Medical Legal History of Assisted Dying Rodriguez to Bill C-7

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Qualifications (or Conflicts of Interest)

1. Former board member Dying with Dignity Canada
2. Former board member World Federation of Right to Die Societies
3. Testified as an expert witness in the *Carter* case.
4. Testified before the Special Parliamentary Committee, the Senate and the House of Commons on Bill C-14
5. Testified to the Senate on Bill C-7, February 2021

Learning Objectives

1. To understand the medical/legal history of Medical Assistance in Dying (MAiD) in Canada
2. To be familiar with Bills C-14 and C-7
3. To discuss the role of psychiatry
    a) Capacity assessments
    b) Psychiatric illness

Constitution Act 1982

Canadian Charter of Rights and Freedoms

Section 7	"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 15	No discrimination allowed on basis of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"

1. Carter v. Canada http://scc-csc.lexum.com
2. Charter http://laws.justice.gc.ca/eng/Const

Criminal Code

Section 241 — anyone assisting a person in committing suicide commits an indictable offense and that no person can consent to death being inflicted on them

Attempted suicide has not been a criminal act in Canada since 1972

Rodriguez v. British Columbia - 1993

- Sue Rodriguez was suffering from ALS and sought PAD (Physician Assisted Dying)
- Supreme Court of Canada denied her the right to PAD by a 5-4 decision
- Justice Sopinka – no other western democracy permitted assistance in dying
- Eventually she was assisted to die – an illegal act
- By 2010 eight jurisdictions, starting with the State of Oregon in 1994, had legalized medical aid in dying

The Carter Case

- Kay Carter had travelled to Switzerland for Physician-Assisted Dying (PAD) in 2010
- She was suffering from spinal stenosis
- She was represented by her daughter

Kay Carter

The Carter Case

- Case was heard by Madame Justice Lynn Smith
- 395 page decision – June 15, 2012

- Findings:
  1. PAD would not impede development of palliative care
  2. A system could be designed that would protect the vulnerable
  3. Physicians were capable of assessing patient competence

Carter v. Canada, Supreme Court of BC, 2012 BCSC 886, June 15, 2012 Docket S112688

The Carter Case

- The BC Court of Appeal (2013) by a 2 – 1 decision held that Justice Smith had erred by not considering herself bound by *Rodriguez*
- The Chief Justice dissented

http://www.courts.gov.bc.ca/jdb-txt/CA/13/04/2013BCCA0435.htm

The Supreme Court of Canada (February 6, 2015)

- The trial judge was entitled to revisit *Rodriguez*
- The law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*

Chief Justice McLachlin

Carter v. Canada, 2015, SCC 5 (CanLii)

The Supreme Court of Canada

- The Supreme Court of Canada allowed the appeal
- Found that denying PAD offended Section 7 of the Charter
- “Properly designed and administered safeguards were capable of protecting vulnerable people from abuse and error”

The Supreme Court of Canada

PAD should be available for:

1. A “competent adult person”
2. who has a “grievous and irremediable medical condition (including an illness, disease or disability)”
3. that causes “enduring suffering that is intolerable to the individual”

The Carter Case

4. *Rodriguez* did not prevent her from reviewing the constitutional issues
5. Concluded that PAD was permissable for “grievously ill and irremediably suffering” people who are competent
6. The prohibition against PAD offended Section 7 of the Charter
7. Ms. Taylor was granted access to PAD
8. The Government of Canada was given one year to amend legislation

The Supreme Court of Canada

- The decision was unanimous
- All nine Justices signed the decision
- The government was given 12 months to amend the law
- The sitting government (Conservative) did nothing for 8 months
- An election changed the government (Liberal)
- The new government asked for a 6-month extension and in a 5 – 4 decision the Supreme Court of Canada gave them a 4 month extension

Court Cases Before Bill C-14

- Persons seeking PAD had to apply to the courts
- About 12 persons were granted access to PAD
- A court in Alberta granted PAD to a woman with only a psychiatric condition
- This was appealed by the Attorney General of Canada but by a 3 – 0 decision the Court of Appeal upheld the decision (referencing the *Carter* decision)

Canada (AG) v. E.F., 2016 ABCA 155

Physician Assisted Dying and Psychiatry

- E.F. was a 58-year-old woman with a diagnosis of a severe conversion disorder
- She applied to the Supreme Court of Alberta for PAD.
- She had undergone extensive treatment from psychiatrists, neurologists, and other specialists
- She had trials of many medications, psychotherapy, and ECT – all without benefit
- She did not want any further treatment
- She was supported in her request for PAD by her longstanding family doctor and her family members
- She was granted access to PAD by Madame Justice M.R. Bast on May 5, 2016

