Respectfully Submitted

POLICY REPORT for Parliamentarians

Courtesy of the Association for Reformed Political Action (ARPA) Canada

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The Supreme Court of Canada overturned both its own precedent, as well as thousands of years of broader legal, medical, and moral precedent, when it struck down the Criminal Code prohibitions on assisted suicide in the case *Carter v. Canada* in February, 2015. The court ruled that sections 14 and 241(b) are "of no force or effect to the extent that 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 is intolerable to the individual in the circumstances of his or her condition."[1]

In this adjective-riddled sentence, our nation formally crossed a line whereby human life (post birth) moves from inviolable to violable. Unless Parliament passes legislation to the contrary, the right to life will transform from something that is objective and inherent in all humanity, to a subjective concept open to being challenged by oneself and by others.

Without the benefit of much explanation, the Supreme Court has given Canada's Parliament and Legislatures the overwhelming task of creating and implementing a system in which some people may kill others in some circumstances. The lack of reasoning leaves Canada's legal and medical experts unsure of what the decision actually means. "We've got a few key questions that we think need clarity and this is one of them: Is it euthanasia or is it assisted dying?" asked the Canadian Medical Association's director of ethics and professional affairs, Dr. Jeff Blackmer, in response to the decision.[2]

Crossing a sacred line

If there were a wastebasket in the Supreme Court of Canada devoted to words and expressions that the highest justices of our land are eliminating from legal discourse, the term "sanctity of human life" would be found there. It was only in 1993 (recent, by legal standards) that the Supreme Court examined the exact same issue in *Rodriguez v. British Columbia*. The majority in that case ruled that the value of the sanctity of life cannot be subordinated by the choice for death, even if that choice is an exercise of liberty. Choice is not an absolute principle. Writing for the majority in that case, Justice Sopinka explained, "This argument focuses on the generally held and deeply rooted belief in our society that human life is sacred or inviolable".[3] He quickly clarified that he meant this in a strictly secular sense. But the point remains: the Court relied on the concept of sanctity (or, inviolability) to refuse those who wanted to end their own lives with doctor assistance.

Compare the reasoning of Justice Sopinka above with the *Carter* decision of 2015, where the Supreme Court only spent one paragraph discussing this matter directly. "The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life" noted the court. Given this "profound respect", it is striking that the court then goes on to ignore the sanctity of human life entirely. They conclude that Section 7

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> *"also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life 'is no longer seen to require that all human life be preserved at all costs.' And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect."*[4]

This is an astonishing leap of reason. Even those interveners in the case who argued most emphatically for upholding the sanctity of human life made pains to clarify that it does not mean that life has to be preserved at all costs.[5] That isn't the issue. The Supreme Court justices say that sanctity of life is a most fundamental value, but then simply conclude that it is no longer an absolute value – it can be usurped by choice. A sacred line was crossed without even justifying it by reason, science, or morality. As columnist Andrew Coyne noted, the Supreme Court "did it because it wanted to."[6]

> "[W]hat can one say about a ruling that finds a right to death in a section of the constitution devoted to the right to life — that does so in breezy defiance, not just of Parliament's stated preferences, but of the Court's own ruling in a similar case, rendered two decades before? The Court goes to elaborate and unconvincing lengths to suggest it had been moved by changes in "the matrix of legislative and social facts" since then. The reality, one suspects, is rather simpler. It did it because it wanted to."
>
> - *Columnist Andrew Coyne*

What is the sacred line? It is wrong to intentionally kill an innocent human being. This has been a moral and legal principle that Western civilization was built upon, from the Sixth Commandment in Scripture[7] (formulated well over 4,000 years ago) to the prohibitions of murder found in every nation's criminal laws today.

