CHRISTIAN LEGAL FELLOWSHIP

Alliance des chrétiens en droit

RESPONSE TO THE REPORT OF PARLIAMENT'S SPECIAL JOINT COMMITTEE ON PHYSICIAN-ASSISTED DYING

The enclosed letter, endorsed by over 100 lawyers and law students, explains Parliament's legislative authority to prohibit or at the very least to significantly restrict access to assisted suicide and euthanasia, and to prevent abuse of vulnerable persons. This page provides a brief summary:

CURRENT LAW

Carter does not:

1. Create a *Charter* right to suicide or the right to physician-assistance in suicide;
2. Require Parliament to allow physician-assistance in suicide.

Instead, *Carter* "simply renders the [existing] criminal prohibition invalid"[1] because the existing prohibition was found to be broader than necessary to protect vulnerable people from error and abuse. *Carter* does, however, maintain the *Criminal Code* prohibition against physician-assistance in suicide for those under 18 years of age, the mentally ill, those without the capacity to give fully informed consent, and those with minor medical conditions.[2]

NEW LEGISLATION

Parliament can legitimately (re)enact a complete prohibition on "assisted death" pursuant to such legislative objectives as preventing suicide and maintaining respect for life. However, if Parliament decides to permit assisted suicide or euthanasia in some circumstances, it need not and should not permit it beyond circumstances factually similar to those in *Carter*, because:

1. The SCC's statement that its declaration of the law's invalidity responds strictly to the facts in *Carter* and not to other situations[3] gives lawmakers far greater latitude to restrict assisted suicide and euthanasia than the Special Joint Committee's Report may lead Parliamentarians to believe;
2. The protections of the *Criminal Code* were only relaxed by the Supreme Court of Canada because, and with the expectation that, protections for the vulnerable identified by the trial judge in *Carter* would be the minimum protection adopted by Parliament in legislation on the subject of physician-assisted suicide;[4]
3. The European Court of Human Rights has indicated that the failure to implement stringent statutory protections for the vulnerable will violate the human right to life;[5]
4. The failure to prohibit assisted suicide and euthanasia, or at the very least restrict its availability to factual circumstances similar to those in *Carter*, will send the signal that the Government supports suicide as a solution to suffering. It will normalize suicide and undermine efforts of Government and others to prevent suicide in communities where it has become an epidemic.

---

[1] *Carter v. Canada* (*Attorney General*), [2015] 1 S.C.R. 331, at paragraph 132.
[2] *Ibid*, at paragraph 111. Informed consent requires properly informing the patient of the full range of options, including palliative care, *ibid*, at paragraph 106.
[3] *Ibid*, at paragraph 127.
[4] *Ibid*, at paragraphs 104-113.
[5] *Haas v. Switzerland*, European Court of Human Rights, Application No. 31322/07 (January 20, 2011), at paragraph 58.

CHRISTIAN LEGAL FELLOWSHIP
Alliance des chrétiens en droit
INTEGRATING CHRISTIAN FAITH & LAW SINCE 1978
470 Weber St. N., Suite 202, Waterloo, ON, N2L 6J2 • Ph. 519-208-9200 • Fax 519-208-3600

The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada

Sent via email to mcu@justice.gc.ca

Re: Assisted suicide and euthanasia

Dear Attorney General and Minister,

We are writing to express concern about and to rectify certain misunderstandings reflected in the Special Joint Committee's Report regarding the scope of the *Carter* ruling and its implications for Parliament's legislative response.

In particular, we are concerned that the (erroneous) assumption that *Carter* established a *Charter* right to physician-assisted suicide or euthanasia ("PAS/E") guided the Joint Committee's deliberations and may, by extension, guide Parliament's.

The Supreme Court of Canada (SCC) in *Carter* did not create a freestanding "constitutional right" to PAS/E, nor did it impose on Parliament and the nation a value judgment that assisted suicide and euthanasia are public goods to which Canadians must be guaranteed broad and equal access, as the Special Joint Committee's Report seems to suggest.