Physician Assisted Dying and Psychiatry

- The Attorney General of Canada and BC appealed this decision
- The court concluded:
  1. *Carter* does not require "terminal illness"
  2. Persons with a psychiatric illness are not excluded from PAD if they fit the other criteria
- The Attorney Generals were criticized by the court for bringing the appeal forward
- The court unanimously (3 – 0) granted E.F. access to PAD on May 17, 2016
- E.F. and 10 of her family members came to Vancouver where she had an assisted death

Parliamentary Debate

- Between 1991 and 2010 the House of Commons debated 6 private members bills seeking to decriminalize assisted suicide. None were passed

Quebec

- All party Select Committee on Dying with Dignity in 2012 recommended recognizing legal recognition of PAD
- They passed Bill 52 allowing PAD as of December 2015

Special Joint Committee of Parliament February 2016

Set up to advise the government on legislation.

Recommended:

1. MAiD* (Medical Assistance in Dying) “for terminal and non terminal grievous and irremediable conditions”
2. Would include psychiatric illness
3. Age 18 and older with a second bill for mature minors
4. Advance requests
5. National reporting
6. Better palliative care
7. National strategy for dementia

* MAiD is now used to include doctors and nurse practitioners

Bill C-14

- An amendment to the Criminal Code
- Exempts doctors, nurses and pharmacists from criminal prosecution for participating in MAiD
- Doctors and nurse practitioners may administer medication IV or write a prescription that patient may take
- At least 18 years old
- Grievous and irremediable:
  - Serious and incurable
  - Advanced state of irreversible decline
  - Suffering is intolerable and irremediable
  - “natural death has become reasonably foreseeable”

Bill C-14

Process

- Two medical practitioners or nurse practitioners
- Two independent witnesses
- At least 10 days between request and MAiD
- Patient must be given an opportunity to change their mind immediately before MAiD
- Voluntary, informed consent, from a competent individual

Problems with Bill C-14

- Many critics believed that C-14 is not compliant with *Carter*
- Government refused to ask the Supreme Court to rule on the constitutionality of C-14
- Heavy lobbying from the Catholic Church to narrow *Carter*
- "Natural death must be reasonably foreseeable" – no definition

A.B. v. Canada (Attorney General) June 19, 2017

- A.B., an almost 80-year-old woman, suffered from osteoarthritis
- The issue was whether her "natural death was reasonably foreseeable"
- Knee and hip replacements, metal rods in her legs and back
- She refused more operations
- Perell, J. concluded that A.B. had a "trajectory towards death"
- "Natural death need not be connected to a particular terminal disease or condition and rather is connected to all of a particular person's medical circumstances"

https://canlii.ca/t/h4cnh

Truchon c. Procureur Général du Canada September 11, 2019

- Jean Truchon was a 51-year-old man who suffered from spastic cerebral palsy since birth
- Completely paralyzed except for his left arm
- Cognitive functioning normal or above
- March 2012:
    1. Severe spinal stenosis
    2. Myelomalacia
- Baudouin, J.S.C. concluded:
    1. No evidence of abuse, slippery slope, or risks for vulnerable people
    2. Accepted the testimony of the psychiatrist Dr. Justine Dembo
    3. Rejected the testimony of the government's witnesses, the psychiatrists Drs. Sonu Gaind, Scott Kim and Mark Sinyor
    4. "Reasonably foreseeable natural death" infringes Sections 7 and 15 of the Charter and is not justified under section 1

Nicole Gladu and Jean Truchon

https://canlii.ca/t/j4f8t

First Annual Report, MAiD in Canada 2019 Published June 2020

- 5,631 deaths by MAiD in 2019
- 26.1% increase since 2018
- In 2016, deaths via MAiD: 1,015
- 2.0% of all deaths in Canada
- 80% 65 or older
- Medical conditions:
  - Cancer 67.2%
  - Respiratory 10.8%
  - Neurological 10.4%
- No reporting on psychiatric diagnoses
- Settings:
  - Hospital 36.3%
  - Home 35.2%
- 26.5% of requests were denied
- Of those eligible:
  - 15.2% died of another cause
  - 3.6% withdraw request

Potential Roles for Psychiatry

1. Assessing capacity/competence
2. Assessing “grievous and irremediable” in the context of psychiatric illness
3. Assessing psychiatric symptoms and potential treatment in patients without a primary psychiatric disorder, e.g. depression the context of terminal cancer