Why is it sacred? Sanctity means being set apart or holy. Human life is not the same as other life forms, including plants or animals. As the preambles and introductions to the *Canadian Charter of Rights and Freedoms,* the *American Declaration of Independence,* and the *Universal Declaration of Human Rights* all correctly recognize in some way, human beings are set apart and possess inherent rights because we have been given these by our Creator. The Supremacy of God (as recognized in the preamble to Canada's *Charter*) is the absolute basis for human rights. God made humanity in His image (see Genesis 1 for broader context)[8] and with a special task of having stewardship over the earth. He made it absolutely clear that we may not violate the life of another innocent human being, even amidst a broken world that is plagued by violence and weakness.[9]

How can we maintain the sacred in a land that is secular? Although Canada is pluralist, it continues to be built upon principles that are absolutely essential to uphold human rights, equality, justice, and freedom. As the Supreme Court acknowledged in this *Carter* decision, the sanctity of human life is one of our most fundamental societal principles. If human life is not equally and inherently worthy of protection by the law, we become a society of animals that has no basis upon which to point to or uphold any human rights.[10] Concepts such as equality under the law rely on a belief that humanity is inherently worthy of this protection, regardless of physical or societal limitations.

This *Carter* decision from the Supreme Court of Canada is not neutral or objective. It is an intentional effort to replace God's normative law ("You shall not murder") with self-made law (my life, my choice). Time will show that this new moral foundation simply cannot sustain human rights. If autonomy or choice is the absolute standard by which public policy is determined, and if individuals do not embody the ethic of "love your neighbor as yourself", then we can be sure that one person's autonomy will violate another weaker person's right to life.[11]

How does assisted suicide and euthanasia violate the sanctity of human life? When legalized, these practices codify the principle that it is permissible to intentionally kill a human being when that person either requests it or no longer possess the qualities or capabilities that society deems are meaningful for human life.

This has significant consequences:

- The right to life and human dignity are no longer inviolable when they lose their objective and existential nature, that is, that humans have a right to life simply from being or existing as a human – an objectively measurable standard. When the right to life is changed to something subjective where the right comes from possessing specific abilities or enjoying certain qualities of life that others think are necessary, then the right to life becomes violable.
- Such a fundamental change makes it logically impossible to draw a fixed line between those who can be killed and those who cannot. For example, on what logical basis does the Supreme Court disqualify suffering children or suffering Alzheimer's patients from assisted suicide with their current qualification of competent, consenting adults? As we see in Belgium (detailed below), such conditions will be seen as discriminatory.
- As soon as the fixed line is crossed, anybody who meets the qualifications for legalized death now has to justify their existence (implicitly, if not explicitly) in the face of a law that would allow them to be killed for no other reason than their disability or suffering. And since they can now consent to die, criminal homicide provisions protecting the lives of similar people are naturally weakened – why prosecute when there is reasonable doubt as to whether the victim actually wanted to die?

As McGill ethicist Margaret Somerville remarked so poignantly in a letter to the Justice Minister following the ruling, the *Carter* decision "does not represent an evolution in the foundational values that bind us together as a society, but a revolution, a radical departure from upholding the value of respect for life."[12]

Lessons from other jurisdictions

The Supreme Court agreed with the trial judge's conclusion that "a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error."[13] This was based upon the trial judge's conclusions after her examination of evidence from Canada and abroad. We respectfully submit that logic, peer-reviewed research, and testimonials from permissive jurisdictions prove that this conclusion is either wishful thinking or intentionally deceptive. The Netherlands, Belgium, and the states of Washington and Oregon have all opened the doors to various forms of state-assisted death, justifying their move with promises of strict safeguards to protect people from abuse and error. The results are telling:

Netherlands: The number of euthanasia deaths has doubled between 2008 (2,331 reported) and 2013 (4,829 reported), as the practice becomes increasingly normalized.[14] A five-year *Lancet* study also found that 23% of euthanasia deaths were not reported to the required review committee in 2010, up from 20% in 2005.[15] The country also has mobile euthanasia teams, able to perform euthanasia for those whose request would be, or was already, declined by their doctor.[16] In 2005, Dutch pediatricians adopted the Groningen Protocol, allowing the killing of babies in "exceptional" circumstances.[17]

Belgium: A *Canadian Medical Association Journal* study has concluded that one-third of the euthanasia deaths it examined in Belgium were done without explicit consent,[18] in spite of a law clearly requiring consent. Belgian law also requires that only doctors administer euthanasia. Yet a 2010 study found that 45% of euthanasia deaths were administered by nurses.[19] In 2014, Belgium extended the "right" of euthanasia to children.[20] A mere twelve years after legalizing euthanasia, the country now has no age restrictions on the practice. Presumably, the state now has a duty to inform children that an acceptable option to address their suffering is death.

