

Schulich School of Law, Dalhousie University

Schulich Law Scholars

Articles, Book Chapters, & Popular Press

Faculty Scholarship

2-24-2015

After Carter v. Canada

Jocelyn Downie

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/scholarly_works



Part of the [Health Law and Policy Commons](#)

After Carter v. Canada

BY [JOCELYN DOWNIE](#) WEB ONLY

SHARE



• [in](#)

What should federal lawmakers do next?



Photo of Jocelyn Downie by Marvin Moore

When it recently [struck down](#) the *Criminal Code* prohibitions on physician-assisted dying, the Supreme Court of Canada gave federal and provincial legislatures 12 months to craft new legislation to meet the conditions set out in its landmark ruling. Of course, the legislatures could do nothing, just as they did after the SCC struck down the criminal law on [abortion](#) years ago. But this would

mean that, as of February 6, 2016, physician-assisted dying would be legal in Canada for those individuals who meet the criteria set out by the Court (subject to the general regulation of health services).

I leave the assessment of the political wisdom of choosing this path to the political scientists and strategists. Here, I simply explore what the next steps for federal lawmakers would be if Parliament were to decide to legislate in an effort to respect the SCC decision and reflect the will of the electorate. The obvious questions then are: “what should this legislation contain?” and “how should the federal Parliament go about legislating on the issue of physician-assisted dying?”

As stated in *Carter*, the *Criminal Code* prohibitions on physician-assisted dying 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 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. ‘Irremediable’, it should be added, does not require the patient to undertake treatments that are not acceptable to the individual.” These criteria for access could, quite straightforwardly, be reflected in a [Bill](#) reforming ss.14 and 241(b) of the *Criminal Code*.

However, a number of questions remain unanswered.

First, should the criteria for access be broader than those set out by the SCC? Some have suggested that competent adults should be able to access physician-assisted dying through advance directives (commonly known as “living wills” or “durable powers of attorney for health care”). This suggestion is often made with reference to those diagnosed with Alzheimer’s disease and other forms of dementia. Some have suggested that mature minors should also have access – just as they are now sometimes permitted to refuse life-sustaining treatment. Should the legislation have a residency requirement or should individuals who come from other countries be able to access physician-assisted dying in Canada?

Second, what procedural safeguards should be put in place? Must two physicians be involved or is one sufficient? How much time must pass, if any, between the time of request for assistance and the provision of assistance? And, must a committee, special tribunal, or a judge review the request?

Third, what oversight system should be put in place to monitor physician-assisted dying in Canada? Should physicians have to report all cases of assisted dying, and if so, to whom? What information should be reported (e.g., demographic information, medical conditions, reasons for accessing assisted dying)? Should

the body receiving reports issue annual reports to the Canadian public? And what structure rests in between insufficient controls and overly burdensome bureaucracy?

Fourth, how do we reconcile the *Charter* rights of patients (life, liberty, and security of the person – accessing assisted dying) and physicians (conscience – refusing to participate in assisted dying)? The SCC said explicitly in *Carter* that “nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians’ colleges, Parliament, and the provincial legislatures.” So should physicians have a duty to provide assistance? Should they have a duty to refer? Should institutions (as opposed to individuals) be allowed to refuse to provide assistance?

Finally, can we take the process of legislating on physician-assisted dying as an opportunity to improve end-of-life care more broadly? Can we tie opening access to assisted dying to improving access to palliative care (as happened in Quebec and [Belgium](#))? Can we clarify the legal status of unilateral withholding and withdrawal of potentially life-sustaining treatment and palliative sedation? Can we establish advance directives registries?

These are all challenging questions. Fortunately, Parliament does not have to start from scratch in trying to answer them before the SCC’s declaration of invalidity takes effect. Lessons about content can be drawn from the experiences of jurisdictions that have permitted and regulated assisted dying for many years (e.g., the [Netherlands](#) and [Oregon](#)) and from the careful reviews of the issues conducted by the [Royal Society of Canada Expert Panel on End of Life Decision-Making](#) and the [Quebec National Assembly Select Committee on Dying with Dignity](#).

Lessons about process can be drawn from the recent experience in Quebec. In developing *An Act respecting end of life care*, the Quebec National Assembly engaged in a remarkably non-partisan and highly consultative process. This process resulted in legislation that has extremely strong support across party lines and throughout the Quebec population and precisely the kind of legitimacy needed for legislation on such a significant social issue.

In a motion introduced on February 20, 2015, Justin Trudeau called for the appointment of a special committee to “consult with experts and with Canadians, and make recommendations for a legislative framework that will respect the Constitution, the *Charter of Rights and Freedoms*, and the priorities of Canadians.” This committee could take draft legislation that has already

been [proposed](#), revise it as needed to make it consistent with the SCC decision in *Carter* and the results of the committee consultations. The committee members could also make an explicit commitment to conduct their business in a non-partisan manner.

Ideally, the federal Parliament would also work with the provinces and territories as well as the health regulatory bodies to ensure that all of the interdependent systems that will have an impact on physician-assisted dying (including any legislation the federal Parliament is seeking to introduce) work as efficiently and consistently as possible. Cooperation and collaboration across jurisdictions and sectors is essential.

Within the next year, federal lawmakers could dramatically improve end-of-life care in Canada. But we are left with one final question – is there sufficient political will to do so?

Jocelyn Downie is a professor in the faculties of law and medicine, and associate dean, graduate studies, at the faculty of law, at Dalhousie University.