Bill C-14, *Medical Assistance in Dying*, 2016

Date: May 11, 2016

Submitted to: Senate Standing Committee On Legal and Constitutional Affairs

Submitted by:
Omar Ha-Redeye,
AAS, BHA(Hons.), PGCert, JD, LLM,
CNMT, RT(N)(ARRT)

Lisa Feldstein, BA, JD

Table of Contents

Omar Ha-Redeye, Barrister & Solicitor, Operating as Omar Ha-Redeye Professional Corporation

Email: Omar@FleetStreetLaw.com | Phone/ Fax: 416-546-7412 | Mail: 526 Richmond St E Toronto, ON, M5A 2YA

Introduction

As lawyers practicing in this jurisdiction, and with backgrounds in health law and privacy law, we appreciate the opportunity to make this submission to the Senate Standing Committee on Legal and Constitutional Affairs regarding Bill C-14, an Act to amend the *Criminal Code of Canada* and to make related amendments to other Acts on medical assistance and dying.

Professional Backgrounds

Omar Ha-Redeye

I am a health lawyer with a Juris Doctorate from Western University, and a Masters of Law in Health Law from Osgoode Hall. My practice focuses primarily on civil litigation and health law, and I am familiar with the legislation discussed in Bill C-14.

I am actively involved in academic work and commentary in the legal profession. I am a commissioned researcher with the Law Commission of Ontario to investigate the practical implementation of end of life decision-making in our jurisdiction. In addition to my practice, I teach law at a number of post-secondary institutions in the Greater Toronto Area.

I am the recipient of numerous awards, including the Queen Elizabeth II Diamond Jubilee Medal for improving the legal system in Canada, and the OBA Foundation Award for public legal education and promoting access to justice.

Lisa Feldstein

I am a health lawyer with a B.A. from the University of Guelph and a J.D. from Osgoode Hall Law School. I provide health law services to family caregivers, along with some patients and health care providers. My practice involves providing legal guidance to clients planning for end-of-life or facing conflicts arising from end-of-life decision-making. Over the past several months I have been working with clients seeking medical assistance in dying. I taught negotiation at Osgoode Hall Law School for six years, and have served as a director on the board of a small health service provider. I frequently write and present on a variety of health law topics. In 2015, I was honoured to win a Precedent Setter Award for demonstrating excellence and leadership early in my practice.

Comments

Overview

Canada has taken substantive leaps forward since *R. v. Latimer* (1997). In the more recent case of *Carter v. Canada* (2015), the Supreme Court of Canada struck down the prohibition against physician-assisted dying, stating it has contravened section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). As of February 6, 2016, the law prohibiting physician-assisted death has been struck down and individuals granted a constitutional exemption may die with the assistance of a physician.

With a deadline for Parliament to pass legislation by June 6, 2016, the physician-assisted dying Bill will be restricted to adults facing a reasonably foreseeable death. The strict limits will include an 18-year age requirement and mandatory 15-day reflection period. Only those who are mentally competent, have a serious and incurable illness, disease or disability will be eligible under the proposed legislation. Bill C-14 sets out additional safeguards to protect Canadians who are vulnerable; however, Bill C-14 does not include other recommendations from a Parliamentary Committee, such as extending the right to die for the mentally ill, mature minors, and those who give advance consent.

One of the biggest advantages of this Bill is it avails the option to many Canadians who are suffering from a serious and incurable illness, disease or disability to a medical-assisted death. The preamble also recognizes the need for robust safeguards that reflect the irrevocable nature of ending life. The Bill makes it mandatory that a medical practitioner or nurse practitioner must be of the opinion that the person meets all the criteria set out in subsection (1) of the Act to amend the *Criminal Code of Canada* (the "*Criminal Code*"). Further, it sets out penalties for practitioners that fail to comply with the safeguards in place.

