MAID in Canada? Debating the Constitutionality of Canada's New Medical Assistance in Dying Law

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Different conceptions of "the good life", as well as the "the good death", animate the longstanding and contentious debate surrounding euthanasia and assisted suicide. In Carter v Canada (Attorney General)*, the Supreme Court of Canada struck down Canada's blanket prohibition on medical aid in dying (MAID), but suspended its declaration of invalidity. Parliament responded by amending the Criminal Code to permit MAID in some circumstances. However, Parliament's amendment is arguably more restrictive than the vision set out in* Carter*, and has already been the subject of a constitutional challenge.*

In this context, this article examines Carter*, the legislative response to* Carter*, and the debates surrounding the new MAID law, including the challenge to the new law in* Lamb v Canada (Attorney General)*. The author aims to advance understanding of the ways in which interpretations and theories of Canadian constitutional law relate to arguments over the role law can, or should, play in governing MAID. The author distinguishes three major points of disagreement arising from the debate surrounding the new MAID law's constitutionality: the interpretation of the Court's decision in* Carter*; competing accounts of interpretative authority in constitutional theory; and the role that criminal law should play in governing medical assistance in dying. Examining their relationship, the author seeks to identify broader lessons that can be used when framing debates in Canadian constitutional interpretation. Specifically, the author argues that the debate over* Carter *raises questions not just about how the normative filter function of Canadian constitutional law operates, but also the question of who gets to operate it. While* Carter *may showcase the agency of the courts, equally at issue in the debate over the constitutionality of the new MAID legislation is the role and authority of Parliament.*

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Introduction

In 2016, the Parliament of Canada amended the *Criminal Code* to permit health care professionals to provide assistance in ending a patient's life under certain circumstances.[1] Parliament enacted the legislation subsequent to the Supreme Court of Canada's 2015 decision in *Carter v Canada (Attorney General)*, which held that the existing blanket ban on voluntary euthanasia and assisted suicide was constitutionally invalid.[2] Due to its establishment of more restrictive eligibility criteria than those the Court declared in *Carter*, the present law is undergoing a *Charter* challenge.[3] In this paper, I examine arguments over the constitutionality of this legislation, situating them in relation to a broader debate in Canada about the appropriate roles of the judiciary and the legislature in constitutional interpretation. I try to show the framing function of Canadian constitutional law at work, in hopes of shedding light on ways to deploy constitutional law theory to advance arguments about how the law should govern medical assistance in dying (MAID).

1. See Bill C-14, *An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)*, 1st Sess, 42nd Parl, 2016 (assented to 17 June 2016), SC 2016, c 3 [Bill C-14].

2. 2015 SCC 5 [*Carter* SCC No 1].

3. See *Lamb v Canada (Attorney General)* (27 June 2016), Vancouver, BCSC No S-165851 (Notice of Civil Claim, Plaintiffs), online (pdf): <bccla.org/wp-content/uploads/2016/08/2016-06-27-Notice-of-Civil-Claim.pdf> [*Lamb* Notice of Civil Claim].

The contentiousness and complexity of the "great euthanasia debate"[4] owe as much to the competing visions of "the good life"[5] as to the contrasting conceptions of "the good death"[6] it reflects. Moreover, it is not just a matter of what is the right way to live or the good way to die, but the role law can and should

4. See e.g. Arthur Schafer, "Physician Assisted Suicide: The Great Canadian Euthanasia Debate" (2013) 36:5/6 Intl JL & Psychiatry 522. Opinion editorialists and newspaper columnists have been among the more pithy and polemic intervenors in this debate. For instance, in advance of the Court's decision in *Carter*, Chambers wrote expectantly: "[I]f the Supreme Court of Canada concludes that the prohibition against assisted suicide is unconstitutional, the public message it will be sending is loud and clear: human beings, not God, are the arbiters of life and death". Stuart Chambers, "Stuart Chambers: Why Canada's Attitudes on Dying Have Changed", *Ottawa Citizen* (last modified 3 November 2014), online: <ottawacitizen.com/news/national/stuart-chambers-on-assisted-dying>. In light of the Court's decision, Coyne reflected witheringly: "One measure of the eerie complacency of the Supreme Court's ruling in *Carter* . . . is that it spends more time on the question of where to award the costs of the case than it does on the implications of its decision. Six pages on costs; three pages on where the hell is this all leading?" Andrew Coyne, "Andrew Coyne: Crossing the Rubicon, Supreme Court Seems Eerily Complacent About Ramifications of Assisted Suicide Ruling", *National Post* (6 February 2015), online: <nationalpost.com/opinion/andrew-coyne-crossing-the-rubicon-supreme-court-seems-eerily-complacent-about-ramifications-of-assisted-suicide-ruling>.

5. For competing perspectives on this point, see Margaret Somerville, *Death Talk: The Case Against Euthanasia and Physician-Assisted Suicide*, 2nd ed (Montreal: McGill-Queen's University Press, 2014); Jocelyn Downie, *Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada* (Toronto: University of Toronto Press, 2004).

6. See Robert Samek, "Euthanasia and Law Reform" (1985) 17:1 Ottawa L Rev 86 at 89–90. A number of government-funded studies and reports have been conducted on this area in Canada. See e.g. Law Reform Commission of Canada, *Report 20: Euthanasia, Aiding Suicide and Cessation of Treatment* (Ottawa: Supply and Services Canada, 1983); Senate of Canada, *Of Life and Death: A Report of the Special Senate Committee on Euthanasia and Assisted Suicide* (1995); Ontario Law Reform Commission, *Study Paper on Assisted Suicide, Euthanasia and Foregoing Treatment*, by Joan M Gilmour (Toronto: OLRC, 1997); National Assembly of Quebec, Select Committee on Dying with Dignity, *Dying With Dignity* (March 2012); Ontario, *Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying: Final Report* (30 November 2015); Canada, External Panel on Options for Legislative Response to *Carter v Canada*, *Consultations on Physician-Assisted Dying: Summary of Results and Key Findings: Final Report* (15 December 2015); House of Commons & Senate, *Medical Assistance in Dying: A Patient-Centered Approach: Report of the Special Joint Committee on Physician-Assisted Dying* (February 2016) (Chairs: Hon Kelvin Kenneth Ogilvie & Robert Oliphant).

play in governing decisions about these matters.[7] Rather than simply a split along ethical or policy lines, I argue that the debate over the law's constitutionality revolves around three distinct but interrelated points of contention: first, differing views of the correct way to interpret the Court's decision in *Carter*; second, competing accounts of interpretive authority in Canadian constitutional theory; and third, clashing perspectives on the role that the criminal law should play in governing MAID. Thanks to the interwoven nature of these three levels of disagreement, it is difficult to trace a single dividing line between those affirming and those contesting the law's constitutionality.

Constitutional debate performs the role of surrogate for disagreements over morality and politics. Constitutional law establishes reference points for elaborating the kinds of arguments that count when making the case for how state law should govern MAID.[8] For example, the *Canadian Charter of Rights and Freedoms*[9] entrenches individual rights, and sections 91 and 92 of the *Constitution Act, 1867*[10] assign different areas of law-making power to Parliament and the provincial legislatures.[11] In this sense, Canadian constitutional law serves to frame, while allocating the authority to frame, MAID in legal terms.[12]

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7. Moral imperatives and legal obligations do not always correspond. Indeed, there may be compelling moral reasons for them not to. See e.g. Udo Schüklenk et al, "End-of-Life Decision-Making in Canada: The Report by the Royal Society of Canada Expert Panel on End-of-Life Decision-Making" (2011) 25:S1 Bioethics 1 at 44–45; Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012); Ekow N Yankah, "Liberal Virtue" in Amalia Amaya & Ho Hock Lai, eds, *Law, Virtue and Justice*, vol 5 (Oxford: Hart, 2013) 169.

8. It is one thing to treat what courts deem valid arguments as a shorthand for determining the kind of normative claim that "counts", but it is important to recognize not only that jurisprudence evolves over time (in sometimes quite unpredictable ways) but that other actors, both institutional and individual, engage in constitutional interpretation and justification as well.

9. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

10. (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

11. For an overview of these and many other elements of Canadian constitutional law, see Peter W Hogg, *Constitutional Law of Canada: 2016 Student Edition* (Toronto: Thomson Reuters, 2016).

12. This is the distinctive way in which constitutional law exhibits law's quality of holding up "human interaction . . . for assessment in the mirror of rules". Roderick A Macdonald, "Triangulating Social Law Reform" in Ysolde Gendreau, ed, *Dessiner la société par le droit : Mapping Society Through Law* (Montréal: Thémis, 2004) 117 at 121.

Expressing fundamental social, political and ethical questions through the language (meaning the rules, doctrines, conventions, principles, concepts, logics and justifications) of Canadian constitutional law channels normative arguments like a gully channels water. This gully is not naturally occurring. Deliberate engineering and ongoing maintenance—in the form of constitutional conferences and amendment, for instance—have helped to give it its shape; however, its dimensions are not impervious to the nature, force and intensity of the flow it manages.[13] The boundaries are not physical, but discursive—what gains entry is the kind of normative argument that has been successfully translated into the language of constitutional law.

Centring the debate over the legal regulation of MAID around the question of constitutionality makes it less of a free-for-all. One cannot just argue anything. Of course, there is a risk, then, that salient questions posed in straightforward ways end up being displaced. Usually they get reformulated in the language of the *Charter* and past precedents. The idea is that, especially when it comes to vexing questions, some set of parameters are necessary in order to have any meaningful, peaceable and provisionally conclusive debate.[14] Constitutional strictures—complex, iterative and subject to interpretation as they are—do afford some degree of flexibility. Indeed, their channeling function—that of offering a manageable alternative to immersion in a rhetorical deluge—depends on it.