Research reveals similar results from the states of Washington and Oregon, which both allow assisted suicide. Oregon's assisted suicide deaths doubled between 2005 and 2013, while the population grew by only 7%. In Washington State, assisted suicide deaths grew by 130% between 2009 and 2012, when the population grew a mere 18%.[21]

Much more could be profiled about these jurisdictions. No jurisdiction in the world has been able to accomplish what the Supreme Court so naively decided can be done in Canada. So-called safeguards may help limit abuse and unintended deaths, but these safeguards cannot *eliminate* abuse and unintended deaths.

Euthanasia Deaths Permitted Under "Strict" Guidelines

Belgium, 2012: Ann G, a 44-year-old anorexic woman and victim of sexual abuse, received euthanasia to end her mental suffering.

Belgium, 2012: Marc and Eddy Verbessem, 45-year old deaf twins, were euthanized when they discovered they were becoming blind.

Belgium, 2013: Nathan/Nancy Verhelst received euthanasia after three sex change operations left her feeling she was a "monster."

Netherlands, 2013: Doctors euthanatized a 70-year-old whose sight-loss was "unbearable suffering" for her.

Netherlands, 2013: 54-year-old Gerty Gasteelen was euthanized because she suffered from mysophobia (fear of dirt).

Netherlands, 2013: A 63-year-old man did not want to retire from his job. After convincing his doctor that he needed euthanasia, he organized a farewell party where his colleagues shared final drinks with him before he was euthanized the next day.

Netherlands, 2015: A 47-year-old mother of a 13-year-old son and 15-year-old daughter received euthanasia because she suffered from a loud ringing in her ears (tinnitus).

Implications of the Carter decision for Parliament

Though Canada's Supreme Court declared the absolute prohibitions of assisted suicide in our Criminal Code unconstitutional, this does not mean that Canada has to jump to pass legislation allowing the practice. Some important questions must be answered:

Must Parliament pass a law allowing physician-assisted death? Section 33 of the *Charter* gives Parliament the authority to pass laws notwithstanding the Supreme Court's interpretation of certain parts of the *Charter*. This provision was designed to keep ultimate legislative authority with our elected representatives rather than a small group of appointed judges. Although any law passed under section 33 must be re-enacted every five years, that is not all that different from other laws, which can be changed or repealed by future governments. *Parliament has the constitutional and moral authority to pass legislation expressly prohibiting all euthanasia and assisted suicide, notwithstanding the Supreme Court's interpretation of section 7 of the Charter*. If a future government decides to cross the sacred line and legalize physician-assisted death by not renewing the section 33 declaration, that government at that time will be responsible for that choice.

Does Parliament even need to do anything? In an age where so many look to the state to promote welfare, equality, protection, and health, and to oppose bullying and suicide, it is astonishing to see the same voices demand that the state not interfere with the killing of the most vulnerable in society (the disabled, sick and elderly). Just as Canada's lack of abortion law has resulted in well over 100,000 pre-born lives extinguished every year, we can be sure that having no laws restricting euthanasia or assisted suicide will result in the normalization of suicide and pragmatic killing.

If Parliament refuses to use section 33 and intends to allow physician-assisted death, how restrictive can it be? The decisions from the BC Supreme Court and the Supreme Court of Canada make it clear that the judges made their decision with the expectation that Parliament will follow up with very strict limitations. For example, the Supreme Court notes, "Parliament must be given the opportunity to craft an appropriate remedy… Complex regulatory regimes are better created by Parliament than by the courts" (para. 125).[22]

If the Supreme Court says Parliament must be given "opportunity to craft an appropriate" response, then the word "opportunity" must be interpreted as a meaningful one, an opportunity that includes enough time to create a "complex regulatory regime". Further, both courts concluded 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" (para. 105). These courts both stand for the proposition that in order to identify and very substantially minimize (though not eliminate!) inherent risks, Parliament *must* carefully design a system that imposes stringent limits that are scrupulously monitored and enforced.