Legislative Context

In 1993, the Supreme Court of Canada upheld the relevant sections of the *Criminal Code*, in denying access to individuals seeking physician-assisted dying. Twenty-two years later, the Supreme Court of Canada's decision in *Carter v. Canada* (2015), questioned the constitutional implications of section 241(b) and section 14 of the *Criminal Code*, that prohibit medical assistance in dying, stating it violates the rights of individuals contrary to the *Charter.*

In February 2016, a Special Joint Committee on Physician-Assisted Dying (PDAM) reviewed the report of the *External Panel on Options for a Legislative Response to Carter v. Canada* and other studies, to make recommendations on the legal framework on physician-assisted dying.[1] The Committee made a number of recommendations that includes: medical-assisted dying should be available for terminal and non-terminal grievous and irremediable medical conditions that cause intolerable suffering; informed consent should be assessed using existing medical practices, paying attention to vulnerabilities in palliative care; advance requests for medical-assisted death should also be allowed when one is diagnosed with conditions that are likely to cause loss of competence or before the suffering becomes intolerable; and that medical practitioners be exempted from sections 14 and section 241(b) of the *Criminal Code*.[2]

Common Law Context

The Supreme Court of Canada decision in 2015 in *Carter v. Canada* struck down section 241(b) and section 14 of the *Criminal Code*. In a unanimous decision, the Court found that section 241(b) and 14 deprived adults of their constitutional rights; specifically their right to life, liberty, and security of person afforded to them under section 7 of the *Charter*.[3]

Prior to the Supreme Court decision, it was a criminal offence to aid or abet *any* individual in ending his or her own life. In the 1993 Supreme Court decision *Rodriguez v. British Columbia (Attorney General)* the Court held in a 5 to 4 decision that the *Criminal Code* did not violate section 7 *Charter* rights.[4] Specifically, it found that section 241(b) violated section 15 of the *Charter*, but that the violation was justified under the principle of fundamental justice. The original objective of the prohibition was to protect vulnerable individuals that may be induced into committing suicide. The Court determined that the best way to protect these vulnerable individuals was to have a complete prohibition on physician-assisted dying.

In *Carter v. Canada* the trial judge found that this complete prohibition was broader than necessary, as the "evidence showed that a system with properly designed and

[1] Medical Assistance in Dying: A Patient-Centred Approach Report of the Special Joint Committee on Physician-Assisted dying. (2016, February 2016). *Special Joint Committee on Physician-Assisted Dying.* Retrieved May 11, 2016, from http://www.parl.gc.ca/Committees/en/PDAM/StudyActivity?studyActivityId=8765254
[2] Ibid.
[3] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331
[4] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519

administered safeguards offered a less restrictive means of reaching the government decision."[5] Because of this, the trial judge declared that the complete prohibition was unconstitutional. The Court unanimously found that the prohibition on assisted dying was overly broad. The prohibition imposed unnecessary suffering on affected individuals, deprived them of the ability to determine what to do with their bodies and how those bodies would be treated.[6]

In determining whether the prohibition infringed on the constitutional rights of the appellant the government had to show that the "law is proportionate if the means adopted are rationally connected to that objective; it is minimally impairing of the right in question; and there is proportionality between the deleterious and salutary effects of the law."[7] The rational connection is clear; the government in order to protect vulnerable individuals there must be an absolute prohibition. The aspect of minimal impairment is not as clear. In dealing with whether the absolute prohibition is the least drastic means of achieving the legislative purpose, the trial judge found that a "permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse."[8] The Court agreed with the conclusion of the trial judge that there are viable options, other than an absolute prohibition, that would not infringe on individuals' constitutional rights, while protecting vulnerable individuals.

Proposed Amendments

1. Conscientious Objections

Bill-C14 gives medical practitioners a central role in the decision-making process, and consequently, there should be safeguards for "conscience rights" of all medical practitioners. Medical practitioners should be able to say no to issues they believe to be a moral wrong. According to a poll conducted by the Canadian Medical Association (CMA) in Halifax, only 29% said they would consider killing a patient upon request, and only 19% said they would consider killing someone who was suffering psychological harm.[9] The Supreme Court of Canada at paragraph 132 specifically stated, "the *Charter* rights of patients and physicians will need to be reconciled." This comment ought not to be disregarded.