I trace the debate, accentuating particular cleavages, and situating them in relation to larger features of Canadian constitutional jurisprudence and scholarship. I do not make a prediction about how the Supreme Court of Canada will ultimately rule if it ends up hearing the *Charter* challenges launched against

13. This is most evident in developments of judicial interpretations of constitutional law. For sundry examples, see Thomas MJ Bateman et al, *The Court and the Constitution: Leading Cases*, 2nd ed (Toronto: Emond Montgomery, 2017).

14. See generally Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 (provisional character of the conclusory effect of law in general). For Canadian constitutional law in particular, see Jeremy Webber, "Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere)" in Wojciech Sadurski, ed, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2002) 61; Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) [Webber, *Constitution of Canada*]. *Contra* Aileen Kavanagh, "The Lure and the Limits of Dialogue" (2016) 66:1 UTLJ 83 at 116–17 (evocative of Austin's gesturing to the finality of the gallows).

the present MAID law. I do try, however, to demonstrate the gully function at work—with it favouring the formulation of normative claims in some ways, but not others. I emphasize that we are speaking of an organic, as opposed to a mechanical, process—one complicated by an array of interacting factors, not least the purposive dimension to the exercise of judgment itself. The rhetorical devices that, for example, "dialogue" and even "rights" represent do not function automatically or univocally. My aim, therefore, is to shed light on how the framing function of Canadian constitutional law works, while identifying lessons in how those litigating this matter must necessarily endeavour to work the frame.

I begin by reviewing the reasoning of the Supreme Court of Canada in *Carter*. Next, I undertake an exposition of the debate over the new MAID law's constitutionality. First, I explore arguments about which claim, that of consistency or that of inconsistency with the MAID statute, reflects the soundest interpretation of the decision in *Carter*. Second, I evaluate the significance of adopting "dialogue theory" to orient accounts of institutional authority in Canadian constitutional interpretation. These issues are separate from—but at the same time, interrelated with—the question: as a matter of Canadian public law and policy, which presents the preferable option—the access criteria enumerated by the Court or the federal legislation? I do not delve directly into this question but as will be seen, it is never possible to entirely avoid it either. On the one hand, to distinguish these sets of issues is to affirm that disagreement over the constitutionality of Canada's MAID legislation is not reducible to any one of them. On the other hand, their mutual imbrication shows the interplay of the universal and the particular in *Charter* rights adjudication. In the course of this discussion, my aim is to illustrate how the justificatory exercise of claiming what the law should or should not be interacts dynamically with the process of arguing what it is the constitution permits or indeed demands.

I. MAID in Canada: Recent Legal Developments

In 2016, the Parliament of Canada amended the *Criminal Code*, making it lawful for physicians and nurse practitioners to comply with informed, voluntary requests for MAID from competent adults who suffer from "a grievous and irremediable medical condition".[15] The previous year, the Supreme Court

15. Bill C-14, *supra* note 1 at cl 3.

of Canada had struck down the blanket prohibition on voluntary euthanasia and physician-assisted suicide.[16] Specifically, the Court unanimously held that the ban infringed section 7 of the *Charter* in a manner that could not be justified under section 1.[17] It declared the relevant *Criminal Code*[18] provisions "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".[19] Nevertheless, the Court suspended its declaration of invalidity from taking effect for twelve months.[20]

During that period, Canada held a federal election.[21] The new Liberal government asked the Court to postpone the date when its declaration of invalidity

16. See *Carter* SCC No 1, *supra* note 2.

17. See *Charter*, *supra* note 9, ss 1, 7. Section 7 provides that "[e]veryone 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" (*ibid*, s 7). Meanwhile, section 1 permits Parliament and the provincial legislatures of Canada to make justifications for laws that impinge on individual rights: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*ibid*, s 1).

18. See RSC 1985, c C-46, ss 14, 241(b) as they appeared on 15 October 2014 [*Criminal Code*]. Section 14 stated that "[n]o 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" (*ibid*, s 14). Section 241(b) stated that "everyone who . . . aids or abets a person in committing suicide commits, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years" (*ibid*, s 241(b)).

19. *Carter* SCC No 1, *supra* note 2 at para 127.

20. See generally Robert Leckey, *Bills of Rights in the Common Law* (Cambridge, UK: Cambridge University Press, 2015) at 93–150 (on courts delaying the legal effect of declarations of invalidity); Grant R Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law" (2011) 49:1 Alta L Rev 107; Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2nd) 267.

21. In the debates, all of the party leaders appeared to steer clear of the matter, even though whether and how the government would respond legislatively to the Court's decision in *Carter* were still open questions.

would take effect.[22] The Court granted a three-month extension, but also allowed patients in Quebec to access MAID under the provincial statute on end of life care (which had entered into force two months before the Court's February decision)[23] and patients in the rest of Canada to access MAID by applying to the superior court of their jurisdiction to determine whether they qualified under the criteria set out in *Carter*.[24]

In two cases during that period, the Attorney General of Canada challenged the judicial authorization of a MAID request on the basis that the remedy in *Carter* was restricted to patients with a terminal medical condition. In *IJ v Canada (Attorney General)* and *Canada (Attorney General) v EF*, both the Ontario Superior Court and the Alberta Court of Appeal, respectively, disagreed with this argument, allowing the applicants to proceed with their requests for MAID absent evidence that the medical condition causing them intolerable suffering was terminal.[25] The Alberta Court of Appeal based its reasons in *EF* on what it saw as the "fundamental premise of *Carter* itself",[26] as expressed in the opening paragraph of that judgment:

> It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously 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. The choice is cruel.[27]

22. See *Carter v Canada (Attorney General)*, 2016 SCC 4 [*Carter* SCC No 2]. See also Jennifer Koshan, "A Terminal Dispute? The Alberta Court of Appeal Versus the Federal Government on Assisted Death" (26 May 2016), online (blog): *ABlawg* <ablawg.ca/2016/05/26/a-terminal-dispute-the-alberta-court-of-appeal-versus-the-federal-government-on-assisted-death/>.

23. See *Loi concernant les soins de fin de vie*, CQLR c S-32.0001.

24. See *Carter* SCC No 2, *supra* note 22.

25. 2016 ONSC 3380; 2016 ABCA 155 [*Canada v EF*].

26. *Canada v EF*, *supra* note 25 at para 41.

27. *Carter* SCC No 1, *supra* note 2 at para 1.

And yet, according to the law Parliament passed in June 2016, it remains a crime for a health care professional to satisfy a suffering patient's request to die unless that patient's "natural death has become reasonably foreseeable".[28] In the *Charter* challenge they have launched, Julia Lamb and the British Columbia Civil Liberties Association (BCCLA) argue that this restriction on access to MAID compromises the law's constitutionality.[29]

Arguments over how the *Carter* decision ought to constrain Parliament's legislative response turn on differing accounts of the *ratio decidendi*,[30] *obiter dicta* and *res judicata* in *Carter*.[31] Prior to exploring the significance of the discrepancy between the access parameters elucidated by the Court in *Carter* and those subsequently legislated by Parliament, it is worth reviewing the Court's judgment in *Carter*.

II. The Supreme Court of Canada's Decision in *Carter*

Section 241(b) of the *Criminal Code* provided that everyone who aids or abets a person in committing suicide commits an indictable offence, and section 14 said that no person may consent to death being inflicted on them.[32] Together, these provisions created a blanket prohibition on the provision of assistance in dying in Canada. Gloria Taylor (diagnosed with a fatal neurodegenerative disease in 2009) along with Lee Carter, Hollis Johnson,

28. Bill C-14, *supra* note 1 at cl 3.

29. See *Lamb* Notice of Civil Claim, *supra* note 3 at Part 3, paras 13–15. See also *Truchon c Procureur général du Canada*, 2018 QCCS 331.

30. See generally Rupert Cross & JW Harris, *Precedent in English Law*, 4th ed (Oxford: Clarendon Press, 1991) at 39–84. See also Binnie J's discussion in *R v Henry*, 2005 SCC 76 at paras 44–57.

31. Determining the legally binding element of a decision means identifying which parts of the judgment constitute opinions that do not form precedent because they are not essential to the thing decided. Such inquiries are rooted in theories of constitutional interpretive authority, however. Frequently debated in Canadian judicial and scholarly commentaries referencing "dialogue theory", these beliefs about the nature of legal interpretation, constitutional adjudication, and the division of powers inform the ways in which such questions are asked and answered. I address this matter in the next section of this paper. For present purposes, I consider the nature of the precedent set in *Carter*, as best I can, independent of this wider context.

32. See *Criminal Code*, *supra* note 18, s 241(b).

William Shoichet[33] and the BCCLA challenged the constitutionality of those provisions due to their infringement of sections 7 and 15 of the *Charter*.[34]

Section 7 states: "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."[35] In *Carter*, the Supreme Court of Canada stated that "the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly".[36] Because, in the Court's view, the blanket prohibition on physician-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", it engaged the right to life.[37] Furthermore, the Court saw the impugned legislation as engaging the rights to liberty and security of the person since the former involves "the right to make fundamental personal choices free from state interference" and the latter concerns "control over one's bodily integrity free from state interference".[38] That is because "[a]n individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy."[39] In the Court's view, the blanket prohibition denied people in such a situation the right to make decisions concerning their bodily integrity and medical care, and thus trenched

33. Lee Carter and Hollis Johnson assisted Lee's mother, Kay Carter, (who was 89 years old and suffering from spinal stenosis) to travel to Switzerland to receive MAID. William Shoicet was a physician who claimed that were it not a crime he would be willing to provide patients with MAID.