Rather, the *Carter* judgment "simply renders the criminal prohibition invalid"[1] because, in the SCC's view, the existing prohibition is a broader than necessary means of achieving the legislative objective (or "object"), as the SCC interpreted it, of protecting vulnerable people from error and abuse.[2]

Accordingly, it is imperative for Parliament to be aware that it retains great latitude to re-enact a complete ban and/or impose far more stringent and protective restrictions on PAS/E than what is suggested in the Special Joint Committee's Report.

The starting point for a legislative response: legislative objectives

It is a foundational principle of Canadian law that the lives of all persons are equally valuable and inviolable—despite the many inequalities that exist among persons. The inviolability of life is the principle that the *intentional* taking of all human life is always wrong, no matter whose life it is, no matter what the circumstances. A prohibition on "assisted death" enacted with the preservation of this fundamental principle as its object would be constitutionally valid. It would have the added benefit of preserving a culture of equality that resists the message that some lives are not as valuable as others or that some persons' continued existence is not only not valuable, but is a source of harm.[3]

The SCC interpreted the law's object in *Carter* as "preventing vulnerable people from being induced to commit suicide at a time of weakness". This narrow interpretation effectively determined the outcome of the case.[4] The rest of the judgment became a limited inquiry into whether there is a less restrictive means of achieving that object. Not only did this framing make it easy to find a violation of s. 7 of the *Charter* (since a law to protect the vulnerable that applies to non-vulnerable people is inherently "overbroad") it also side-lined ethical and societal concerns, which Parliament must now consider.

What the SCC did not do, however, was preclude Parliament from legislating pursuant to such objectives as:

- upholding the inviolability of life,
- preventing suicide (assisted or not)
- maintaining a medical culture against killing, or
- preserving societal attitudes against suicide as an appropriate response to suffering.

The SCC simply—as a matter of statutory interpretation—found that such objectives were not embodied in sections 14 and 241(b) of the *Criminal Code*.

Parliament is therefore free to (re)enact a law pursuant to any or all of the above objectives, including a complete prohibition on aiding or abetting suicide, which it could do by including a clear statement of the law's object in the law itself. Such an approach would be in line with what the Attorney General argued in *Carter* was the existing law's actual, if unstated, objective—namely, to prohibit active, intentional participation in causing another person's death as "intrinsically morally and legally wrong", to quote Justice Sopinka in *Rodriguez*.[5] A complete prohibition is not an overbroad means of accomplishing this objective.

Compromising the inviolability principle

If, however, Parliament is willing to compromise the inviolability principle, rather than strictly enforce it, it is still important to maintain an accurate understanding of the *Carter* decision and how s. 7 of the *Charter* operates. The Committee's Report also fails in this respect. It misreads *Carter* as creating a new constitutional right to "assisted death" without limitation based on one's age or the nature of one's illness.

Such a reading of *Carter* misconstrues s. 7 of the *Charter*, which does not create freestanding rights to life, liberty, and security of the person. If that were true, it would mean, for example, that every arrest or incarceration, and every law authorizing either, violates the right to liberty. Rather, s. 7 protects the right to *not be deprived of* life, liberty, or security of the person *except in accordance with the principles of fundamental justice* (PFJ).[6] As one leading constitutional text puts it: life, liberty, and security of the person are the "interests" protected by s. 7, and s. 7 is "engaged" when the state interferes with these—but s. 7 is only *infringed* where the state law or action violates a PFJ.[7] Therefore, where life, liberty, or security is limited by a law and through a process that respects the PFJ, there is no *Charter* violation.

The Committee's reading of *Carter* also ignores both the facts of the case—on which the finding that the law violated section 7 of the Charter depended—and the context of the SCC's declaration of invalidity (in para. 127). The SCC was not deciding the wording of an amendment to the *Criminal Code*. The Committee's recommendation to adopt the wording of the SCC's declaration of invalidity as a legislative enactment without defining terms is therefore misguided. The SCC was ruling on a particular case. Its declaration of invalidity must be understood in that context.

The SCC's clear statement that its declaration responds to the facts of Carter and <u>not</u> to other situations[8] gives lawmakers far greater latitude to restrict assisted suicide and euthanasia than the Committee's Report may lead Parliamentarians to believe.

