of the doubt.

The SCC was wary of stating the objective of the law broadly and thereby giving the claimants no chance of success. The Court expressed its concern in this way: "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." Of course, the opposite outcome is also foreordained[45] by the Court's narrow statement of the law's objective, so the problem of foreordaining the outcome is not avoided.

In our view the Court manufactured a false dichotomy between the broadest possible statement of the law's object—"preserving life"—and an artificially narrow one—preventing vulnerable people from being induced to commit suicide at a time of weakness. In *PHS*, the SCC mentions euthanasia as a "controversial medical procedures" that falls within Parliament's criminal law power.[46] Is it controversial only because it might be used against someone's will (which would be homicide), or because of the nature of the act itself, even if someone consents to being euthanized?

Such criticisms aside, it is not entirely surprising that the Court adopted a narrow objective. Where a court can choose between competing, credible characterizations of a law, it will likely choose the characterization that favours the *Charter* claimant rather than the government. The objective of sections 14 and 241(b) was not clarified by any purpose or interpretation clause and thus open to interpretation and a broad reading would have nullified the *Charter* claim and render unnecessary a section 1 analysis.[47] Nothing bound the Court to a broad reading of the law's objective.

Judges have been known to engage in outcome-oriented reasoning. But the validity of democratically enacted statutes should depend not on judicial preference. Peter Hogg, a preeminent Canadian constitutional law scholar, points out that disagreements about the objective of a law are neither surprising nor unusual.[48] He goes on to say, "It must be recognized, however, that a judge who disapproves of a law will always be able to find that it is overbroad."[49] That is a remarkable statement about the scope of judicial discretion. One way to limit judicial discretion, however, is for the legislature to be clear about the objective of the law by clearly stating the objective in the legislation itself.

Where a law's stated purpose and legal effect align, a court cannot credibly find that the law's "true purpose" is other than its stated purpose. On matters such as this, Parliament would do well to state the objective of a law in the law itself, leaving less to be decided by shifting judicial predilections years later.

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[45] A violation of section 7 of the *Charter* is foreordained by the SCC's narrow interpretation of the law's object and to a large extent so is the result of the section 1 analysis, though the latter depends in part on whether or not there is any way to achieve the law's (narrowly stated) objective short of an absolute prohibition.
[46] 2011 SCC 44, at para 69.
[47] See discussion of the degree of judicial discretion in determining the purpose of a law in Peter Hogg, *Constitutional Law of Canada, 5th Edition Supplemented* (December 1, 2014) at 47.15 [Hogg].
[48] *Ibid*, at 47-53.
[49] *Ibid*.

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Protecting the lives of all citizens (vulnerable or not), maintaining respect for the sanctity of life, and preventing the evil of participation in the deliberate, active putting to death of another person are all legitimate objectives for Parliament to pursue. An absolute prohibition on assisted suicide is not an overbroad means of accomplishing *those* objectives.

4. Morality and criminal law

Our proposed law would clearly have a purpose rooted in public morality. Criminalizing an activity can be controversial where the prohibited act harms nobody but the person committing the act. It can even be controversial where the person affected by the act consents. Such laws may draw accusations of imposing "moralism" to limit personal freedom, but they are legitimate and important nonetheless.

The SCC reminded us in *R v Malmo-Levine* (2003) that "[m]orality has traditionally been identified as a legitimate concern of the criminal law".[50] And as Justice McLachlin commented in *Reference re Assisted Human Reproduction Act*, "Every generation faces unique moral issues. And historically, every generation has turned to the criminal law to address them."[51] The law does not and has never granted absolute freedom to harm oneself or another person with his or her consent.

Criminal law limits personal autonomy even over one's own body. When it comes to assisted human reproduction, for example, the fact that "[d]ifferent people have taken different moral views on the issues"[52] did not mean Parliament lacked authority to legislate in this area. In fact, when the federal *Assisted Human Reproduction Act* was challenged on division of powers grounds, the validity of the challenged provisions depended in large part on whether they served moral objectives. The parts of the Act that were not challenged, and the parts that were upheld, clearly had moral objectives.[53]

That morality is a traditional and enduring foundation for criminal law also explains why "[s]everal instances of crimes that do not cause harm to others are found in the *Criminal Code*"[54], such as laws against cannibalism or drug consumption—crimes which involve one person acting alone. If criminal law can prohibit self-victimization, how much more can it prohibit doing certain things to another person, even with consent? That is why a person is morally and legally culpable for homicide or assault causing serious bodily harm or assisted suicide regardless of whether the victim consented.

We cannot read *Carter* as precluding the prohibition of assisted suicide for moral reasons. Rather, as explained above in Part 3(d), the SCC interpreted the existing prohibition, which says nothing explicitly about its objective, as being narrowly concerned with the autonomy of vulnerable persons. Parliament

[50] 2003 SCC 74, at para 77: "The protection of vulnerable groups from self-inflicted harms [drug use in this case] does not [...] amount to no more than 'legal moralism'. Morality has traditionally been identified as a legitimate concern of the criminal law […] although today this does not include mere 'conventional standards of propriety' but must be understood as referring to societal values beyond the simply prurient or prudish [citations omitted]." [*Malmo-Levine*]
[51] 2010 SCC 61, at para 1.
[52] *Ibid*, at para 4.
[53] *Ibid*, McLachlin C.J. at paras 11-48, and Cromwell J. at 289-292.
[54] *Malmo-Levine*, *supra* note 50, at para 117; the Court uses cannibalism as an example of an offence that does not harm another sentient being, but which is prohibited "on the basis of fundamental social and ethical considerations."

