Bill C-14: A Constitutionally Sufficient Response to *Carter v. Canada*

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What *Carter* Decided

Section 241(*b*) of the *Criminal Code* makes it an offence to aid or abet another person's suicide.[1] *Carter v. Canada (Attorney General)*, 2015 SCC 5, was a constitutional challenge to that section. The trial judge, Madam Justice Lynn Smith of the British Columbia Supreme Court, held that s. 241(*b*) was unconstitutionally overbroad. The Supreme Court of Canada upheld that decision. In the opening paragraph of its reasons, the court recognised that s. 241(*b*) puts some people in an extremely difficult position:

> … people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. (*Carter*, para. 1)

Recasting this dilemma in constitutional terms, the court held that s. 241(*b*) violated s. 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 provides that "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." The court held that s. 241(*b*) affected the individual interest in life because it had the potential to force some people to end their lives prematurely (*Carter*, para. 57); it affected the interest in liberty and security of the person because it interfered with the individual's fundamental personal choices, his or her "ability to make decisions concerning their bodily integrity and medical care"; and it affected the interest in security of the person by leaving some people "to endure intolerable suffering" (*Carter*, para. 66). Moreover, s. 241(*b*) did not comply with the principles of fundamental justice because it was overbroad. The norm against overbroad laws was recognized as a principle of fundamental justice in the early 1990s and has since been applied on several occasions.[2] This principle of fundamental justice "asks whether a law that takes away [s.7] rights in a way that general supports the

[1] Section 14 of the *Code* is also implicated in the reasoning in *Carter*, insofar as it states that consent to death is not legally effective.

[2] For further discussion of this norm, see Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012) at pp. 133-36.

object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object" (*Carter*, para. 85). The purpose of s. 241(*b*) was to prevent "vulnerable persons from being induced to commit suicide at a time of weakness" (*Carter*, para. 78). But because s. 241(*b*) forbad assisted suicide in all cases, whether or not the person who sought assistance was vulnerable or weak, it went farther than necessary to achieve its own purpose. As the trial judge said (quoted in *Carter*, para. 86):

> " … not every person who wants to commit suicide is vulnerable, and … there may be persons with disabilities who have a considered, rational and persistent wish to end their own lives."

Thus, s. 241(*b*) was overbroad because it was "at least in some cases not connected to the objective of protecting *vulnerable* persons" (*Carter*, para. 86, original emphasis).

An infringement of any *Charter* right can in principle be justified as a reasonable limit under s. 1. To justify a limit on a Charter right, the government must demonstrate that the limit has a pressing and substantial objective, that it is rationally connected to the objective, that it is the least rights-impairing means of achieving the objective, and that the salutary effects of the limit on the objective outweigh the deleterious effects of the limit on the right in question.[3] The Supreme Court of Canada has often indicated that it is difficult to justify infringements of s. 7 rights under s. 1 and indeed has never recognized such a justification.[4] *Carter* is no exception. The court accepted that the objective of protecting the vulnerable was pressing and substantial and that the overbreadth of s. 241(*b*) was rationally connected to that objective. As for minimal impairment, the government argued that a prohibition like the one in s. 241(*b*), even if overbroad in s. 7 terms, was necessary because of the difficulty in distinguishing between those persons who genuinely consented to physician-assisted death and those who were, for various reasons, actually vulnerable.[5] The trial judge had considered this argument in detail, and the court agreed with her that "a progressive regime with properly designed and administered safeguards was callable of protecting vulnerable people from abuse and error" (*Carter*, para. 105). The limit on s. 7 rights imposed by s. 241(*b*) was not the last rights-impairing way of achieving the legislature's objective of protecting the vulnerable; accordingly, it failed the test for justification under s. 1.

The Supreme Court of Canada declared s. 241(*b*) invalid to the following extent:

> … s. 241(*b*) and s. 14 of the *Criminal Code* 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. (*Carter*, para. 127.)

But the court suspended the declaration of invalidity for one year in order to permit Parliament to enact a new legislative scheme to govern assisted suicide. Because of the interruption of legislative work

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[3] The test for s. 1 justification is laid out in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[4] See Stewart, *Fundamental Justice*, Chapter 6.