34. See *Charter*, *supra* note 9, ss 7, 15. Section 15 states: "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" (*ibid*, s 15). Because the plaintiffs succeeded on the strength of their section 7 arguments, the Court deemed it unnecessary to conduct a section 15 analysis as well. See *Carter* SCC No 1, *supra* note 2 at para 93.

35. *Charter*, *supra* note 9, s 7.

36. *Carter* SCC No 1, *supra* note 2 at para 62.

37. *Ibid* at para 57.

38. *Ibid* at para 64.

39. *Ibid* at para 66.

on their liberty.[40] Furthermore, by leaving them to endure intolerable suffering, it infringed their right to security of the person.[41]

According to the Court's section 7 jurisprudence, a law impinging on the right to life, liberty or security of the person fails to accord with the principles of fundamental justice when it is arbitrary, overbroad, or has consequences grossly disproportionate to its object.[42] Judgments of arbitrariness, overbreadth and gross disproportionality all depend on a determination of what the law is *for* in the first place.[43] The characterization of a law's object is crucial, for as the Court observed in *R v Moriarity*: "An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth."[44] The Court found that the object of the prohibition was not "to preserve life, whatever the circumstances" but to prevent "vulnerable persons from being induced to commit suicide at a time of weakness."[45] Because the prohibition limited the rights of those beyond the group of vulnerable persons requiring such protection, the law was overbroad and thus inconsistent with the principles of fundamental justice.

The question remained, though, whether the section 7 infringement could be saved under section 1, which permits restrictions on *Charter* rights if they are found to be "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[46] Although acknowledged to be prescribed by law and related to a pressing and substantial objective, the restriction failed the Court's proportionality test.[47] Based on the findings of the trial judge,

40. See *ibid*.

41. See *ibid*.

42. See *ibid* at para 72. See also *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*]. For further scholarly analysis of section 7, including additional principles of fundamental justice, see Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) [Stewart, *Fundamental Justice*].

43. Hence Peter W Hogg observes that "a judge who disapproves of a law will always be able to find that it is overbroad". Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2nd) 195 at 203 [Hogg, "The Brilliant Career of Section 7"].

44. 2015 SCC 55 at para 28.

45. *Carter* SCC No 1, *supra* note 2 at para 78. See also *ibid* at paras 70–92.

46. *Charter*, *supra* note 9, s 1. In full, section 1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*ibid*).

47. See *Carter* SCC No 1, *supra* note 2 at paras 94–123.

the Court concluded that the blanket prohibition was not necessary to substantially meet the government's objective, and consequently, was not minimally impairing. The Court wrote:

> The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goals" . . .. The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" . . .. The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.[48]

The Court then stated that the case essentially boiled down to the question of "whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person [was] the least drastic means of achieving the legislative objective".[49] It ultimately affirmed the trial judge's conclusion "that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error".[50]

In its declaration of invalidity, the Court never indicated that death must be imminent, but it did refer to Gloria Taylor (whose condition was terminal) and "people like" her.[51] The subsequent amendments to the *Criminal Code*, however, introduce the requirement that one's "natural death has become reasonably foreseeable" for accessing MAID.[52]

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48. *Ibid* at para 102 [citations omitted].

49. *Ibid* at para 103.

50. *Ibid* at para 105.

51. *Ibid* at para 126. The word terminal appears twice in the judgment, once in the Court's summary of jurisdictions that have legalized voluntary euthanasia and once in the extract from Gloria Taylor's statement in which she refers to her "experience of knowing that you are terminal" (*ibid* at para 12). The transcript of the proceedings records counsel for the appellants, Joseph Arvay, stating: "[W]e do not limit our claim to the terminally ill . . . but we are limiting our case to people whose condition is irremediable or incurable . . . because assisted dying should only be allowed in the most serious cases and not just because somebody wants to, it's because their condition is not going to get any better". *Carter* SCC No 1, *supra* note 2 (Transcript of proceedings, 15 October 2014, at 35) [*Carter*, Transcript].

52. Bill C-14, *supra* note 1 at cl 3.

III. The *Charter* Challenge to the New Law

According to the new law's preamble, defining MAID eligibility in this way is meant to strike a balance between recognizing the autonomy of persons with grievous and irremediable medical conditions who wish to end their lives, and affirming "the inherent and equal value of every person's life and to avoid encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled".[53] Lamb and the BCCLA insist, however, that "she has the right to be able, should her medical condition bring her to the point of enduring and intolerable suffering, to seek medical assistance in dying in order to alleviate that suffering regardless of how long she might survive in that state . . . or that her death from natural causes is not reasonably foreseeable".[54]

Lamb and the BCCLA claim that although the new law is no longer a blanket ban, it still constitutes an absolute prohibition for a class of individuals seeking to exercise the constitutional right to physician-assisted dying that the Court in *Carter* declared that they have.[55] As Arvay has argued since the new law passed, barring those whose natural death is not reasonably foreseeable means condemning them to an even longer period of suffering than those whose end is near.[56] Foregoing MAID when the end is in sight may be less onerous than when natural death is potentially years and years down the road. From this standpoint, the requirement that "natural death has become reasonably foreseeable"[57] forces those suffering from a painful, debilitating medical condition to

53. *Ibid*, Preamble.

54. *Lamb* Notice of Civil Claim, *supra* note 3 at Part 1, para 35.

55. See *Lamb* Notice of Civil Claim, *supra* note 3. In May 2017, Robyn Moro joined Lamb's *Charter* challenge. See Joan Bryden, "Second Plaintiff Added to Court Challenge of Assisted-Dying Law", *The Globe and Mail* (23 May 2017), online: <www.theglobeandmail.com/news/national/second-plaintiff-added-to-court-challenge-of-restrictive-assisted-dying-law/article35082786/>. On August 31, 2017, Robyn Moro received MAID. See Joan Bryden, "B.C. Woman Who Challenged Right-to-Die Laws Gets Medically Assisted Death", *CBC News* (18 September 2017), online: <www.cbc.ca/news/canada/british-columbia/assisted-dying-law-canada-moro-1.4294809>.

56. See Joseph Arvay, Address (Lecture delivered at the Constitutional Cases Conference at Osgoode Hall, York University, 7 April 2017) [unpublished]; Joseph Arvay, Address (Lecture delivered at the Second International Conference on End of Life at Schulich School of Law, Dalhousie University, 13 September 2017) [unpublished].

57. *Criminal Code*, *supra* note 18, s 241.2(2)(d).

accept their lot for an indefinite, potentially long period, no matter how badly they may wish to die.

Julia Lamb has spinal muscular atrophy type 2, a hereditary condition causing degradation of a person's voluntary muscles. Over time, this wasting may result in "areflexia, overall muscle weakness, difficulty walking/standing/sitting, loss of strength of the respiratory muscles and respiratory distress, fasciculations of the tongue and difficulty swallowing".[58] Lamb does not wish to end her life now, but is aware that she may one day be suffering for an "unknown and unbearable duration", and wants "the peace of mind of knowing that . . . she has the right to be able . . . to seek medical assistance in dying in order to alleviate that suffering".[59]

Accordingly, Lamb and the BCCLA argue that barring people like her from lawfully obtaining aid in ending their lives, once they feel that their condition is no longer tolerable, unjustifiably infringes sections 7 and 15 of the *Charter*.[60] They object to the legislation's eligibility requirements including the word "incurable", which they interpret as different from "irremediable", which the Court stressed in *Carter* "does not require the patient to undertake treatments that are not acceptable to the individual".[61] Most especially, they object to the law requiring that a person's natural death become reasonably foreseeable, and that the person be in an advanced stage of irreversible decline of capability.

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58. *Lamb* Notice of Civil Claim, *supra* note 3 at Part 1, para 6.

59. *Ibid* at Part 1, para 35.

60. Julia Lamb's Notice of Civil Claim includes the following non-exhaustive list of medical conditions that may cause the patient intolerable suffering before natural death becomes reasonably foreseeable or an advanced stage of irreversible decline in capability is reached: spinal muscular atrophy, multiple sclerosis, spinal stenosis, locked-in syndrome, severe conversion disorder, traumatic spinal injury, Parkinson's disease, and Huntington's disease. Eliminating the "reasonably foreseeable" criterion would not, however, guarantee eligibility. Having locked-in syndrome, for example, may impair a patient's ability to communicate one's wishes and thereby satisfy the procedural requirements set out in the MAID law. *Ibid* at Part 1, para 66.

61. *Ibid* at Part 1, para 4; *Carter* SCC No 1, *supra* note 2 at para 127. Nonetheless, there is good reason to interpret the terms consistently, since, for example, section 241.2(2)(c) of the statute also refers to "suffering . . . that cannot be relieved under conditions that they [the patient] consider acceptable." Bill C-14, *supra* note 1 at cl 3. For a more detailed argument on this point, see Jocelyn Downie & Jennifer A Chandler, "Interpreting Canada's Medical Assistance in Dying Legislation" (2018) at 16–19, online (pdf): *Institute for Research on Public Policy* <irpp.org/wp-content/uploads/2018/03/Interpreting-Canadas-MAiD-Lesgislation.pdf>.