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would be in keeping with the traditional and legitimate use of its criminal law power by prohibiting assisted suicide and euthanasia for moral reasons.[55] It ought to do so.

Conclusion

A side effect of *Charter* review of legislation observed by political scientists is "policy distortion", a phenomenon that occurs where lawmakers choose policies that may be less effective but which they believe will be more easily defensible against Charter challenges.[56] Parliament may risk foregoing the best policy option because MPs mistakenly believe it falls outside the range of policies a court would accept under *Charter* review. It is crucial, therefore, that MPs are aware of the precise legal reasons underlying the outcome in a given case.

Members of Parliament must not misread *Carter* as precluding Parliament from prohibiting certain actions as inherently morally and legally wrong. The SCC has repeatedly affirmed that morality is a legitimate concern of the criminal law. Rather, *Carter* merely reinforces the well-established rule that Parliament cannot pursue a legislative objective in an overbroad manner where section 7 interests[57] are at stake. What legislative objectives it wishes to pursue is up to Parliament.

There are weighty issues involved in deciding whether or not or in what circumstances to permit assisted suicide—including the immorality of participating in another person's suicide, the normalization of suicide due to the participation of medical professionals, the diminishing of the lives of the sick and disabled, and the risk that vulnerable people will be subtly induced to choose death. The SCC interpreted the objective of s. 241(b) to be only preventing the latter. Parliament can correct this. By targeting the immorality of assisted suicide, Parliament can also prevent the associated harms just mentioned. However, taking as its primary objective the prevention of harms resulting from an intrinsically immoral and social act is putting the cart before the horse.

It is often said that hard cases make bad law. The judges of Canada's highest court are doubtless acutely aware of this maxim. It is not surprising, then, that the Supreme Court would clarify the limited scope of its declaration in *Carter*. Whether or not this hard case results in bad law is now up to Parliament.

[55] It would also be in keeping with enduring principles of medical ethics. As the Canadian Medical Association recognized in its 2007 policy document entitled *Euthanasia and Assisted Suicide*: "Euthanasia and assisted suicide are opposed by almost every national medical association and prohibited by the law codes of almost all countries. A change in the legal status of these practices in Canada would represent a major shift in social policy and behaviour. For the medical profession to support such a change and participate in these practices, a fundamental reconsideration of traditional medical ethics would be required."
[56] See Christopher Manfredi and James Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513. See also Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty", (1996) 94:245 *Michigan Law Review*.
[57] That is, the right to life, liberty, and security of the person in section 7 of the *Charter*.

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Appendix – Draft Legislation

Draft Legislation – 21 September 2015

First Session, Forty-second Parliament,

63-64 Elizabeth II, 2015-2016

STATUTES OF CANADA 2016

CHAPTER ___

Bill C-_____ An Act to amend the Criminal Code (prohibiting the acts of assisted suicide and euthanasia as intrinsically morally and legally wrong)

Preamble

Whereas section 91 of the *Constitution Act, 1867* gives exclusive authority to Parliament to make laws in relation to the Criminal Law;

Whereas Parliament has the authority to decide what constitutes a criminal act;

Whereas Parliament has the authority to enact criminal prohibitions on the basis of fundamental social and ethical considerations;

Whereas it is Parliament's duty to protect human life and uphold the inviolable right to life of all human beings;

Whereas assisted suicide and euthanasia are inherently social acts and are, in this respect, fundamentally different than the act of suicide;

Whereas the active participation by one person in causing the death of another person is intrinsically morally and legally wrong;

Whereas the previous two statements apply equally to physicians as to others;

Whereas permitting physician-assisted suicide and/or euthanasia would overturn longstanding and foundational principles of medical ethics;

And whereas an absolute prohibition on euthanasia and assisted suicide is not an overbroad means of achieving these objectives;

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Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

R.S., c. C-46

CRIMINAL CODE

R.S.C. 1970,

1. Section 14 of the *Criminal Code* is repealed and the following provision enacted:

Purpose

14. (a) The purpose of section 14 (b) is to prohibit, as intrinsically morally and legally wrong, the inflicting of death by one person on another regardless of the consent of the person on whom death is inflicted;

(b) No 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.

R.S.C. 1970,

2. Section 241 of the Act is repealed and the following provision enacted:

241 (a) The purpose of section 241.1(b) and (c) is to prohibit, as intrinsically morally and legally wrong, the act of counselling a person to commit suicide or the active participation in the suicide of another person, regardless of consent or the vulnerability of the person committing suicide.

(b) Everyone who counsels 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 fourteen years.

(c) 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 fourteen years.

[OR]

Section 241(b) of the Act is repealed and the following provision enacted:

241.1 (a) The purpose of section 241.1(b) is to prohibit, as intrinsically morally and legally wrong, the active participation by one person in the suicide of another person, regardless of the consent of the person committing suicide.

(b) Everyone who aids or abets a person to commit suicide 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 fourteen years.

One day after royal assent

5. The provisions of this Act come into force one day after the day on which this Act receives royal assent.