

# Legal Status of Assisted Dying: Canada & the U.S.

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# From Ban To *Carter v. Canada*

- Was a blanket criminal prohibition on assisting suicide, but then:
- *Carter v. Canada (A.G.)* (2015), a unanimous, 9 judge decision, held that these sections of the Criminal Code unjustifiably infringed on constitutionally-protected rights to life, liberty & security of the person to the extent they prohibit medical assistance in dying for **adults, who (1) clearly consent to the termination of life; and (2) have a 'grievous and irremediable medical condition (including an illness, death or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition'**.
- Declaration of invalidity suspended to allow gov'ts to respond;
- **What Carter did not affect:** existing criminal prohibitions on taking life & on assisted suicide where *Carter* conditions not met; existing law about treatment consent & refusal (including withholding & withdrawing life-sustaining trt), by decisionally capable people & substitute decision makers.

# Quebec

- Prior to *Carter*, Quebec had already passed legislation to allow PAD as part of end of life care; impetus from profession & public, with extensive consultation (2014);
- Free vote of Nat'l Assembly;
- Came into effect Dec. 2015;
- Generally narrower than *Carter* (eg. 1 of eligibility criteria to receive medical assistance in dying: person must be at the end of life).

# And Now...

- Criminal Code was amended June 2016 to legalize & regulate provision of medical assistance in dying by MD's & nurse practitioners in limited circumstances;
- Permits assisted suicide and voluntary euthanasia;
- Narrower eligibility criteria than *Carter*:

# Eligibility Criteria

Must have a “grievous & irremediable medical condition”, which requires that the person:

- Have a serious & incurable illness, disease or disability;
- Is in an advanced state of irreversible decline in capability;
- The illness, disease or disability or the state of decline causes them enduring physical or psychological suffering that is intolerable to them & cannot be relieved under conditions they consider acceptable; and
- Their natural death has become reasonably foreseeable, taking into account all their medical circumstances, without necessarily having a prognosis as to the specific length of time they have remaining;
- PLUS...

# More on Eligibility...

- Must be 18 or older, decisionally capable with respect to health care, eligible for publicly funded health services in Canada;
- Decision must be voluntary;
- Practitioners must comply with statutory procedural safeguards, including 2 assessments that eligibility criteria met, 10 day waiting period before administer after patient confirmation, patient informed of all means available to relieve suffering, including palliative care, reporting requirements etc.;
- Must also comply with provincial laws, rules & standards (constitutional jurisdiction over health is divided, but primarily provincial).

# Is That It?

- Not necessarily. Gov't committed to **independent review** of:
  1. Mature minors;
  2. Advance requests;
  3. Requests where mental illness is the sole underlying medical condition.

Report to be submitted to Parl't within 2 years;

Also, after 5 years, **Senate or House cttee must review** legislation & state of palliative care & report findings & recommendations to Parl't.

**Apr 2017:** gov't released 1<sup>st</sup> interim report on MAiD, June – Dec. 2016: 803 deaths with med assistance, = .6% of deaths in Can.

# Legal Challenges

- When has “natural death become reasonably foreseeable”?
  1. Is that requirement contra Charter of Rights & Freedoms (no such temporal limitation in *Carter*) ? (*Lamb v. Canada*; also Quebec challenge – Nicole Gladu, Jean Truchon);
  2. What is sufficient to satisfy that condition right now, and who decides? *A.B. v. Canada*, 2017 ONSC 2759: Ct held MD decides (but ct can opine on what death being “reasonably foreseeable” means in this pt’s circumstances...hmmm – a distinction without a difference?).

# More Legal Challenges

- **Access:**
- Interrelation of patients' rights to MAiD and practitioners' conscience rights – does right of conscience extend to refusal to refer to another practitioner who is not opposed to MAiD?
- Do institutions have conscience rights?

## **And yet to come:**

- Relation with unregulated practices, eg patient who starves self (is he/she entitled to sedation to cope?) to reach point where would meet eligibility criteria for MAiD (i.e. put self in a “grievous & irremediable condition”)? (Quebec example);
- And more...

# U.S. (briefly)

- Neither 'right to die' nor 'right to assist in dying' protected by US Constitution; jurisdiction over legal status of physician aid in dying left to the states;
- Oregon = 1<sup>st</sup> state to legalize PAD after ballot initiative in 1994; went into effect 1997, after various challenges;
- Followed by Washington state (2008), Vermont (2013), California (2015), Colorado (2016); all except Vermont by voter initiative. *Death with Dignity Act* passed Feb. & implemented July 2017 in District of Columbia; may be shortlived because of Republican (federal) opposition;
- Montana: Supreme Ct concluded MD's could rely on defence of consent, if charged with homicide for assisting competent terminally ill patient to commit suicide (*Baxter v. Montana*).

# Physician Assisted Dying in the U.S.

- Where legal in U.S., eligibility typically limited to patients who are terminally ill (i.e. illness likely to be fatal within 6 months); presence of suffering is not the focus;
- Physicians can prescribe medication for self-administration, not administer it to patients themselves;
- Similar provisions re competence, voluntariness, 2 MD opinions (at least about the patient's competence), waiting period etc...

# More on the U.S.

- Majority of states continue to maintain statutory bans against physician aid in dying; lawsuits seeking to legalize the practice have mostly been unsuccessful;
- Many initiatives to legalize medical assistance in dying have been & continue to be brought forward.