The phrase "natural death has become reasonably foreseeable" is not an established clinical term. The College of Physicians and Surgeons of Ontario notes: "[T]he patient need not have a terminal condition to be eligible for medical assistance in dying. Rather, there must be a real possibility of death, evidenced by the patient's irreversible decline, within a period of time that is foreseeable in the not too distant future."[62]

The *Criminal Code* does not specify what that time period is. The legislation states that a prognosis as to a specific length of time need not be made either. Neither does it define what constitutes "an advanced state of irreversible decline in capability".[63] The eligibility of individuals diagnosed with the conditions listed in Lamb's Notice of Civil Claim depends on their age and overall health. It is up to physicians and nurse practitioners—the legislation requires two—to determine a patient's eligibility. As occurred in the Ontario Superior Court of Justice case of *AB v Canada (Attorney General)*, however, a court may declare, based on the evidence before it and as a matter of statutory interpretation, whether a person's natural death has become reasonably foreseeable within the meaning of section 241.2(2)(d) of the *Criminal Code*.[64] Justice Perell noted: "There may be cases of doubt about the ambit of s 241.2(2)(d), but AB's case of an almost 80 year old woman in an advanced state of incurable, irreversible, worsening illness with excruciating pain and no quality of life is not one of them."[65] It appears that a patient must be "on a trajectory toward death"[66] due to natural causes, but no statute, court judgment or professional guideline defines any temporal limit.[67] It is possible

62. "Medical Assistance in Dying Policy: Frequently Asked Questions" at 2, online (pdf): *College of Physicians and Surgeons of Ontario* <www.cpso.on.ca/CPSO/media/documents/Policies/Policy-Items/medical-assistance-in-dying-FAQ.pdf>.

63. Bill C-14, *supra* note 1 at cl 3.

64. 2017 ONSC 3759 [*AB v Canada (AG)*] (declaration of statutory interpretation by Perell J).

65. *Ibid* at para 87. See also Downie & Chandler, *supra* note 61 (argument on the need for uniformly flexible, interpretive guidelines for determining whether a patient's "natural death has become reasonably foreseeable" at 7–15).

66. *AB v Canada (AG)*, *supra* note 64 at para 83.

67. There is no universal understanding of this phrase. See Thomas McMorrow, "Assisted Dying Bill C-14 Is Heavy On Ambiguity", *Huffington Post Canada* (15 April 2016), online: <www.huffingtonpost.ca/thomas-mcmorrow/assisted-dying-c-14_b_9697872.html?utm_hp_ref=canada-politics&ir=Canada+Politics>. Bateman and LeBlanc insist, for example "that Bill C-14's limiting clause narrows the period in which a legal MAID regime would operate; it would

then that, depending on if and when Julia Lamb were to pursue MAID, the requisite two health care professionals may deem her eligible.[68]

The restriction on access to MAID would appear to be intended to deter those living with disabilities and illnesses from seeking MAID; it evinces the willingness to enable those who are at the end of life already—or are close enough—to pass away with the aid of medical and nurse practitioners.[69] It also involves

require, so to speak, the shadow of death to be cast over the decision to terminate one's life". Thomas MJ Bateman & Matthew LeBlanc "Dialogue on Death: Parliament and the Courts on Medically-Assisted Dying" (2018) 85 SCLR (2nd) 387 at 405. Conversely, Joceyln Downie and Kate Scallion point to remarks from the Minister of Justice and the Minister of Health, as well as the Department of Justice's *Legislative Background*, to show that the criterion is not tantamount to an end-of-life requirement. In their view, predicting how long a patient has left is sufficient but not necessary to determine that "natural death has become reasonably foreseeable". Rather than apply a bright-line temporal limit of six months, twelve months or even five years, the health care professional must determine if, in light of the patient's medical circumstances, either how or when the patient's natural death will occur is reasonably predictable. See Jocelyn Downie & Kate Scallion, "Foreseeably Unclear: The Meaning of the 'Reasonably Foreseeable' Criterion for Access to Medical Assistance in Dying in Canada" Dal LJ at 30 [forthcoming], DOI: <10.2139/ssrn.3126871>; Department of Justice, *Legislative Background: Medical Assistance in Dying (Bill C-14)*, Catalogue No J4-41/2016E (Ottawa: Justice Canada, 2016). Needless to say, given such a wide range of interpretations in the legal academic literature, "it will not be easy to prosecute a physician or nurse under the criminal law, with the requirement that their interpretation is beyond any reasonable doubt wrong". Trudo Lemmens, "Charter Scrutiny of Canada's Medical Assistance in Dying Law and the Shifting Landscape of Belgian and Dutch Euthanasia Practice" (2018) 85 SCLR (2nd) 459 at 462, n 8.

68. In Downie and Scallion's view, a patient with SMA would be eligible, so long as one satisfied the other eligibility requirements. Other conditions they list as eligible on this interpretation are: amyotrophic lateral sclerosis, Parkinson's, Huntington, Alzheimer's, intractable anorexia, and locked-in syndrome where the patient refuses artificial hydration and nutrition. Cases they see as still not eligible include: "40-year-old patient with incurable cancer for which suffering can be controlled by means acceptable to the patient[;] 25-year-old patient with paraplegia resulting from a car accident but no other health conditions[;] 60-year-old patient with spinal stenosis but no other health conditions[;] 45-year-old patient with chronic pain but no other health conditions[;] 50-year-old patient with schizophrenia but no other health conditions." Downie & Scallion, *supra* note 67 at 30–31.

69. In the House of Commons Debates, the Honourable Jody Wilson-Raybould stated: "[I]t would limit medical assistance in dying to persons in these types of circumstances in order to prevent the normalization of suicide, protect vulnerable persons who were disproportionately at risk of inducement to suicide, and affirm the equal value of every person's life". "Bill C-14, An

denying that option to certain classes of people: those under eighteen, those whose medical condition is strictly psychological and cannot meet the requisite criteria,[70] those seeking to give advanced directives for MAID, and those who wish to die but are not suffering from a medical condition. There have been cases reported of patients refusing hydration and nutrition in order to imperil their health enough so as to qualify.[71] In addition to the formal requests for MAID that are turned down,[72] there are the potentially numerous instances of

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Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)", 3rd reading, *House of Commons Debates*, 42-1, No 62 (31 May 2016) at 3798 (Hon Jody Wilson-Raybould). Contrarily, the Honourable Vance Badawey stated:

> However, medical assistance in dying is not a solution to all forms of medical suffering. Such an approach would raise unacceptable risks, particularly for vulnerable people throughout our society. Take the example of someone who is exclusively suffering from a physical or mental disability, but who is otherwise in good health and whose natural death is still many years away. Making medical assistance in dying available to people in these circumstances risks reinforcing negative stereotypes of the lives lived by Canadians with disabilities, and could suggest that death is an acceptable alternative to any level of medical suffering or disability.

"Bill C-14, An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)", 2nd reading, *House of Commons Debates*, 42-1, No 47 (3 May 2016) at 2744 (Hon Vance Badawey).

70. See Jocelyn Downie & Justine Dembo, "Medical Assistance in Dying and Mental Illness Under the New Canadian Law" (2016) J Ethics in Mental Health 1. *Cf* Trudo Lemmens, Heesoo Kim & Elizabeth Kurz, "Why Canada's Medical Assistance in Dying Legislation Should Be C(h)arter Compliant and What it May Help to Avoid" (2018) 11:1 McGill JL & Health S61 at S112.

71. When Dr. Ellen Wiebe provided MAID to a fifty-six-year-old patient known as Ms. S. who starved herself to become eligible for access to MAID, the College of Physicians and Surgeons of British Columbia found that she did not break the regulator's rules. See Kelly Grant, "B.C. Doctor Cleared of Wrongdoing for Providing Assisted Death to Woman Who Starved Herself", *The Globe and Mail* (23 March 2018), online: <www.theglobeandmail.com/canada/article-bc-doctor-cleared-of-wrongdoing-for-providing-assisted-death-to>.

72. Currently, no national, comprehensive, detailed empirical picture of the patients whose requests for MAID are refused is available. See Ellen Wiebe et al, "Reasons For Requesting Medical Assistance in Dying" (2018) 64:9 Can Family Physician 674. Wiebe et al note that, of the 250 assessments for MAID conducted by six physicians in British Columbia in 2016, "112 of the patients had assisted deaths, 11 had natural deaths, 35 were assessed as not eligible for MAID, and most of the rest were not ready . . .. Of the 35 people who were assessed as not eligible, 18

doctors informing patients that they would not be eligible for MAID.[73] Some may view this as a failure of access, others as regulatory success.[74] What the legislation was intended to achieve—and how—has been controversial from the start.

IV. Objections at the Legislative Stage

Challenges to the new law's constitutionality dogged it from its introduction as Bill C-14 in Parliament.[75] The argument was that by narrowing the access parameters expressed in *Carter*, the legislation conflicts with what the Court declared the *Charter* to require. The language in the Court's declaration of invalidity built a rights floor, below which Parliament had an obligation not to go unless it were to invoke the notwithstanding clause. The Court's interpretation did not constitute a ceiling—meaning, Parliament could extend access to MAID beyond just those who fit the profile described by the Court. The opposing view was that *Carter* struck down a blanket prohibition because it

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were refused because their natural deaths were not deemed to be in the foreseeable future, 8 were considered to have primarily psychiatric causes, 7 were assessed as not capable of making health care decisions, and 2 were not considered to be suffering" (*ibid* at 674, 677).