[5] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331, at para 31.
[6] *Ibid*, at para 90.
[7] *Ibid*, at para 94.
[8] *Ibid*, at para 105.
[9] Holleron, M. (2015, Aug 27). "National post view: On physician assisted suicide, respect the conscience rights of all." *National Post.* Retrieved from http://news.nationalpost.com/full-comment/national-post-view-on-physician-assisted-suicide-respect-the-conscience-rights-of-all

2. Written Requests

One of the safeguards in the Bill states that a person's request for medical assistance in dying must be in writing "and signed and dated by the person or by another person." As lawyers, we have concerns around the possibility that a decision of such magnitude could be signed by "another person." This is not a satisfactory safeguard and has the potential for abuse. Although 241.1(1) states that forgery constitutes an offence, this is a reactive strategy that does not adequately protect vulnerable individuals.

While there may be illnesses or disabilities that make it difficult or impossible for a person to legibly write their signature on a request, this dilemma has already been addressed in the context of wills and powers of attorney, which are also legal documents that may be executed by people with significant physical limitations.
Rather than permit "another person" to sign, Bill C-14 ought to be amended to ensure requests cannot be ostensibly made by another person.

We suggest the following amendments be introduced to section 241.2(4):

> *If the person requesting medical assistance in dying is unable to sign and date the request*
> *(a) the person shall make a mark on the document, or a thumbprint in ink, representing the person's authorization and one of the independent witnesses shall execute an affidavit swearing that the formalities of witnessing and signing were properly followed; or*
> *(b) the person may make the request for medical assistance in dying in video format that shall include both an audio and video component in which the person states the person's name, the date, and the request.*

3. Liability of Family

Many people who will be seeking medical assistance in dying will do so with family by their bedsides. People who are very ill or disabled may require family assistance with various aspects of seeking medical assistance in dying, from scheduling medical appointments to providing transportation. Most people seeking medical assistance in dying can be anticipated to express the desire to die while surrounded by their family and friends.

In *Carter v. Canada*, the Supreme Court of Canada at paragraph 17 and 18 stated that:

> *As her illness progressed, Kay informed her family that she did not wish to live out her life as an "ironing board," lying flat in bed. She asked her daughter, Lee Carter, and her daughter's husband, Hollis Johnson, to support and assist her in arranging an assisted suicide in Switzerland, and to travel there with her for that purpose. Although aware that assisting Kay could expose them both to prosecution in Canada, they agreed to assist her. .. Ms. Carter and Mr. Johnson found the process of planning and arranging for Kay's trip to Switzerland difficult, in part because their activities had to be kept secret due to the potential for criminal sanctions.*

The Court was not asked to rule specifically on the liability of supportive family members, but they did acknowledge that the family faced exposure to prosecution under the *Criminal Code*. In light of the legalization of medical assistance in dying, Bill C-14 ought to also ensure that supportive family and friends are not prosecuted for assisting loved ones to access an otherwise legal health service.

Sections 227(2) and 241(3) should be broadened to provide legal protection for family and friends who are present during the medically-assisted death, or otherwise supporting a loved one who has made a request for medical assistance in dying.

Conclusions

Generally, we are in support of the changes to the *Criminal Code*, which would provide a mechanism to allow qualified individuals to seek medical-assisted death pursuant to *Carter v. Canada.*

We believe the Bill could be improved in particular by adding protections where the person seeking the treatment is unable to sign for himself or herself. These changes would be consistent with the direction we observe in palliative care and estates law.

The Bill could also be improved by providing explicit immunity to family members who may be perceived to be assisting in the care leading up to a medically assisted death.

Finally, the role of medical practitioners who object based on moral or religious grounds to participation is worthy of consideration.

Omar Ha-Redeye, Barrister & Solicitor, Operating as Omar Ha-Redeye Professional Corporation
Email: Omar@FleetStreetLaw.com | Phone/ Fax: 416-546-7412 | Mail: 526 Richmond St E Toronto, ON, M5A 2YA