Conclusion & Recommendations

ARPA Canada respectfully calls on the federal and provincial governments to do everything in their power to uphold the intrinsic worth of all human life. Like fighting for any human right, this requires courage. The federal government has the constitutional means and authority to pass legislation which absolutely prohibits physician-assisted death and includes a declaration invoking section 33 of the *Charter*. This response can continue to be done every five years by future governments in perpetuity. In addition to protecting the inviolability of human life, such a measure sends a long-overdue message to the courts that they are called to interpret the law that is in place, not to chart the moral direction or social policy of the nation according to their personal worldview.

However, if the government insists on following the direction established by the *Carter* decision, we recommend that it first conduct a Royal Commission to study the matters presented in this policy report and to make recommendations regarding the improvement of palliative care. This will likely require the use of section 33 to provide enough time (likely 5+ years) to conduct such a study and possibly additional time to work with the provinces in improving palliative care services.

Even if the government is determined to cross the most sacred line with the Supreme Court and pass legislation allowing for assisted death by ignoring the evidence of the societal harm of legalizing assisted suicide and euthanasia, it should not be hesitant to invoke section 33 to provide sufficient time to properly introduce, study, amend, and pass the legislation. Among other things, the legislation can include the following restrictions to help mitigate the evil and harm, at least temporarily:

1) Clarify in the preamble that assisted suicide is not medical care; it is an exception to the Criminal Code prohibition of homicide;
2) Use accurate terminology that actually describes what is occurring. Because the Supreme Court's ruling is so vague and subjective, definitions are important. For example, "suffering" should not include psychological suffering; "dying with dignity" or "medical aid in dying," are simply euphemisms. Assisting in suicide and euthanasia are descriptive and accurate terms;
3) Only allow assisted suicide, not euthanasia. Legal opinions indicate this is consistent with the vague *Carter* decision requirements.[23] In addition to decreasing the number of deaths, this would ensure that medicine maintains it focus on caring, not killing;
4) Ensure that Section 241(a) of the Criminal Code, which prohibits counselling to commit suicide, is consistently upheld, investigated and, where necessary, prosecuted. All assisted suicides must be requested by the person who desires it and must not be suggested by others;
5) Only allow assisted suicide for individuals who are terminally ill (defined clearly – for example, with three months left to live);
6) Clearly preclude psychological suffering as a justifiable basis for death;
7) Require a two panel process for determining eligibility for assisted suicide. The first panel should be made up of three *independent* doctors to determine the medical grounds for assisted suicide. The second panel should include one judge to determine legal eligibility of assisted suicide. This protects against rogue doctors who might liberally approve assisted suicide and also makes the final determination both a legal and a medical one;

8) Require contemporaneous consent of competent adults to ensure consent is given at the exact time of death. This protects incapacitated people who may have indicated consent to death earlier in life, but where their wishes cannot be confirmed at the present time;

9) The onus must be on the death-providers to provide evidence from third parties that the request for death is not coerced, in every case. Failure to provide this should result in a prison sentence, served consecutively for multiple offences;

10) Related to the foregoing, in order to ensure contemporaneous consent, require the videotaping of the entire process: initial request for assisted suicide, discussions with doctors, the panel hearings, the lethal injection and the pronouncement of death. These videos must be regularly and independently reviewed by a joint panel of doctors, lawyers and ethicists and must be immediately and fully accessible to any judge, officer of the court, or Parliamentarian on request.

11) Assisted suicide should only be available for those who are otherwise physically unable to take their own life. This limits the normalization of allowing some people to kill other people;

12) Explicitly protect the conscience rights of all physicians and health care workers so they have the freedom to refuse to take part in, refer for, or counsel against the killing of any patient. No other jurisdiction that allows euthanasia or assisted suicide imposes a legal duty on physicians who conscientiously object to make referrals for physician-assisted death;

13) Require a judicial review of assisted deaths every three years. If the findings reveal that the law is not being followed, there must be an immediate nation-wide moratorium on the provision of assisted death, since it is not possible to guarantee the security of all persons.