The SCC relied on Ms. Taylor's factual situation for its *Charter* analysis. Ms. Taylor had ALS, a fatal neurodegenerative disease. The Court refers to Ms. Taylor, "persons like her", and "persons in her position" throughout its judgment, as the trial judge had. *Charter* rulings are not ordinarily made in the abstract. They depend on certain facts. The law was found to violate the *Charter* on the facts in *Carter* and, by extension, in factually similar circumstances. Would a law prohibiting euthanasia as a "treatment" option for mental illness violate the *Charter*? No. Or at least *Carter* does not provide an affirmative answer, though the Committee imagines that it does.[9]

The right to life of Ms. Taylor and "persons in her position" was infringed because the law might "force" persons with degenerative diseases to take their own lives while they are still physically capable of doing so, for fear of being incapable later. Their liberty and security were infringed because the law deprived them of control over their bodily integrity in the context of end-of-life health care decisions.[10]

Notably, the trial judge's remedy for Ms. Taylor contained stringent stipulations, among them that her attending physician must attest that she "is terminally ill and near death, and there is no hope of her recovering" before aiding her suicide. The SCC says nothing about the trial judge's conditions for Ms. Taylor being unconstitutional and there is no reason to believe that they were, or that legislation with similarly strict conditions would be. Rather, the SCC was adamant that enacting conditions and restrictions is Parliament's job and that Parliament is entitled to deference.

"Assisted death" will remain illegal in circumstances that are not factually similar to those of Ms. Taylor <u>unless</u> Parliament explicitly legalizes it in other circumstances, which it should not.

The SCC addressed "slippery slope" concerns raised by the Attorney General by clarifying that controversial cases arising out of Belgium "would not fall within the parameters suggested in these reasons, such as euthanasia for minors or persons with psychiatric disorders or minor medical conditions."[11] The Committee ignores the SCC's clear statements regarding the limited scope of *Carter*, asserting that it sets the "floor" on which Parliament must build and that there is no basis to deny any person the "recognized Charter right" of PAS/E "based on his or her mental health condition."[12] However, many people who believe it is ethically and legally acceptable to euthanize a person who is dying from advanced ALS, for example, may *not* believe it is ethical to euthanize a person suffering depression. Parliament has responsibility to decide this matter for the nation; it ought to at least consider the difference in circumstances.

If Parliament chooses to make exceptions to the inviolability principle, it should still affirm the principle in the new law. The circumstances, if any, in which exceptions to this principle are justified is a morally laden policy question. Parliament may decide an exception is justified where physicians are certain that a person is an advanced state of physical decline and will die from his or her illness, but not justified where a person's illness is not terminal or degenerative, for example. It would be entitled to deference from the courts with respect to where it draws that line.[13] In our view, any exceptions would undermine equality and respect for life. If, however, that is the direction the Parliament takes, we urge Parliamentarians to discourage suicide, assisted or not, in whatever way possible. Speaking of "assisted death" as a "constitutional right" or a "health care service" achieves the opposite. It equates suicide with any other "treatment" option, to which access must not be hindered or impeded in any way. A legal regime constructed on this premise would create a social, legal, and ethical culture in which the ability of health care providers, community organizations, social welfare agencies, churches, and others to discourage and prevent suicide is undermined.

Competing ethical and societal considerations

The SCC commented, in the course of its section 7 analysis, that any "competing moral and societal benefits" of the prohibition on assisted death would be more appropriately considered under section 1 of the *Charter*.[14] However, in its s. 1 analysis, the SCC's focus was on the question of whether physicians are able to reliably assess competence, voluntariness, and non-ambivalence in patients, and on the feasibility of minimizing the risk of abuse through safeguards.[15] Ethical and societal concerns carried little if any weight because they were not connected to the law's object as the SCC framed it—the law's object being the gate through which all competing considerations in the s. 1 proportionality (*Oakes*) assessment must enter. This again underscores the importance of Parliament's objectives.