Consent: A Guide for Canadian Physicians
https://www.cmpa-acpm.ca

Competence and Capacity

1. Competence is a legal term, is specific to the task at hand, and includes elements such as capacity, jurisdiction and age
2. Mental capacity assessment is necessary to determine legal competence[1]
3. Components of capacity[2]
    a) Receive, process, hold and understand relevant information
    b) Appreciate implications for one's own situation
    c) Reason with the information
    d) Express a firm treatment choice

[1]Buchanan, Alec *Mental Capacity, Legal Competence and Consent to Treatment*, J R Soc Med. 2004 Sept 97(9) 414-420
[2]Appelbaum, P.S. *Consent in Impaired Populations*, Curr Neurol Neurosci Rep (2010) 10:367-373

Capacity and Informed Consent[1]

1. All persons, including those with psychiatric illness are presumed to be capable until deemed otherwise
2. Capacity may be compromised by psychosis, dementia, intellectual disability, and severe mood disorders
3. “Inherent mental factors that limit choice should not deprive a person of access to appropriate medical treatments […] that may alleviate suffering”
4. May use advance directives

[1]Neilson, G. et.al. *Informed Consent to Treatment in Psychiatry* (CPA Position Paper) The Canadian Journal of Psychiatry, Vol 60 No. 4 2015

Specific Questions For Assessing Capacity for Medical Assistance in Dying (MAiD)

1. What is the medical condition you have?
2. What is your understanding of the treatment that you have had or other treatment that is available?
3. You have requested medical assistance in dying. Have you considered:
    a. Other treament
    b. Palliative care
    c. No treatment
4. Have you discussed your request for MAiD with your family?
5. Do you understand the process for completing MAiD?
6. Have you made a final decision in regards to proceeding with MAiD?
7. Can you tell me how you reached this decision?
8. Are you certain about proceeding with MAiD?

Mental Capacity Assessments

There is good evidence[1] that psychiatrists, using a clinical interview, can make reliable capacity assessments when using the MacArthur Competency Assessment Tool.

1. Cairns, R. Reliability of Mental Capacity Assessments, British J. Psych. 2005; 187, 372-378

Can Suicide or Physician Assisted Dying be Rational

- 90% of completed suicides are the result of psychiatric illness
- Effective treatment of psychiatric conditions reduces suicide risk
- Some authors argue that in some situations that suicide can be a rational choice even in patients with psychiatric illness

1. American Psychiatric Association (APA) Practice guideline for the assessment and treatment of patients with suicidal behaviors http://psychiatryonline.org/pb/assets/raw/sitewide/practice_guidelines/
2. Hewitt, J. Why are people with mental illness excluded from the rational suicide debate? Int J Law Psychiatry 2013; 36(5 - 6) 358-365
3. Hewitt, J. Rational suicide: philosophical perspectives on schizophrenia. Med Health Care Philos. 2010; 13:25-31
4. Groenewould J, van der Maas PJ, van der Wal G, et. al. Physician-assisted death in psychiatric practice in the Netherlands N Engl J Med. 1997;336:1795 – 1801
5. Burgess S, Hawton K. Suicide, euthanasia and the psychiatrist. Philos Psychiatr Psychol. 1998;5:113-126

Physician-Assisted Dying

Studies from Oregon and the Netherlands have shown that between 8 – 47% of patients requesting PAD have depressive symptoms.

Levene I, Parker M. Prevalence of depression in granted and refused requests for euthanasia and assisted suicide: a systematic review J Med Ethics 2011;37(4): 205-211

Psychiatric Illness

- ½ of patients in the Netherlands requesting PAD have depression[1]
- Most patients with depression are competent
- 27% of patients receiving PAD in Switzerland had depression
- Review of 8 palliative care programs in Canada[2]
    - 12.2% had a genuine desire to die
    - 52.2% of these had a mental disorder
- 58 patients in Oregon with either cancer or ALS who had requests for PAD; 15[3] were suffering from depression; 13 were suffering from anxiety
- There is no good data that we can successfully treat depression in adults with cancer[4]
- Two contradictory views in the literature regarding patients with depression:
    1. Need to be protected from PAD
    2. Are being denied access to PAD