[5] *Carter*, para. 87. The submission was made in support of the government's claim that s. 241(*b*) did not violate s. 7, but the court held it was more appropriately considered at the minimal impairment stage of the *Oakes* test.

caused by the 2015 federal election, the government applied for an extension of the suspension. The court granted a four-month exception and, by a 5:4 majority, held that in during this four-month period s. 241(*b*) would not operate inside Quebec and that individuals outside Quebec could apply for constitutional exemptions from s. 241(*b*) in accordance with the conditions set out in the declaration of invalidity (see *Carter v. Canada (Attorney General)*, 2016 SCC 4).

In short, *Carter* decided, on the basis of the facts found by the trial judge, that s. 241(*b*) of the *Criminal Code* is unconstitutional to the extent that it prevents adult individuals in the situations described in para. 127 from obtaining the assistance of a physician to commit suicide. But there are many things that *Carter* does not say. It does not say precisely which procedural mechanisms for protecting the vulnerable would be constitutionally acceptable. Moreover, *Carter* says nothing about the extent to which it is constitutionally permissible to criminalize medically-assisted suicide for persons under the age of 18 years. Finally, the reasoning *Carter* is premised on the legitimacy of the legislative objective of preventing vulnerable individuals from committing suicide; nothing in the decision casts any doubt on that objective.

What Bill C-14 Would Do

The centrepiece of Bill C-14 is proposed s. 241.2 of the *Criminal Code*, which (together with proposed ss. 251(2), (3), and (4)) would create an exemption to the general prohibition on assisted suicide in what is now s. 241(*b*). The elements of proposed s. 241.2 can be conveniently into two categories: the *criteria* for medically assisted dying, and the *safeguards*.

The criteria. Under s. 241.2(1), a person who meets the following four criteria "may receive medical assistance in dying":

a) They are (or will soon be) eligible for publicly-funded health care services in Canada.
b) They are an adult (over 18 years of age).
c) "they have a grievous and irremediable medical condition." This criterion is defined more fully in proposed s. 241.2(2) as having four elements, each of which must be satisfied. The person must have (a) "a serious and incurable illness, disease or disability" that puts the person (b) "in an advanced state of irreversible decline in capability", which in turn causes (c) "enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable" and (d) "their natural death has become reasonable foreseeable", though no prognosis "as to the specific length of time" is needed.
d) "they give informed consent to receive medical assistance in dying."

The safeguards. Proposed s. 241.2(4) sets up a number of safeguards and places the primary responsibility for ensuring that the criteria are met on the professional (medical practitioner or nurse practitioner) who will provide the assistance. There are eight safeguards. The professional must:

a) "be of the opinion that the person meets all the criteria" set out in proposed s. 241.2(1).
b) ensure that the person's request was in writing and made "after the person was informed that the person's natural death has become reasonable foreseeable …"
c) "be satisfied that the request was signed and dated … before two independent witnesses who also signed and dated the request". The requirements of the witnesses' independence is spelled

out more fully in proposed s. 241.2(5) and are designed to exclude those who might stand to benefit or profit from the person's death.

d) "ensure that the person has been informed that they may, at any time and in any manner, withdraw their request".
e) obtain a second opinion concerning the criteria in s. 241.2(1).
f) ensure that all the professions involved are also independent. The requirements of the professionals' independence is spelled out in more detail in s. 241.2(6) and are seemingly designed to ensure that the two professionals in question are not professionally or financially connected with each other or with the person who seeks assistance in dying.
g) Ensure a 15-day waiting period, unless both professionals are of the opinion that the person's death or loss of capacity to provide consent is imminent.
h) "immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their consent and ensure that the person gives express consent to receive medical assistance in dying."

The Constitutionality of Bill C-14

In my opinion, Bill C-14 in its current form is a constitutionally permissible response to the flaws of s. 241(*b*) identified in *Carter*. It is, in my view, unlikely that a court will find the medically-assisted dying regime created by Bill C-14 to be overbroad in s. 7 terms. But even if Bill C-14 is overbroad, it is likely justified under s. 1.

