Post D-Day (June 6, 2016)

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What happens, effective June 7, 2016, if no legislation has been passed by the federal Parliament to amend the *Criminal Code* respecting medical assistance in dying?

Currently, the absolute criminal prohibition on physician-assisted death in Canada is in force (outside Quebec[1]) subject to an order of a superior court judge authorizing physician-assisted death in any particular case. This judicial authorization is an exception to the suspension of the declaration of invalidity which (outside Quebec) lasts until June 6, 2016 (*Carter v Canada (Attorney General)* 2016 SCC 4). After that date, if there is no amendment to the *Criminal Code*, the suspension, and the judicial authorization exception, come to an end, and the declaration of invalidity from *Carter 2015* becomes generally effective.

> Section 241(b) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that 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 v Canada (Attorney General)*, [2015] 1 SCR 331, paras. 127 and 147)

The further stipulation in paragraph 127 that "The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought." gives some guidance to Parliament as to the parameters within which to respond, but is likely not precise enough to provide legal effect in the absence of Parliamentary action. Nor does the declaration incorporate the "carefully designed and monitored system of safeguards" (para. 117 of *Carter 2015*) anticipated from Parliament by the Supreme Court of Canada. There is contention as to how far Parliament can go in designing such safeguards in a *Charter* compliant manner consistent with *Carter*, but there is no doubt that some kinds of safeguards, not articulated in the declaration of invalidity, are permissible to protect the vulnerable.

Once the declaration of invalidity were fully effective in the absence of a Parliamentary response, judicial authorization would no longer be required to make physician-assisted death legal. A doctor falling within the terms of the declaration of invalidity would, without anything more, not be guilty of an offence under ss. 241(b) and 14 of the *Criminal Code*.[2] Although

[1] Within Quebec, the declaration of invalidity is no longer suspended. Instead of a criminal prohibition against medical assistance in dying, Quebec's *Act Respecting End-of-Life Care* S.Q. 2014, c. 2 (in force 10 December 2015) applies.

[2] There could be other sections of the *Criminal Code* in issue, such as s. 245:

cautious, risk-averse doctors may be hesitant to act, determined doctors could proceed, confident of the absence of criminal liability.[3] If prosecuted, a doctor would only need to raise a reasonable doubt on the non-applicability of the criteria of "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."[4] Doctors participating in physician-assisted death would not need to comply with any of the limitations/safeguards about which there is no disagreement in:

> The Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report* (November 30, 2015) (Provincial-Territorial Report)
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> The Report of the Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying*: *A Patient Centred Approach* (February 2016) (Special Joint Committee Report)
>
> Quebec's *Act Respecting End-of-Life Care*, S.Q. 2014, c. 2 (in force 10 December 2015) (Que. *ARELC*)
>
> Bill C-14 (tabled in the House of Commons on April 14, 2016)

Although not everyone signed the Provincial-Territorial Report, and although there was a dissent in the Special Joint Committee Report, there were many basic things about which there was easy consensus.

Specifically, without getting into anything about which there is contention as to what constitutes a *Charter* compliant response to *Carter*, if Parliament does not act by June 6, 2016, there would be a legislative vacuum in the criminal law on key issues:

> **245** Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and liable
>
> **(a)** to imprisonment for a term not exceeding fourteen years, if he intends thereby to endanger the life of or to cause bodily harm to that person; or
>
> **(b)** to imprisonment for a term not exceeding two years, if he intends thereby to aggrieve or annoy that person.

However, if the declaration of invalidity from *Carter* were otherwise applicable, a constitutional defence to a charge under s. 245 seems inevitable.

[3] Within Quebec, compliance with provincial legislation would still be required. Otherwise, the prospect of professional discipline would also be a consideration.

[4] There is some uncertainty as to the exact scope of the *Carter* declaration of invalidity against the absolute ban on physician-assisted death in terms of conditions covered; although the declaration itself does not exclude psychiatric disorders, in para. 111 of the judgment the Court specifically indicates that psychiatric disorders "would not fall within the parameters suggested in these reasons." In addition, since the *Carter 2015* declaration and judgment do not deal with either mature minors or advance directives, any attempt to invoke such circumstances as giving rise to a constitutional defence would require a fresh *Charter* challenge.

- One doctor's involvement would be enough, despite unanimous agreement that (at a minimum) a second medical practitioner needs to concur that all of the eligibility criteria are met.

  Provincial-Territorial Report, Recommendation 22
  Special Joint Committee Report, Recommendation 12
  Que. *ARELC*, s. 29(3)
  Bill C-14, proposed s. 241.2(3)(e) [5]

- There would be no requirement of a written request, or other formality of consent, despite unanimous agreement that there be careful attention to such details.

  Provincial-Territorial Report, Recommendation 11
  Special Joint Committee Report, Recommendation 9
  Que. *ARELC*, ss. 26, 27
  Bill C-14, proposed s. 241.2(3)(b),(4),(5)

- No reflection period at all would be required between request and implementation of medical assistance in dying, despite unanimous agreement that, subject to the need to be flexible to meet individual circumstances, there ought to be opportunity for reflection as is appropriate.

  Provincial-Territorial Report, Recommendation 26
  Special Joint Committee Report, Recommendation 14
  Que. *ARELC*, s. 29(1)(c)
  Bill C-14, proposed s. 241.2(3)(g)

- There would be no requirement to report to anybody about anything, despite unanimous agreement regarding the need to collect data to enable assessment and evaluation of the practice of medical assistance in dying.

  Provincial-Territorial Report, Recommendations 15, 16, 39
  Special Joint Committee Report, Recommendation 16
  Que. *ARELC*, ss. 32, 36, 37, 42-46
  Bill C-14, proposed s. 241.31

- There would be no requirement that medical assistance in dying be available only to insured persons eligible for publicly funded health care services in Canada, despite unanimous agreement that medical assistance in dying in Canada should not be available as a matter of medical tourism.

  Provincial-Territorial Report, Recommendation 21
  Special Joint Committee Report, Recommendation 8
  Que. *ARELC*, s. 26(1)
  Bill C-14, proposed s. 241.2(1)(a)

In short, it is not a responsible option for the Parliament of Canada to fail to act by June 6, 2016.

[55] Moreover, the Special Joint Committee Report, Recommendation 12, the Que. *ARELC*, s.29(3), and Bill C-14, proposed s. 241.2(3)(f) and (6) further stipulate that the second medical practitioner be independent of the first.