

Palliative Sedation

A legal perspective

“Palliative sedation” means the intentional administration of sedative medication to reduce a patient’s level of consciousness, with the intent to alleviate suffering at the end of life. It includes both intermittent and continuous sedation, as well as both superficial and deep sedation. It may be accompanied by the withdrawal of artificial hydration and nutrition.

(Justice Smith, *Carter v. Canada (Attorney General)*, 2012 BCSC 886)

Variables within palliative sedation

- intermittent and **continuous**
- superficial and **deep**
- with artificial hydration and nutrition and **without**

Deep and continuous sedation +
withholding/withdrawal of
artificial hydration and nutrition
(PS̄ANH)

A Canadian legal perspective

Three types of PS̄ANH

- Type 1 – **will not** hasten death
 - Death anticipated within 48 hours
- Type 2 – **may but is not certain to** hasten death
 - Death anticipated within 2 to 14 days
- Type 3 – **is certain to** hasten death
 - Death anticipated in, e.g., six months

Are types 1, 2, 3 PS̄ANH legal?

- Provincial/territorial legislation?
- Case law explicitly addressing the issue?
- Canadian *Criminal Code*?

Provincial/territorial legislation

- Quebec *An Act respecting end-of-life care*
 - “**continuous palliative sedation**” = “care that is offered as **part of palliative care** and consists in administering medications or substances to an end-of-life patient to relieve their suffering by rendering them unconscious without interruption until death ensues.” (emphasis added)
 - “**palliative care**” = “the total and active care delivered by an interdisciplinary team to patients suffering from a disease with reserved prognosis, in order to relieve their suffering, **without delaying or hastening death.**” (emphasis added).

Provincial/territorial legislation

- Quebec legislation
 - Type 1 permitted
 - Silent on Types 2 and 3
- All other provinces/territories
 - Silent

Case law explicitly
addressing the issue

Case law explicitly addressing the issue

- No cases explicitly testing the legality
- Comments on issue in *Carter v. Canada (Attorney General)*

Carter v. Canada (Attorney General) @trial

- “So far as I am aware, palliative or terminal sedation has not been the subject of judicial consideration in Canada. It seems, however, to be a practice that may fall within the principles already described with regard to informed consent and potentially life-shortening symptom relief.” (Justice Smith)
- “the law permits death-hastening acts through... declining nutrition and hydration while under palliative sedation.” (Defence position embraced by Justice Smith)

Problems with reliance on *Carter*

- Not clear whether contemplating all 3 types of PS̄ANH
- What are the boundaries of permissibility? (Types 1 and 2 or also 3?)
- Reliance on *Rodriguez v. Canada (Attorney General)*
 - Only contemplating potentially life-shortening effects of opioids and other pain medications (but not sedatives) and not life-shortening effects of withholding/withdrawal of artificial nutrition and hydration
 - Not applicable
 - Reliance on principle of double effect
 - Rejected by SCC in other cases
 - Context was constitutional challenge not criminal trial
 - Question here is interpretation of *Criminal Code* not constitutionality

Canadian *Criminal Code*

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- Aiding suicide?
- Administering a noxious thing?
- Failure to provide the necessaries of life?
- Criminal negligence causing death?
- Culpable homicide (murder or manslaughter)?

Does PS̄ANH violate Canadian *Criminal Code*?

	Aiding suicide	Administering a noxious thing	Failure to provide the necessaries of life	Criminal negligence causing death	Culpable homicide (murder or manslaughter)
Type 1	No	No	No	No	No
Type 2	???	No	w/o consent Yes with consent ?	w/o consent Yes with consent ?	w/o consent Yes with consent?
Type 3	???	No	w/o consent Yes with consent ??	w/o consent Yes with consent ??	w/o consent Yes with consent??

What **should** the law be?

(In order to be consistent with the legal status of analogous practices)

- Type 1 – **Legal** (routine medical procedures that don't shorten life)
- Type 2 – **Legal with consent** (potentially life-shortening opioids and other pain medications)
- Type 3 – **Legal when eligibility criteria and procedural safeguards for access to MAiD are met** (medical assistance in dying)

Amend the *Criminal Code* #1

- Make clear that Types 1 and 2 are not contrary to the *Criminal Code* and that, like any ordinary medical treatment, free and informed consent from the patient (or patient's substitute decision-maker where the patient does not have competence to make the decision) is necessary and sufficient for access.

Amend *Criminal Code* #2

- Make clear that Type 3 is not contrary to the *Criminal Code* **if but only if** the eligibility criteria and procedural safeguards for access to MAiD are met.

Why not “leave well enough alone”?

- Underinclusion
 - Unalleviated suffering for patients
 - chilling effect on practice (esp. Types 1 and 2)
 - Sophie’s choice of suffering or MAiD for patients who would be eligible for MAiD and accept Type 3 PS̄ANH but reject MAiD
 - Denial of preferred option for patients who are eligible for MAiD, accept both PS̄ANH and MAiD, but would prefer PS̄ANH
- Overinclusion
 - PS̄ANH without consent
 - PS̄ANH beyond boundaries of MAiD
- Stress on health care providers (fear of liability)

Why fix problem via *Criminal Code*?

- Source of problem
- Federal jurisdiction
 - consistency across the country
- Courts reluctant to engage
 - Prospective immunity
- Court challenges take too long
- Court challenges put burden of clarification/reform on backs of those least able to bear it (patients)
 - Financial, physical, psychological, emotional

Proposed *Criminal Code* amendment

- “‘palliative sedation’ means the administration of deep and continuous sedation whether or not accompanied by the withholding or withdrawal of artificial nutrition and hydration, where the physician’s purpose is to alleviate suffering, and where the physician believes on reasonable grounds that it will not, or might but is not certain to, shorten the life of the person;”

Proposed *Criminal Code* amendment

- “No physician, other health care provider acting under the direction of a physician, or nurse practitioner is guilty of an offence under this Act where the physician, other health care provider acting under the direction of a physician, or nurse practitioner provides palliative sedation (whether or not accompanied by artificial nutrition and hydration) to a patient with valid consent from the patient if competent (or through a valid advance directive if incompetent) or the patient’s statutory substitute decision-maker (if incompetent and without a valid advance directive).”

Proposed *Criminal Code* amendment

227(1) Exemption for medical assistance in dying

No medical practitioner or nurse practitioner commits culpable homicide, failure to provide the necessities of life, causing death by criminal negligence, or aiding suicide if they provide a person with medical assistance in dying in accordance with section 241.2.

241.1 Definitions

...

"medical assistance in dying" means

...

(c) the administering by a medical practitioner or nurse practitioner of deep and continuous sedation accompanied by the withholding or withdrawal of artificial nutrition and hydration to a person, at their request, that the medical practitioner or nurse practitioner believes on reasonable grounds is certain to cause their death.