73. Based on information gathered from Alberta, Manitoba, Saskatchewan, Quebec and some Atlantic provinces, Health Canada notes that "of the 1,066 requests for medical assistance in dying reported by these provinces, approximately 8% were declined. The most commonly cited reasons were loss of competency and that death was not reasonably foreseeable." The report only posts the number of inquiries about medical assistance in dying for Saskatchewan and Alberta, while noting that the figures for Alberta are likely higher than reported. Health Canada, *Third Interim Report on Medical Assistance in Dying in Canada*, Catalogue No H14-230/3-2018E (Ottawa: Health Canada, 2018) at 9.

74. Diverging beliefs about MAID in principle inflect those calls for increasing access and those for expanding monitoring and safeguards. See e.g. Sandra Martin, "Fight to the Death: Why Canada's Physician-Assisted Dying Debate Has Only Just Begun", *The Globe and Mail* (last modified 28 January 2018), online: <www.theglobeandmail.com/opinion/sandra-martin-physician-assisted-death-debate/article37742446/>. *Cf* Catherine Frazee, "Catherine Frazee: Medically Assisted Dying Cases Need Stronger Review to Safeguard Us All", *The Province* (9 September 2018), online: <theprovince.com/opinion/op-ed/catherine-frazee-medically-assisted-dying-cases-need-stronger-review-to-safeguard-us-all>.

75. For a summary and analysis of debates in the House and Senate on Bill C-14, see Bateman & LeBlanc, *supra* note 67 at 405–26.

infringed the section 7 rights of Gloria Taylor and people like her. The new law, and the manner in which it restricts access to MAID, is different from a blanket ban. The courts should interpret the additional prerequisites introduced by legislative amendment as safeguards and not as an identical infringement to the blanket prohibition struck down in *Carter*. Although the Supreme Court of Canada's reasoning in *Carter* would justify a more permissive regime than Parliament has chosen to implement, the legal effect of that reasoning was to invalidate the blanket ban—not to tie Parliament's hands in doing its job as legislator.

Notwithstanding conflicting testimony presented to Parliament during its consideration of Bill C-14, the government never sought to settle the question of its constitutionality through a Supreme Court of Canada reference.[76] Peter Hogg argued that because its eligibility criteria were narrower than those outlined in *Carter*, it had to be unconstitutional.[77] For example, in his submission to the Senate Standing Committee on Legal and Constitutional Affairs, he exclaimed: "I think it's incredible to think that what was intended by the court, when it said to pass legislation consistent with the constitutional parameters of the case, was to exclude a whole category of people who had won the right through three stages of litigation up to the Supreme Court of Canada."[78]

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76. See "Legal and Constitutional Affairs: June 6, 2016" (6 June 2016) at 00h:58m:17s, 01h:59m:51s, online (video): *CPAC* <www.cpac.ca/en/programs/in-committee-from-the-senate-of-canada/episodes/47941576> [Hogg, *CPAC*] (Peter Hogg and Amir Attaran contesting Bill C-14's constitutionality). *Contra* "Legal and Constitutional Affairs: May 10, 2016: Part 1" (10 May 2016) at 00h:06m:32s, 00h:13m:54s, online (video): *CPAC* <www.cpac.ca/en/programs/in-committee-from-the-senate-of-canada/episodes/47699142> ["Legal and Constitutional Affairs: May 10, 2016"] (Dwight Newman and Hamish Stewart supporting Bill C-14's constitutionality).

77. See Hogg, *CPAC*, *supra* note 76 at 01h:20m:36s, 01h:26m:43s. See also Jocelyn Downie, "Bouquets and Brickbats for the Proposed Assisted Dying Legislation", *Policy Options* (20 April 2016), online: <policyoptions.irpp.org/magazines/april-2016/bouquets-and-brickbats-for-the-proposed-assisted-dying-legislation> [Downie, "Bouquets and Brickbats"].

78. Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, "Bill C-14, An Act to Amend the Criminal Code and to Make Related Amendments to Other Acts (Medical Assistance in Dying)", *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No 10 (6 June 2016) at 10:75 (Peter Hogg) [*Proceedings of the Standing Senate Committee*].

Conversely, Dianne Pothier wrote that "[i]t is an extraordinary claim that judicial silence ties Parliament's hands, a claim that does not withstand careful scrutiny."[79] Now, the Court did state in *Carter* that "[i]t is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons."[80] Importantly, the Court stressed that "[c]omplex regulatory regimes are better created by Parliament than by the courts."[81] Furthermore, it proceeded to suspend its declaration of invalidity not only in its initial decision but also in a subsequent decision one year later to grant Parliament an opportunity to pass relevant legislation.[82] In addition, the specific legal effect of the *Carter* decision was the invalidation of the blanket ban on MAID.

Moreover, the Court's declaration of invalidity expressly references Gloria Taylor, whose condition was terminal. The specific wording is as follows:

> We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241(b) and s. 14) infringe *Ms. Taylor's* s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter*. *To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void* by operation of s. 52 of the *Constitution Act, 1982*. It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.

79. Dianne Pothier, "Doctor-Assisted Death Bill Falls Well Within Top Court's Ruling", *Policy Options* (29 April 2016), online: <policyoptions.irpp.org/2016/04/29/doctor-assisted-death-bill-falls-well-within-top-courts-ruling> [Pothier, "Doctor-Assisted Death"]. See also Dianne Pothier, "The Parameters of a *Charter* Compliant Response to *Carter v Canada (Attorney General)*, 2015 SCC 5" (20 March 2016) [unpublished], online: *SSRN* <ssrn.com/abstract=2753167>.

80. *Carter* SCC No 1, *supra* note 2 at para 126.

81. *Ibid* at para 125.

82. See *ibid* at para 128; *Carter* SCC No 2, *supra* note 22.

> The appropriate remedy is therefore a declaration that 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. "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. *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.*[83]

As far as Pothier is concerned, "[t]he court did not elaborate on what Parliament would need to do to meet its constitutional obligations to protect the vulnerable from error and/or abuse, beyond saying that an absolute ban on physician-assisted death was not a proportionate balance between competing constitutional rights."[84] Thus, Parliament did not have an obligation to transpose the *Carter* criteria whole cloth.[85] Furthermore, in Pothier's view, the legislative restrictions on access reduce "the odds of a transitory suicidal wish be

83. *Carter* SCC No 1, *supra* note 2 at paras 126–27 [emphasis added].

84. Pothier, "Doctor-Assisted Death", *supra* note 79.

85. See Sébastien Grammond, "Parliament Isn't Bound to 'Copy and Paste' Court Rulings Into Law", *The Globe and Mail* (30 June 2016), online: <www.theglobeandmail.com/opinion/parliament-isnt-bound-to-copy-and-paste-rulings-into-law/article30687631>; Derek Ross & John Sikkema, "The Carter Decision: Start of a Dialogue, or Final Word?", *Policy Options* (7 June 2016), online: <policyoptions.irpp.org/magazines/june-2016/the-carter-decision-start-of-a-dialogue-or-final-word>; Geoffrey Sigalet & Joanna Baron "The 'Charter Party's' New Dance with the Judiciary", *Policy Options* (8 September 2016), online: <policyoptions.irpp.org/magazines/september-2016/the-charter-partys-new-dance-with-the-judiciary>. *Cf* Downie, "Bouquets and Brickbats" *supra* note 77; Udo Schuklenk, "Canada's Assisted-Dying Legislation is Unconstitutional: Now What?", *The Globe and Mail* (20 June 2016), online: <www.theglobeandmail.com/opinion/canadas-assisted-dying-legislation-is-unconstitutional-now-what/article30520572>.

coming reality", while militating against "risks that the notion of a disabled life not being worth living will creep into assessments".[86] Therefore, Parliament is justified in limiting access to MAID to those whose natural death is reasonably foreseeable (and whose condition is in a state of irreversible decline) because it helps to mitigate the vulnerability concerns that a permissive regime modelled on the Court's declaration in *Carter* would magnify.[87]

From the perspective of Lamb and the BCCLA, however, Parliament's approach was worse than piecemeal: that Parliament would push through a law that continues to present patients with the cruel choice that confronted Gloria Taylor defies the reasoning of the Supreme Court of Canada. They see the government's actions as an attempt to re-litigate *Carter*, since the Court could have fashioned narrower parameters but decided not to. In his submission to the Senate Committee on behalf of the BCCLA, Josh Paterson argued that "Bill C-14 will not pass the section 1 test, because it continues the blanket prohibition on medical assistance in dying for a class of patients who have already won the right".[88] Furthermore, maintained Paterson, the fact that the new law differs from the old one—permitting access to one class of patients, explicitly introducing additional legislative purposes, and elaborating a regulatory scheme—does not inoculate it from a finding of invalidity.[89]

The two explicit, central premises of Paterson's argument are these: the Court in *Carter* granted people with non-terminal but grievously irremediable medical conditions, who are not near to death, the right to choose a medically-assisted death; and any impairment of "this right is not a legitimate area for dialogue between Parliament and the courts".[90] In other words, the Court had already passed judgment on this matter, and Parliament was therefore bound to operate within the constitutional boundaries that the Court's ruling established.[91] It is to the issue of dialogue between judicial and legislative branches that this paper now turns.

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86. Pothier, "Doctor-Assisted Death", *supra* note 79.

87. See *ibid*.

88. *Proceedings of the Standing Senate Committee*, *supra* note 78 at 10:86. Furthermore, Paterson notes that "[t]his dialogue can take place around safeguards, but it can't take place around who is entitled to the right" (*ibid* at 10:87). What counts as a safeguard will be central to the litigation in *Lamb*.