The criteria for medically-assisted death laid out in proposed s. 241.2(2) closely track the language of para. 127 of *Carter*. Two possibly significant differences are the requirements in proposed s. 241.2 (*b*) and (*d*). Section 241.2(*b*) would require "an advanced state of irreversible decline in capability", while s. 241.2(*d*) would require that the person's "natural death" be "reasonably foreseeable". It should be be remembered that that these conditions were satisfied in both cases that were before the court in *Carter*, and its reasoning and remedy were tailored to the facts of those cases. Moreover, proposed s. 241.2 (*b*) is evidently intended to protect the vulnerable, while proposed s. 241.2(*d*) does not require that the person's death be imminent or that the precise time of death be predictable. Thus, these requirements are unlikely to exclude anyone who is, according to the reasoning in *Carter*, constitutionally entitled to medically-assisted death. Therefore, they do not render the new regime overbroad.

It is likely that a constitutional challenge to the new regime would focus not on the criteria but on the safeguards in Bill C-14. These safeguards are designed to ensure that a person's consent to medically-assisted death is genuine and clearly expressed. The *Carter* decision does not speak directly to which safeguards would be constitutionally permissible or required, as that question was not before the court. However, it might be argued that the safeguards are so stringent that they prevent a person who satisfies the criteria from having access to the procedure for medically assisted dying. If that is so, the new regime would be constitutionally overbroad. In my view, such a claim is unlikely to succeed. The trial judge's view, accepted by the Supreme Court of Canada, was that "the risks of physician-assisted death 'can be identified and very substantially minimized through a carefully-designed system' that imposes strict limits that are scrupulously monitored and enforced" (*Carter*, para. 27; the internal quotation is from the trial judgment; see also para. 105). The court was evidently of the view that such a system would be constitutionally sufficient: it would both respect the autonomy of the individual and satisfy the policy objective of protecting the vulnerable.

Nevertheless, according to the court's recent interpretation of the norm against overbreadth, the law would violate s. 7 of the Charter if it prevented even one person who was not vulnerable from accessing medically-assisted death.[6] But even if the regime is overbroad, there is a good chance that a court would find it to be a justified limit on the s. 7 right. As noted above, the Supreme Court of Canada has never found that an infringement of a s. 7 right was justified under s. 1. But recent case law, including *Carter* itself, indicates that the court may be open to the argument that an overbroad law is justified under s. 1. I say this for two reasons. First, starting with *Bedford*, the court has indicated that the question whether a law is arbitrary, overbroad, or grossly disproportionate in s. 7 terms should have an individualistic focus, while broader evidentiary and societal concerns should be considered at the s. 1 stage. This understanding of the relationship between s. 7 and s. 1 opens up significant possibilities for s. 1 justification of infringements of s. 7 rights.[7] Second, in *Carter* itself, the court has demonstrated that it meant what it said in *Bedford*. Although the s. 1 justification failed, the court gave it far more detailed consideration than in earlier cases involving a s. 7 violation. The court does not simply state, as it had previously done on a number of occasions, that an overbroad law naturally fails the minimal impairment branch of the *Oakes* test. Instead, the court considers in detail the government's argument that the very broad prohibition in s. 241(*b*) was necessary to protect the vulnerable. While rejecting that argument in respect of s. 241(*b*) itself, the court accepted the trial judge's view that "the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards" (*Carter*, para. 117) and essentially invited Parliament to craft a regime that would, on a case-by-case basis, enable individuals who were not vulnerable to give clear consent to medically-assisted death (*Carter*, paras. 114-121). Bill C-14 establishes such a regime. Even if it is overbroad in the sense of preventing a few individuals who would otherwise meet the criteria for medically-assisted death, it is likely a more permissive regime would likely frustrate the legitimate policy objective of protecting the vulnerable.

[6] Compare *Bedford v. Canada*, 2013 SCC 72, at para. 123.

[7] For a more detailed discussion of this point, see Hamish Stewart, "*Bedford* and the Structure of Section Seven" (2015) 60 *McGill Law Journal* 575. For a case where, in light of the reasoning in *Bedford*, a court accepted a s. 1 justification of an overbroad law, see *R. v. Michaud*, 2015 ONCA 585.