[1]Levene, I. *Prevalence of depression in granted and refused PAD,* J. Med. Ethics 2011: 37: 205-211
[2]Wilson, K.G. et.al. *Mental disorders and the desire for death in patients receiving palliative care for cancer*, BMJ Supportive & Palliative Care 2014: 0:1-8
[3]Ganzini, L. et.al. *Prevalence of depression and anxiety in patients requesting physicians' aid in dying: cross sectional survey,* BMJ 2008, 337
[4]Williams, S. et.al. *The effectiveness of treatment for depression/depressive symptoms in adults with cancer: a systematic review,* British Journal of Cancer (2006) 94, 372-390

More Data From The Netherlands

- Data from 1st year of End of Life Clinic
- 645 requests
- 162 granted (25.1%)
- 124 (19.2%) died before assessment

Requests Granted

1.	Somatic condition	113	32.8%
2.	Cognitive decline	21	37.5%
3.	Psychological condition	6	5.0%

Snijdewind, M. *A Study of the First Year Of the End-of-Life Clinic For Physician-Assisted Dying in the Netherlands,* JAMA Internal Medicine , 2015 on Line August

Data from Belgium

- Review of the first 100 patients from Belgium with request for PAD based solely on psychological suffering:
  - Depression 58
  - Personality Disorder 50
  - Asperger's Syndrome 12
- 48 accepted for PAD
- Only 3% of all PAD cases in Belgium had a primary psychiatric disorder

Thienpont, L. et.al., *Euthanasia requests, procedures and outcomes for 100 Belgian patients suffering from psychiatric disorders: a retrospective, descriptive study,* BMJ Open 2015 Accepted May 12, 2015

Additional Points on MAiD for Psychiatric Patients

1. Patients do not have to avail themselves of all possible treatments to be considered "irremediable"
2. Some psychiatric illness is "irremediable". This was determined to be the case with "E.F." in the Alberta Court of Appeal
3. Some authors[1] have stated that "most" patients with depression achieve remission if given high quality treatment. The paper they quoted showed remission rates of 60.2%[2] meaning that 39.8% remain ill
4. Denying MAiD to competent, but vulnerable and stigmatized populations may consign them to years of suffering or a horrific death by suicide[3]

1. Kim S. Lemmens T. Should assisted dying for psychiatric disorders be legalized in Canada? *CMAJ 2016:188:E337-9.*
2. Fekadu A., Rane I.J., Wooderson S. et.al. Predication of longer-term outcome of treatment-resistant depression in tertiary care. *Br. J. Psychiatry 2012:201:369-75.*
3. Dembo J., Smith, D.H. Assisted dying for patients with psychiatric disorders. *CMAJ 2016:188(14):1036*

Bill C-7
March 17, 2021

- Response to the 2019 *Truchon* case in which a Quebec judge ruled that the clause "natural death must be reasonably foreseeable" was unconstitutional
- Two classes of persons:

1. Natural death not foreseeable
   - 90 days between assessment and MAiD
   - May have a consultation with a medical "expert"
2. Natural death is foreseeable
   - No time frame

- MAiD can proceed if the person whose natural death is foreseeable loses capacity, if they have already been approved for MAiD
- MAiD is not allowed for persons with the sole diagnosis of mental illness for two years

Thienpont, L. et.al., *Euthanasia requests, procedures and outcomes for 100 Belgian patients suffering from psychiatric disorders: a retrospective, descriptive study,* BMJ Open 2015 Accepted May 12, 2015

College of Physicians and Surgeons of BC

Medical Assistant in Dying, March 2023

- Doctors who object to MAiD must provide an effective transfer of care to other practitioners

The "provider" must ensure:

1. All legal criteria are met
2. Voluntary request – no external pressure
3. One independent witness
4. Patient knows they can withdraw request at any time
5. Where death is not reasonably foreseeable:
   a) Patient has been informed of other means to relieve suffering
   b) There may be consultation with an appropriate expert
   c) 90 days can be shortened if person at risk for losing capacity

Cause of death – the underlying medical condition

Thienpont, L. et.al., *Euthanasia requests, procedures and outcomes for 100 Belgian patients suffering from psychiatric disorders: a retrospective, descriptive study,* BMJ Open 2015 Accepted May 12, 2015

Canadian Association of MAiD Assessors and Providers

- A membership based organization for MAiD assessors and providers
- Holds annual national meetings
- Provides hands on education for Canadian healthcare providers

www.camapcanada.ca

camap.office@gmail.com

Summary

Medical Assistance in Dying is now legal in Canada under certain conditions

Canadians can be assisted in dying using either oral or intravenous medications—in practice, intravenous administration is the norm

There continues to be significant opposition to providing this service in Catholic healthcare facilities