89. See *ibid* at 10:86.

90. *Ibid* at 10:87.

91. See *ibid.*

V. Deploying Dialogue Theory

In a 1997 article, Peter Hogg and Allison Bushell deployed the metaphor of "dialogue"[92] to describe the relationship between courts and legislatures in Canada.[93] Responding to claims that enactment of the *Charter* had catapulted the legal authority of an appointed judiciary beyond that of a democratically elected legislature, Hogg and Bushell presented the concept of inter-branch dialogue as a way to "reconcile judicial review with democracy".[94] Reprising and clarifying their argument in their first piece, Hogg, Bushell & Wright noted years later that their aim was never to demonstrate "that judicial review was good, but that judicial review under the *Charter* was weaker than is generally supposed".[95] They have insisted that their goals were descriptive and not normative. They were simply observing that "*Charter* decisions striking down laws are not the last word, but rather the beginning of a 'dialogue,' because legislative bodies are generally able to (and generally do) enact sequel legislation that accomplishes the main objective of the unconstitutional law."[96] Notwithstanding the authors' professedly modest intentions, dialogue has taken on a life of its own. Shortly after publication of the 1997 article, the Supreme Court of Canada itself began to adopt the term. A considerable literature consisting of analyses, defences and critiques of dialogue theory subsequently emerged.[97]

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92. This metaphor was first introduced by US constitutional scholar Alexander Bickel. See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed (New Haven: Yale University Press, 1986).

93. See Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75.

94. Kent Roach, "American Constitutional Theory for Canadians (and the Rest of the World)" (2002) 52:4 UTLJ 503 at 504.

95. Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1 at 29.

96. *Ibid* at 1.

97. See the foregoing and subsequent citations in this section. See also Kent Roach, "Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States" (2006) 4:2 Intl J Constitutional L 347; Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" (2004) 23 SCLR (2nd) 7; FL Morton, "Dialogue or Monologue?" in Paul Howe & Peter H Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 111; Jean Leclair, "Réflexions critiques au sujet de

Despite the term's prominence in Canada's public law discourse—and increasingly, that of other, international jurisdictions as well—its meaning and implications for constitutional interpretation are less certain.[98] Some years after the publication of his seminal article with Bushell, Hogg wrote that "[t]he theory of dialogue, if applied to the courts, would suggest that the Court should give increased deference to the legislation in that situation, and should normally uphold the 'second try'."[99] Later, Hogg and his co-authors distanced themselves from the notion of dialogue offering prescriptive guidance to decision makers, arguing instead that all the concept of dialogue captures is that there is an institutional back and forth.[100] In particular, they stated that "[w]e used the word 'dialogue' to describe the recurring sequence of judicial decision followed by legislative amendment that we observed and documented. We never made the ridiculous suggestion that courts and legislatures were actually 'talking' to each other."[101]

In their view, "courts should not approach second look cases any differently than they approach first look cases".[102] In the late 1990s and early 2000s,

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la métaphore du dialogue en droit constitutionnel canadien" (2003) 63 R du B 377; Gavin Phillipson, "Deference, Discretion, and Democracy in the Human Rights Act Era" (2007) 60:1 Current Leg Probs 40.

98. Macfarlane identifies four different ideas of dialogue, reflected in the literature. The first, and most common, according to his study, is dialogue as formal description of institutional operation. The other three are: dialogue as substantive communication between government branches; dialogue as a means of promoting a culture of rights in legislative and executive policy-making; and dialogue as prescriptive norm. See Emmett Macfarlane, "Conceptual Precision and Parliamentary Systems of Rights: Disambiguating 'Dialogue'" (2012) 17:2 Rev Const Stud 73 [Macfarlane, "Conceptual Precision"].

99. Peter W Hogg, "Discovering Dialogue" (2004) 23 SCLR (2nd) 3 at 5 [Hogg, "Discovering Dialogue"].

100. This corresponds with what Macfarlane calls the procedural "tennis match" of "dialogue as description". Macfarlane, "Conceptual Precision", *supra* note 98 at 75, 77–85.

101. Hogg, Bushell Thornton & Wright, *supra* note 95 at 26.

102. *Ibid* at 47–48. While the authors stress that "[t]he mere fact of legislative deliberation does not carry a law over the section 1 barrier", they nonetheless acknowledge that "in a second look case, the dialogic process that followed the previous decision is likely to yield a particularly strong case for section 1 justification" (*ibid* at 49). This, they recognize, marks a departure from Hogg's former position that dialogue theory yields reason for court deference to Parliament. See Hogg, "Discovering Dialogue", *supra* note 99 at 5.

however, the Supreme Court of Canada regularly deployed the dialogue metaphor while discussing the question of judicial deference to legislative action.[103] The high-water mark was struck in the 1999 case of *R v Mills*.[104] Although Parliament had made a law "that differed in four fundamental respects from the principles and procedures established by [the Supreme Court of Canada's decision in] *O'Connor*",[105] the Court nevertheless held the legislation to be constitutional, stating:

> The law develops through dialogue between courts and legislatures. . .. Against the backdrop of [the procedures for production and disclosure of evidence that the court laid out in *O'Connor*, in respect of the *Charter* rights of the accused and complainants,] Parliament was free to craft its own solution to the problem consistent with the *Charter*.[106]

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103. See Macfarlane, "Conceptual Precision", *supra* note 98 at 93; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1; *R v Hall*, 2002 SCC 64; *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*]; Rosalind Dixon, "The Supreme Court of Canada, *Charter* Dialogue, and Deference" (2009) 47:2 Osgoode Hall LJ 235; Sujit Choudhry & Claire Hunter, "Continuing the Conversation: A Reply to Manfredi and Kelly" (2004) 49:3 McGill LJ 765; Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall LJ 513; Christopher P Manfredi, "The Life of a Metaphor: Dialogue in the Supreme Court, 1998-2003" (2004) 23 SCLR (2nd) 105.

104. See *R v Mills*, *supra* note 103. For a highly critical reading of this case, see Jamie Cameron, "Dialogue and Hierarchy in *Charter* Interpretation: A Comment on *R. v. Mills*" (2000) 38:4 Alta L Rev 1051 [Cameron, "Dialogue and Hierarchy"].

105. Cameron, "Dialogue and Hierarchy", *supra* note 104 at 1051–052.

106. *R v Mills*, *supra* note 103 at para 20. A majority of the Supreme Court of Canada had previously endorsed a regime for producing personal records in sexual assault cases that ensured greater protection for "the accused's right to make full answer and defence" than the "the complainant's and witness's right to privacy" in *O'Connor* (*ibid* at para 17). Even though Parliament modelled its subsequent legislation on the dissenting judgment in *O'Connor*, the court in *Mills* held that

> it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the

Emphasizing "institutional respect for Parliament", the Supreme Court of Canada accepted the constitutionality of a law that "more or less adopted the *O'Connor* dissent".[107] This is evidence of the Court's willingness to let Parliament rely on a *Charter* interpretation that happens to differ from the Court's own; moreover, it shows the Court expressly invoking the concept of dialogue to justify this deferential approach. And yet, in *Sauvé v Canada (Chief Electoral Officer)*, a 5–4 majority of the Court held that Parliament's reply to the Court's invalidation of a law disenfranchising all prisoners in Canada did not deserve deference, as it continued to disenfranchise those serving sentences in correctional institutions for two years or more.[108] Chief Justice McLachlin, noted:

> [T]he fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".[109]

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judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy

Ibid at para 55. Notably, for the majority, McLachlin and Iacobucci JJ write:

> [C]onstitutionalism can facilitate democracy rather than undermine it, and . . . one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection . . .. Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups.

Ibid at paras 17, 58. See also *R v O'Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235.

107. Cameron, "Dialogue and Hierarchy", *supra* note 104 at 1056.

108. *Supra* note 103. The law disenfranchising all prisoners had been struck down in *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 153 NR 242.

109. *Sauvé*, *supra* note 103 at para 17. See also Christopher P Manfredi, "The Day the

Given that Canadian judges have invoked dialogue not only when deferring to Parliament but also when striking down Parliament's duly enacted reply legislation, its meaning is vague. Due to its lack of clarity and precision, an increasing chorus of voices question its utility.[110] Aileen Kavanagh describes dialogue as a metaphor that represents the possibility of courts having "powers of rights-based review" and the legislature having the power to "limit, override, or disagree with court decisions".[111] In Kavanagh's view, however, "it is a metaphor in search of a theory";[112] indeed, she argues, its vague symbolism has distorted and detracted from "focus . . . on the pressing issue of examining and evaluating the institutional roles of the courts and the legislature under bills of rights, as well as exploring the complex inter-institutional dynamic between them".[113] In Canada, it did not take long before the metaphor had metamorphosed into a kind of constitutional talisman, assuaging fears that "the *Charter* was not, and is not, a threat to Canadian democracy".[114] Since its heyday in the late 1990s and early 2000s in Supreme Court of Canada decisions, the term has significantly waned in prominence.

Emmett Macfarlane argues that dialogue is a moribund concept.[115] In his view, a vigorous account of dialogue would prominently feature legislative replies that "reverse, modify, or avoid the policy effects of judicial decisions";[116] however, in the vast majority of so-called dialogue cases, Parliament is just doing the Supreme Court of Canada's bidding.[117] Moreover, any time there appears to be a meaningful difference between the substance of a judicial decision and the

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Dialogue Died: A Comment on *Sauvé v. Canada*" (2007) 45:1 Osgoode Hall LJ 105 at 117.