We realize that following through on our recommendations to uphold the absolute prohibitions against euthanasia and assisted suicide is a daunting task. Yet doing so would be consistent with the constitution, God's calling for you as civil authorities (Romans 13), and the well-being of our neighbours.

Respectfully Submitted,

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[1] *Carter v. Canada (Attorney General),* 2015 SCC 5, at para. 147.
[2] Sharon Kirkey, "How far should a doctor go? MDs say they 'need clarity' on Supreme Court's assisted suicide ruling." *National Post,* 23 Feb 2015. Available online: <http://news.nationalpost.com/news/canada/how-far-should-a-doctor-go-mds-say-they-need-clarity-on-supreme-courts-assisted-suicide-ruling>.
[3] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 585.
[4] *Carter v. Canada*, *supra* note 1 at para. 63.
[5] See, for example, ARPA Canada's intervener factum to the Supreme Court of Canada, available at ARPACanada.ca.
[6] Andrew Coyne, "Supreme Court euthanasia ruling marks the death of judicial restraint." *National Post*, 13 Feb 2015. Available online: <http://news.nationalpost.com/full-comment/andrew-coyne-supreme-court-euthanasia-ruling-marks-the-death-of-judicial-restraint>.
[7] See The Holy Bible, Exodus 20 and Deuteronomy 5.
[8] The Holy Bible, Genesis 1:27.
[9] The Holy Bible, Genesis 9:5-6.
[10] A fuller explanation of this is available in ARPA Canada's factum to the Supreme Court, available at ARPACanada.ca.
[11] ARPA Canada has published an entire book on this topic. *Building on Sand: Human Dignity in Canadian Law and Society* by Mark Penninga is viewable online at ARPACanada.ca.
[12] Margaret Somerville, letter to the Honourable Peter MacKay, 19 Feb 2015.
[13] *Carter v. Canada*, *supra* note 1 at para. 105.
[14] Alex Schadenberg, "Netherlands 2013 euthanasia report – 15% increase, euthanasia for psychiatric problems and dementia", 29 Sept 2014. Available online: <http://alexschadenberg.blogspot.ca/2014/09/netherland-2013-euthanasia-report-15.html>.
[15] Prof Bregje D Onwuteaka-Philipsen et al, "Trends in end-of-life practices before and after the enactment of the euthanasia law in the Netherlands from 1990 to 2010: a repeated cross-sectional survey." *The Lancet*, Vol 380, No 9845, p. 908-915, 8 Sept 2012. Available online: <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2812%2961034-4/abstract>.
[16] Schadenberg, *supra* note 14.
[17] Eduard Verhagen and Pieter Sauer, "The Groningen Protocol – Euthanasia in Severely Ill Newborns." *New England Journal of Medicine*, 10 Mar 2005. Available online: <http://www.nejm.org/doi/full/10.1056/NEJMp058026>.
[18] Kenneth Chambaere et al "Physcian-assisted deaths under euthanasia law in Belgium: A population-based survey." *Canadian Medical Association Journal*, 15 June 2010. Available online: <http://www.cmaj.ca/content/182/9/895>.
[19] Derek Miedema, "The illusion of limited legalized euthanasia" *IMFC Review*, 19 May 2011. Available online: <http://www.imfcanada.org/issues/illusion-limiting-legalized-euthanasia>.
[20] BBC.com "Belgium's Parliament votes through child euthanasia" 13 Feb 2014. Available online: <http://www.bbc.com/news/world-europe-26181615>.
[21] Derek Miedema, "No second chances: International experience shows legal euthanasia is never just for "exceptional" cases", 21 Oct 2013. Available online: <http://www.imfcanada.org/no_second_chances>.
[22] *Carter v Canada, supra* note 1 at para. 125.
[23] For example, see "the Carter decision authorizes only assisted suicide" by *Living with Dignity* available at http://vivredignite.org/en/2015/03/the-carter-decision-authorizes-only-assisted-suicide>.