The SCC had the luxury in *Carter* of looking at the issue of assisted suicide from a particular plaintiff's perspective. Parliament does not have that luxury. Rather, it has a mandate and obligation to consider

broader ethical and societal issues which, as one of the British Columbia Court of Appeal Justices commented in *Rodriguez*, "are not suited to resolution by a court on affidavit evidence at the instance of a single individual."[16] Parliament's task is to consider not only individual rights, but also the common good, which entails more than ensuring that people comply with a set of rules and obtain informed consent before killing someone or aiding their suicide.

Beyond coercion, undue influence, or ambivalence (which, the SCC believed, physicians can reliably detect) a person's request for "assisted death" may be motivated by a wide variety of influences—internal and external, interpersonal, familial, institutional and cultural. As "assisted death" becomes normalized, more and more Canadians may choose assisted suicide or euthanasia to deal with their suffering. Should Parliamentarians' only concern be that "assisted death" is "chosen" (rather than forced upon people)? In our view, the very notion that suicide is freely chosen so long as the person is competent and not subject to coercion or undue influence itself represents an extremely myopic understanding of human nature, vulnerability, and social and cultural influences.[17] Even if suicide is considered a "choice", however, it is one the government should strongly discourage.

"Right to die" may seem powerful, but it is also simplistic and misleading. Parliamentarians who believe assisted suicide should remain illegal because it is intrinsically wrong would be mistaken to think that such a position is now invalid. Parliamentarians who wish to preserve a culture that rejects suicide or euthanasia as a solution to suffering must know that the judiciary has not irreversibly steered Canada in the opposite direction. Their concerns should have a place in Parliament's deliberations and, ultimately, in the legislative response to the *Carter* ruling.

Respectfully,

Derek B.M. Ross, LL.B., LL.M.
CLF Executive Director

John R. Sikkema, B.A., J.D.
CLF Associate Legal Counsel

ENDORSED BY:

Robert Reynolds (Lawyer – Montreal, QC)

Shayna Beeksma (Lawyer – Burlington, ON)

Philip Fourie (Lawyer – Prince Albert, SK)

John Lockhart (Lawyer – Mississauga, ON)

Philip Milley (Lawyer – St. John's NL)

Shawn Smith (Lawyer – White Rock, BC)

Timothy Sinnott (Lawyer – Waterloo, ON)

Jessie Legaree (Articling Student – Vancouver, BC)

Michael Menear (Lawyer – London, ON)

Barry W. Bussey (Lawyer – Elmira, ON)

Gerald Chipeur, Q.C. (Lawyer – Calgary, AB)

Bruce Bos (Lawyer – Toronto, ON)

Ernest A. Marshall (Retired Justice, Court of Queen's Bench of Alberta)
Deborah Santema Olthof (Lawyer – Leduc, AB)
Donald L. Wilkinson (Lawyer – Kelowna, BC)
Geoffrey Trotter (Lawyer – Vancouver, ON)
Marty Klein (Lawyer – Mississauga, ON)
Chris Heibert (Articling Student – Hamilton, ON)
Roger Song (Lawyer – Calgary, AB)
Vicky Chan (Law Student – University of Windsor)
Omolola Fasina (Law Student – University of Western Ontario)
Randy Schliemann (Lawyer – Toronto, ON)
Suzanne Chiodo (Lawyer – Toronto, ON)
Serena Singh (Lawyer – Toronto, ON)
Nancy Bergstrom (Lawyer – Red Deer, AB)
John E. Humphries (Lawyer – Peachland, BC)
Peter Anderson (Lawyer – Vancouver, BC)
Darren L. Richards (Lawyer – Calgary, AB)
Brian Prill (Lawyer – Toronto, ON)
John C. Knibbe (Lawyer – Calgary, AB)
Walter W. Kubitz, Q.C. (Lawyer – Calgary, AB)
Dawn M. Bennett (Lawyer – Mississauga, ON)
André Schutten (Lawyer – Ottawa, ON)
Dawson McKay (Articling Student – Kelowna, BC)
Peter Luttmann (Law Student – South Farmington, NS)
Robert M. Culos (Lawyer – Vernon, BC)
Benjamin R. Heath (Lawyer – Brampton, ON)
Gerald N. Kent (Lawyer – Cranbrook, BC)
Michael Kim (Law Student – Toronto, ON)
Jonathan M. Sinopoli (Lawyer – Chatham, ON)
Uba E. Anya (Lawyer – Calgary, AB)
Denis Grigoras (Lawyer – Thornhill, ON)
Joshua Tong (Lawyer – Toronto, ON)
Jonathan Ng (Lawyer – Toronto, ON)
Teresa Douma (Lawyer – Ayr, ON)
Roselyn Kelada-Sedra (Articling Student – Toronto, ON)