110. See Macfarlane, "Conceptual Precision", *supra* note 98 at 76.

111. Kavanagh, *supra* note 14 at 83.

112. *Ibid* at 120.

113. *Ibid*.

114. Jamie Cameron, "Collateral Thoughts on Dialogue's Legacy as Metaphor and Theory: A Favourite from Canada" (2016) 35:1 UQLJ 157 at 159.

115. See Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v. Canada* as Microcosm for Past and Future Issues under the *Charter of Rights and Freedoms*" (2017) 49:1 Ottawa L Rev 107 [Macfarlane, "Dialogue, Remedies and Positive Rights"].

116. *Ibid* at 112.

117. See Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2012) 34:1 Intl Political Science Rev 39. Based on his empirical study of legislative responses to Supreme Court of Canada decisions, Macfarlane writes:

legislative response, erstwhile proponents of the concept describe the exchange as an illegitimate, dangerous or unhealthy form of dialogue.[118] Macfarlane argues that if Peter Hogg was not willing to see Parliament's legislative reply in the form of Bill C-14 as a legitimate example of dialogue, then this is "yet another, and perhaps final, nail in the concept's coffin".[119]

Reports of dialogue's demise may be premature, however. Although Hogg insisted Bill C-14 was unconstitutional when Parliament was debating its passage, he has since come to embrace the post-*Carter* legislative reply as an illustration of dialogue.[120] Hogg and Amarnath argue that in *Carter*, "the Supreme Court recommended how the legislative scheme could be fixed, without compelling such a solution".[121] In this way, they affirm, the Court continues to exercise "a role in ensuring the fundamental rights of Canadians are protected, while often leaving the ultimate modification of legislation to the legislature".[122] Macfarlane would doubtless argue that such a statement grossly diminishes the impact the Court actually has, for the legislature is nearly always just following the Court's lead. And yet, Hogg and others (who contend that dialogue helps to ground the legitimacy of judicial review) present the Supreme Court of Canada's very authority as both premise for and product of the possibility of institutional dialogue. Hogg and Amarnath, for example, acknowledge that Parliament did not heed the Court's guidance on how to legislate in

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> The principal finding of this analysis – that fewer than one in five Charter cases in which the Court struck down or altered legislation involved dialogue – refutes earlier assertions that a strong majority of Charter cases are marked by dialogue and that in Canada dialogue is "a means of reconciling judicial review with democracy". This also confirms critics' assertions that characterizing the system of judicial review in Canada as weak-form is a mistake, at least in terms of how it operates in practice.

Ibid at 48 [footnotes omitted].

118. See *ibid* at 42.

119. Macfarlane, "Dialogue, Remedies and Positive Rights", *supra* note 115 at 111.

120. See Peter W Hogg & Ravi Amarnath, "Understanding Dialogue Theory" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 1053.

121. *Ibid* at 1068.

122. *Ibid* at 1069.

relation to access to MAID but that is okay because on this point, the Court was only offering advice. One may infer, then, that listening to the Court is all it takes for dialogue to work.[123]

Downplaying the elements of the Court's *Carter* remedy that clash with the legislation's MAID access criteria as being there to guide, not dictate to Parliament, serves to rationalize and legitimize the post-*Carter* reply. It also demonstrates (and perhaps anticipates) the Supreme Court of Canada's inclination to explain and justify deference to the legislature in terms that implicitly affirm its own authority. In essence, the Court seems to say: "What you have said is fine since we never told you that you could not say it." In inter-branch relationships, the dialogue metaphor may therefore help the legislature to advance its interests, while enabling the courts to save face.[124] Some calculation as to the Court's real and perceived legitimacy as interpreter and guardian of fundamental rights will influence its choices about how to frame and address parliamentary responses. Deciding to impel legislative action on a matter of relevance to fundamental rights may turn not just on a sense of the importance of the rights and gravity of the infringement at stake, but also of the need for court action to redress the problem. That sense is shaped in part by the court's perception of how society and the public perceive the court.

Parliamentary stasis in the twenty years since a divided court in *Rodriguez v British Columbia (Attorney General)* just barely let the blanket ban on voluntary euthanasia and physician-assisted suicide stand may have moved the Court's hand in *Carter* as much as any constitutional or societal change.[125] After *Carter*, the situation is different. Given the ethically contentious and socially divisive nature of the issue, plus the unprecedented changes in health law and practice since Bill C-14 entered into force, the Court may feel that it has already done enough to get the ball rolling. To safeguard itself from accusations of "judicial activism", the Court may prefer to let the weight of societal expectations

123. Meanwhile, should the Supreme Court of Canada end up striking down the present law, one may well expect for that, too, to be presented as further evidence of dialogue.

124. See Dennis Baker & Rainer Knopff, "*Daviault* Dialogue: The Strange Journey of Canada's Intoxication Defence" (2014) 19:1 Rev Const Stud 35 (on avoidance of outright inter-institutional clash).

125. [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*].

gradually press Parliament to expand access to MAID.[126] That Parliament has itself committed to revisiting access for people currently excluded (such as minors, those who lack capacity due to a cognitive impairment but who previously requested MAID in their advanced directives, and those whose sole condition is psychiatric)[127] is a sign that the area is in flux. The Court may consider it unnecessary and imprudent to wade in. Then again, by the time the case makes its way up to the Supreme Court of Canada, the distinction drawn in the legislation may be harder to maintain in the face of section 7 and section 15 arguments under the *Charter*.

VI. Relating Dialogue to Role, Relationship, and Deference

While the dialogue metaphor may no longer be in vogue, it is not yet obsolete.[128] Precedents, such as *Mills*, *Sauvé*, *R v Hall* and *Vriend v Alberta*, militate against dismissal of the concept of dialogue altogether—especially when examining

126. As Newman notes, "[o]nce one moves away from a bright-line rule, a law on assisted suicide becomes subject to continual questioning concerning the boundary temporarily established." Dwight Newman, "Judicial Method and Three Gaps in the Supreme Court of Canada's Assisted Suicide Judgment in *Carter*" (2015) 78:2 Sask L Rev 217 at 220.

127. See Bill C-14, *supra* note 1 at cl 9.1(1).

128. The last Supreme Court of Canada decision to explicitly refer to a dialogue between Parliament and the Court (and not just quote a passage from a previous decision referencing it) was Lebel J's judgment for the court in *R v Kang-Brown* in which he wrote: "The extension of common law police powers as proposed in this case would short-cut the justification process and leave the Court to frame the common law rule itself without the full benefit of the dialogue and discussion that would have taken place had Parliament acted and been required to justify its action." *R v Kang-Brown*, 2008 SCC 18 at para 14. It would be wrong to infer the presence of a total taboo, however. As recently as *R v Clarke* the Court invoked the concept, in citing with approval paragraph 66 of Iacobucci J's judgment in *Bell ExpressVu Limited Partnership v Rex*. See *R v Clarke*, 2014 SCC 28 at para 13, citing *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42. The passage states that such is "the importance of retaining a forum for dialogue among the branches of governance" that only where there is genuine ambiguity in the legislative text may the court justifiably employ the *Charter* as an interpretive aid; otherwise, it would "wrongly upset the dialogic balance" (*ibid*). These statements mirror comments in *R v Gomboc*, 2010 SCC 55 at para 87. Furthermore, in *Ontario (Attorney General) v Fraser*, the Court cites Hogg, Bushell Thornton & Wright who allude to *Bell ExpressVu* to make the same point. See *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 282. There has been a paucity of legislative reply cases in the last decade, compared to the late 1990s and early 2000s.

justifications for judicial deference to the legislature's coordinate authority to interpret the constitution.[129] That is because on matters of fundamental rights, courts are not disposed to expressly defer to Parliament; a rhetorical device is necessary to resist the dismal response that "vacating the field" or "ceding ground" would elicit. Recognizing the metaphorical quality of dialogue reveals its limitations as a prescriptive norm; at the same time, its evocative polyvalence illustrates the rich, complex and intertwining strands between judicial and political judgments of constitutionality. Janet Hiebert argues that Parliament shares responsibility for constitutional judgment to make legislative decisions accountable to the *Charter*'s normative values.[130] Each branch has a duty to ensure "its judgment respects *Charter* values, particularly when faced with the other's contrary judgment".[131] Accordingly, Hiebert argues, neither should merely try to mimic the other's approach. Parliament and the Supreme Court of Canada may reach different conclusions as to what the *Charter* demands, and that is understandable. To say so does not diminish the authority of the Supreme Court of Canada to make findings of invalidity; it is to recognize that Parliament has an obligation to pass constitutionally valid law, whether another institutional branch happens to be leaning over it or not.

When the government introduced a bill with a more restrictive set of MAID access criteria than the Court in *Carter* had outlined (and that the Joint Parliamentary Committee had taken for granted as the constitutional baseline for its report and recommendations), some saw it as a political gambit, intended to mollify interest groups intensely opposed to a permissive euthanasia regime.[132] Predictions of how a given law or policy is going to play out with

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129. See *R v Mills*, *supra* note 103; *Sauvé*, *supra* note 103; *R v Hall*, *supra* note 103; *Vriend v Alberta*, *supra* note 103. See also *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469; Grégoire Webber, "The Unfulfilled Potential of the Court and Legislature Dialogue" (2009) 42:2 Can J Pol Sc 443; Baker & Knopff, *supra* note 124; Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010); Dennis Baker, "Checking the Court: Justifying Parliament's Role in Constitutional Interpretation" (2016) 73 SCLR (2nd) 1.

