

TOP FIVE 2015

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

CARTER v CANADA (ATTORNEY GENERAL), 2015 SCC 5, [2015] 1 SCR 331.

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>

Facts

Prior to this case, aiding or abetting a person to commit suicide was a criminal offence, which meant that a person could not seek a physician-assisted death. In 1993, the Supreme Court of Canada (SCC) upheld this blanket *Criminal Code* prohibition on assisted suicide by a slim majority in *Rodriguez v British Columbia (AG)*.

In 2009, Gloria Taylor was diagnosed with a fatal neurodegenerative disease called amyotrophic lateral sclerosis (ALS). Taylor did not want to "live in a bedridden state, stripped of dignity and independence." As a result, Taylor challenged the constitutionality of *Criminal Code* provisions ss. 14 and 241(b), which prohibited assistance in dying. Lee Carter and Hollis Johnson, who had previously taken Carter's mother to an assisted suicide clinic in Switzerland to fulfill her wish to die with dignity, joined the challenge, along with a physician, and the British Columbia Civil Liberties Association. They argued that the *Criminal Code* provisions violated the rights set out in sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

Criminal Code of Canada

14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

24(1). Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.



Canadian Charter of Rights and Freedoms

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.

15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Procedural History

At trial, the judge found that the *Criminal Code* provisions violated the s. 7 *Charter* rights of competent adults who were suffering intolerably as a result of an irremediable medical condition. She granted a one-year suspension of invalidity and provided Taylor with a constitutional exemption. On appeal, the majority for the British Columbia Court of Appeal (BCCA) followed the precedent set out in *Rodriguez v British Columbia (AG)* [1993], which upheld the prohibition on assisted suicide, and overturned the trial judge's ruling. The applicants appealed to the SCC.

Issues

1. Do ss. 14 and 241(b) of the *Criminal Code*, which prohibit physician-assisted dying, infringe upon the right to life, liberty, and security of the person, as guaranteed under s. 7 of the *Charter*?

2. Do ss. 14 and 241(b) infringe upon the applicant's guarantee to equal treatment provided under s. 15 of the *Charter*?

Decision

The SCC unanimously struck down the *Criminal Code* prohibition on assisted suicide, holding that ss. 14 and 241(b) of the *Criminal Code* were overbroad, and therefore contrary to s. 7 of the *Charter*, in a way that cannot be justified by s. 1. Since the prohibition violated s. 7 of the *Charter*, it was unnecessary to consider violations under s. 15.

Ratio

The *Criminal Code* provisions on assisted suicide deprived Taylor and others suffering from irremediable medical conditions of the right to life, liberty and security of the person in a manner that was overbroad, and therefore not in accordance with the principles of fundamental justice, in violation of s. 7 of the *Charter*.

The prohibition against physician-assisted dying was void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individuals in the circumstances of their condition.

Reasons

The *Criminal Code* provisions on assisted suicide had the effect of forcing some individuals to take their own lives prematurely for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. Thus, the prohibition deprived some individuals of life.

While the *Criminal Code* provisions denied some individuals the right to request a physician's assistance in dying, the law allowed others in similar situations to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment. This interfered with a person's ability to make decisions concerning their bodily integrity and medical care, infringing upon liberty.

Finally, by leaving people like Taylor to endure intolerable suffering, the *Criminal Code* provisions impinged on their security of the person.

A law that impinges on life, liberty or security of the person must not be overbroad. Here, the law was overbroad because it cast a wide net. The object of the law was to protect vulnerable persons from being induced to commit suicide at a moment of weakness. For example, some advocates for people with disabilities argued that this change in the law could lead many people with disabilities to end their lives prematurely and that social discrimination against disabled people was an important factor in this. From this view, changing the law to essentially

make assisted dying available to people with medical disabilities advances an already prevalent notion that the lives of people with disabilities are less worth living than those of people without disabilities.

For the SCC, though, the prohibition also caught people outside this class. For example, Taylor was competent, fully-informed and free from coercion or duress; she was clearly outside the intended audience. Thus, it followed that the limitation on *Charter* rights was, in at least some cases, not connected with the objective of protecting vulnerable persons. This type of blanket criminal prohibition captured conduct unrelated to the law's objective – Taylor and others in her situation were not in need of the law's protection, in this sense.

The SCC struck down the prohibition against physician-assisted dying in February 2015, and gave governments twelve months to draft legislation reflecting the change in the law. In January 2016, this deadline was extended by four additional months because only Ontario and Quebec had provincial guidelines in place and the federal government had not yet completed drafting the new law. The new deadline was June 6, 2016.

The federal government did not meet the SCC's deadline, but new legislation received royal assent on June 17, 2016. Despite the government's efforts to comply with the ruling in *Carter*, a *Charter* challenge to the new legislation was launched just days after the law came into force.

DISCUSSION

1. Prior to this ruling, what options might a person have had for ending their own life when faced with a condition that was intolerable to them?
2. Why might a physician-assisted death be preferable to other ways of ending one's life for someone contemplating that decision?
3. In its ruling, the SCC clarified that the law was changed for fully competent adults who have clearly consented to terminating their lives and who have a serious and irreversible medical condition, including an illness, disability or disease that is intolerable to the individual. How might the perspective of people with serious mental health conditions complicate this?
4. Should only people with serious and irremediable illness have the right to a physician-assisted death, or should this right be extended to a broader group? Why?
5. Taking all of these factors into account, do you feel that the SCC came to the correct decision? Explain.