Susanna M. Crichlow (Lawyer – Whitby, ON)
Sonya Tors (Law Student – Toronto, ON)
Pamela Shin (Lawyer – London, ON)
T. Charles De Jager (Lawyer – Surrey, BC)
Robyn Smith (Lawyer – Calgary, AB)
Richard Harding (Lawyer – Calgary, AB)
Oloff Biermann (Lawyer – Langley, BC)
Frank de Walle (Lawyer – Lethbridge, AB)
Tyler Koverko (Lawyer – London, ON)
Philip E. Carr (Lawyer – Calgary, AB)
Rachael de Souza (Lawyer – Oakville, ON)
Elizabeth Swarbrick (Lawyer – Almonte, ON)
Ruth A.M. Ross (Lawyer – London, ON)
Barbara L. B. Wallace (General Counsel, Christian Horizons – Kitchener, ON)
Lisa C. Wight (Lawyer – Plattsville, ON)
David McMath (Lawyer – Fredericton, AB)
Maria Mach (Lawyer – Langley, BC)
Phil Dougan (Lawyer – Vancouver, BC)
Peter Stauffer (Law Student – University of British Columbia)
Ryan McConaghy (Lawyer – Toronto, ON)
Simon J. Hersey (Lawyer – Medicine Hat, AB)
Jeffrey S. Lowe (Lawyer – Vancouver, BC)
J. Allen Howard (Lawyer – Calgary, AB)
Earl Phillips (Lawyer – Vancouver, BC)
Lisa Statt Foy (Lawyer – Calgary, AB)
Dajin Kim (Law Student – Winnipeg, MB)
Tom Schuck (Lawyer – Weyburn, SK)
David MacPhail (Retired Lawyer)
Paul D. Mack (Lawyer – Oshawa, ON)
Peter Bowal (Lawyer – Calgary, AB)
Danny Gurizzan (Lawyer – Vaughan, ON)
Rhoda Adetunji (Lawyer – Toronto, ON)
Catherine Dyck (Law Student – University of Western Ontario)
Jessica Kwok (Lawyer – Calgary, Alberta)

Sarah Kim (Lawyer – London, ON)
Diane Gyimah (Lawyer – Toronto, ON)
Ashley R. Gnyś (Lawyer – Niagara Falls, ON)
Shannon Davis (Crown Prosecutor – Grande Prairie, AB)
Ronald J. Swain (Retired Lawyer – Lindsay, ON)
Deina Warren (Lawyer – Toronto, ON)
Kallen Fong (Lawyer – Vancouver, ON)
Carol Crosson (Lawyer – Airdrie, AB)
Ariel Wong (Law Student – Ontario)
Faustina Otchere (Lawyer – Toronto, ON)
Peter Trieu (Lawyer – Calgary, AB)
Frank Molnar, Q.C. (Lawyer – Calgary, AB)
Waldy Derksen (Lawyer – Winnipeg, MB)
Christy Stockdale (Lawyer – Regina, SK)
Daniel Tangjerd (Lawyer – Saskatoon, SK)
Tabitha Ewert (Law Student – University of British Columbia)
Andrew Loewen (Lawyer – Winnipeg, MB)
Linda G. Yang (Lawyer – Vancouver, BC)
Esther O. Abraham (Lawyer – Mississauga, ON)
Brendan Bernakevitch (Lawyer – Regina, SK)
Geoff Severide (Lawyer – Penticton, BC)
Abraham An (Law Student – University of British Columbia)
Daniel J. Mol (Lawyer – Edmonton, AB)
Sarah Ross (Articling Student – Toronto, ON)
Jorge Pineda (Lawyer – Hamilton, ON)
Timothy A. Stonhouse (Lawyer – Victoria, BC)
Wayne Bernakevitch (Lawyer – Regina, SK)
Marcia Banfield (Articling Student – Toronto, ON)
Chantal Desloges (Lawyer – Toronto, ON)
Richard E. Harrison (Lawyer – Calgary, AB)
David Bond (Lawyer – St. Margaret's Bay, Nova Scotia)
J. Paul Fletcher (Lawyer – Locust Hill, ON)
Chris Markou (Lawyer – Mississauga, ON)

NOTES:

[1] *Carter v Canada (Attorney General)*, 2015 SCC 5, at para 132.
[2] *Ibid*, at paras 85-86; the SCC refers to the object of the law as *Parliament*'s objective in paras 29 and 37.
[3] See *ibid*, Factum of the Intervener Christian Legal Fellowship, available online at <http://goo.gl/lEM1Of>.
[4] Peter Hogg, a leading Canadian constitutional law scholar, points out in *Constitutional Law of Canada, 5th Edition Supplemented* (December 1, 2014), at 47.15, that disagreements about the object of a law are neither surprising nor unusual and goes on to say, "It must be recognized, however, that a judge who disapproves of a law will always be able to find that it is overbroad."
[5] *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, at 601. In 2010, several MPs expressly opposed Bill C-384 (2010) for just this reason, see: Canada, Parliament, House of Commons, Debates, 40th Parliament, 3rd Session, Vol 145, No 010, March 16, 2010, online: <http://goo.gl/fXG4jV>.
[6] Peter Hogg, *supra* note 4, suggests s. 7 is better understood as enacted in French, which does not repeat the legal term "right" as the English does ("right to life, liberty, and security… and the right not to deprived…").
[7] Guy Regimbald and Dwight Newman, *The Law of the Canadian Constitution, 1st Edition* (Markham: LexisNexis, 2013), at 618.
[8] After deciding the *Charter* issues and immediately following its declaration of invalidity, the SCC states in *Carter*, *supra* note 1, at para 127: "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." The Committee treats this statement as a mandate to expand *Carter*, rather than as the clear and deliberate statement of the ruling's limited scope that it truly is: see Special Joint Committee on Physician-Assisted Dying, 42nd Parl, 1st Session, *Medical Assistance in Dying: A Patient-Centred Approach*, at 2 [Report].
[9] The Report, *ibid*, at 14, assumes that *Carter* answers this question in the affirmative: "[T]he Committee does not see how that individual could be denied a recognized Charter right based on his or her mental health condition. Furthermore, we do not understand the *Carter* decision to exclude mental illness." In light of the facts of *Carter* and the SCC's explicit statements about the limited scope of its decision (see *Carter*, *supra* note 1, at paras 56, 113, 127), this is plainly wrong.
[10] In the SCC's view, the principle of patient autonomy on which Ms. Taylor relied in this context "is the same principle that is at work in the cases dealing with the right to refuse consent to medical treatment or to demand that treatment be withdrawn" (*Carter*, *supra* note 1, at para 67)—decisions which may result in death. The Court also noted that the law affords people in Ms. Taylor's situation the freedom to request palliative sedation or to refuse life-sustaining treatment, while denying them assisted suicide: *ibid*, at para 66.
[11] *Carter*, *supra* note 1, at para 113.
[12] Report, *supra* note 8, at 14.
[13] *Carter*, *supra* note 1, at paras 97, 98.
[14] *Ibid*, at para 79.
[15] *Ibid*, see especially paras 104-106 and 114-121.
[16] *Rodriguez v British Columbia (Attorney General)*, 1993 CanLii 1191 (BCCA), at para 172. *Carter v Canada (Attorney General)*, 2012 BCSC 886, was decided after a summary hearing, not a full trial, mostly on affidavit evidence.
[17] See Margaret Somerville, "What the top court left out in judgment on assisted suicide," *Globe and Mail*, October 27, 2015. See *Carter*, at para 86, for the SCC's idea of who is not vulnerable: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives." Regrettably, the Attorney General conceded this point, while trying to characterize the object of the law more broadly.