130. See Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 52.

131. *Ibid*.

132. Indeed, Joseph Arvay argued in his submission to the Senate committee studying the constitutionality of Bill C-14 that:

> What Parliament has done in this legislation, has essentially carved out from the

voters is a normal part of all political calculus. Such calculations do not always prove correct. Nor do they dispel the possibility of other, principled reasons for government decision making.[133] Political judgment is both a subject of constitutional constraint and a product of constitutional necessity.

> Carter decision a whole and significant group of individuals in our society and they are the physically disabled—whose death is not imminent or reasonably foreseeable.
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> . . .
>
> People, whether they were disabled from birth, from traumatic accidents mid-life, and most importantly, those people who have in mid to late life developed these horrible debilitating degenerative diseases like MS, Parkinson's, Huntington's and ALS—none of which are terminal. But these people are condemned to suffer.
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> . . .
>
> It appears that the government has now been wowed or persuaded by the rhetoric and the arguments of the disabled rights organizations . . .. The very organizations that were front and centre in the *Carter* case, and whose very arguments are being made to the government now, and accepted by the government now, and underline this bill, were' completely and categorically rejected by the Supreme Court of Canada.

Susan Lund, "Lawyer Who Won Carter Case in High Court Says Assisted-Dying Bill Guts Ruling", *CBC News* (5 May 2016), online: <www.cbc.ca/news/politics/joseph-arvay-assisted-dying-1.3568438>.

133. For example, see the line of argument Catherine Frazee presented in her submission to the Special Joint Committee on Physician-Assisted Dying:

> [C]atastrophic illness or injury radically alters the course of a life built upon the assumption of physical independence. The necessity for any form of intimate care can be experienced as a violation of personal dignity. Similarly, impairments which compromise self-management of one's bodily needs and functions may be experienced as shameful and degrading
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> . . .
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> Herein may lie one of the most compelling arguments for limiting access to physician-hastened death to circumstances of actual, rather than projected future suffering, as a measure to mitigate the cultural spread of stigma and prejudice against persons who are physically dependent. The dread of future shame cannot be a mode of suffering intended by the Court to warrant Charter intervention, whether that shame would derive from physical dependence, disgraceful conduct or financial ruin. Moreover, including definitional criteria requiring that "grievous and irremediable" medical condition be interpreted to mean "an advanced state of irreversible decline" would protect from inducement persons caught in the naked vulnerability of worthlessness and despair when confronted with grief, trauma,

And yet, as David Dyzenhaus notes, legislators tend not to engage in constitutional argument per se, but rather "make claims and assertions about the compliance of their proposed measures with constitutional commitments".[134] Indeed, he writes: "Far from being reason-debating forums, they often fail even to be reason-demanding forums."[135] Meanwhile, legislatures often appear less disposed than courts to ensure wide protections for *Charter* rights.[136] Still, not everything a legislature must do to serve the public interest is reducible to individual rights claims. Moreover, Parliament is meant to embody principles of active, representative democracy. This may be a fundamental ideal—and as such, an idea continually worth striving for—but the patterns of modern-day political life do not always bear it out. On the contrary, Allan Hutchinson writes: "Although there has never been a golden age for Canadian democracy, what now passes for 'democracy' is an exclusive, sporadic, and sketchy conversation between the judicial and executive branches of government over what is best for the country."[137] Even if one holds fast to the notion of parliamentary democracy, the image of the lowly backbencher cowering before the almighty party whip, or that of government policy moulding to whatever shape the short-term self-interest of political power has happened to dictate, are pervasive.[138] They are

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addiction and isolation — circumstances in which suicide prevention offers more robust protective capacity.

Catherine Frazee, "Submission to the Joint Committee on Physician-Assisted Dying" (12 February 2016) at 5–7, online (pdf): *Parliament of Canada* <www.parl.gc.ca/Content/HOC/Committee/421/PDAM/Brief/BR8103887/br-external/2016-02-12_brief_Catherine_Frazee_e-e.pdf>. See also Joanne Laucius, "Beware of Assisted Dying as 'Shame Relief,' Former Human Rights Commissioner Says", *Ottawa Citizen* (last modified 16 October 2016), online: <ottawacitizen.com/news/local-news/beware-of-assisted-dying-as-shame-relief-former-human-rights-commissioner-says>.

134. David Dyzenhaus, "Are Legislatures Good at Morality? Or Better at It than the Courts?" (2009) 7:1 Intl J Constitutional L 46 at 51.

135. *Ibid* at 50.

136. See Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69. See also *Bedford*, *supra* note 42; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

137. Allan Hutchinson, "The Politics of Constitutional Law: A Critical Approach" in Oliver, Macklem & Des Rosiers, *supra* note 120, 989 at 1006.

138. But see Meg Russell & Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (Oxford: Oxford University Press, 2017) (a recent empirical study which presents a more nuanced picture of the UK Parliament); Bateman

also a far cry from the judicial model of independent, informed, unbiased, and reasoned decision making. Conversely, however, courts too have their limitations. David Wiseman notes that courts themselves, as well as scholars, acknowledge:

> first, the limiting effects of the forms of adjudication, including, at its broadest, the rules of evidence and procedures of litigation, the independence and expertise of judges, and the nature of legal rights and remedies; second, the ideological tilt of judicial values; third, the absolutely and relatively small scale of the court system, as compared to other mechanisms for social decision making; fourth, the dynamics of participation, which determine what issues will be brought to court and by whom.[139]

Whatever reluctance the Supreme Court of Canada has expressed in the past about overstepping any presumptive barriers must be viewed in light of the banner it has waved as guarantor of individual *Charter* rights. Its expanding role since the inception of the *Charter* is presaged by Wilson J's contention in *Operation Dismantle v The Queen* that the focus should be on "whether the Courts *should* or *must* rather than on whether they *can* deal with [the issues before them]".[140] Indeed, the sense of duty justices will feel to perform a counter-majoritarian role in vindicating individual *Charter* rights will no doubt be heightened the more deeply the rights infringement resonates as a privation of fundamental justice.

The fact that matters of democratic legitimacy and institutional competence, as well as the virtues (and vices) of distinctive legal processes, are at stake in any comparison between courts and legislatures cautions against the embrace of an idealized judicial process at the expense of a demonized legislative one.[141]

& LeBlanc, *supra* note 67 (an analysis of how constitutional philosophy and not just party discipline may have influenced the ways in which Parliamentarians cast their votes on Bill C-14).

139. David Wiseman, "Competence Concerns in *Charter* Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51:3 McGill LJ 503 at 518.

140. [1985] 1 SCR 441 at 467, 18 DLR (4th) 481.

141. For a detailed analysis of various forms of social ordering—including adjudication, legislation, managerial direction, and legislation—see Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart, 2001). See also Henry M Hart Jr & Albert M Saks, *The Legal Process: Basic Problems in the Making and Application of Law*,

Indeed, Lynn Smith, retired justice of the British Columbia Supreme Court and the trial judge in *Carter*, made this very point in a keynote address she gave at the Ottawa Conference on Medical Assistance in Dying.[142] Of course, as she also noted, the critique cuts both ways.

As far as the judicial and legislative branches are concerned, each has a valuable and distinctive part to play in Canadian constitutionalism.[143] Recognizing as much, however, does not yield a definitive answer to the question of how to decide cases where the two bodies come into conflict. Default preferences for political versus judicial judgment of constitutionality make a difference but only go so far when beliefs about the deep normative implications of the Canadian constitution are at stake.

Neither absolutist perspective—that of judicial supremacy or Parliamentary sovereignty—is as compelling as an integrated view, that is, one that acknowledges each branch's interpretive authority and responsibility within the Canadian constitutional order. Certainly, when it comes to conflicts between the Supreme Court of Canada and Parliament over the question of whether a specific law is consistent with the *Charter*, some court judgments and academic commentary reveal greater faith in the counter-majoritarian virtues of the judicial branch, whereas others place greater stock in the democratic legitimacy of the legislature.

In Jeremy Waldron's "The Core of the Case Against Judicial Review", he lays out his argument "in a way that is uncluttered by discussions of particular decisions or the history of its emergence in particular systems of constitutional

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ed by William N Eskridge Jr & Phillip P Frickey (Westbury, NY: Foundation Press, 1994).

142. See Justice Lynn Smith, "The Courts, Legislatures, and Dialogue about Health Policy" (Keynote delivered at the Ottawa Conference on Medical Assistance in Dying, 15 October 2016) [unpublished].

143. Pamela Karlan made the same observation about the United States system when asked to comment on the remarks of Stephen Miller, the President's Senior Policy Advisor, who said that the federal courts did not have the authority to review Trump's executive order barring travelers from seven Muslim-majority countries: "It is difficult to know how exactly to respond to Miller's statement. He seems to be conflating a series of very different questions. Of course we have 'coequal branches of government,' rather than a hierarchy in which one branch exercises complete dominion over another. In that sense, saying that 'we don't have judicial supremacy' is a truism." Ryan Goodman, "11 Top Constitutional Law Experts React to White House Stephen Miller's Rejection of 'Judicial Supremacy'" (15 February 2017), online: *Just Security* <www.justsecurity.org/37815/11-top-constitutional-law-experts-react-white-houses-stephen-millers-theres-judicial-supremacy> [emphasis omitted].

law".[144] He contends that there is no reason to *presume* judicial review is either more effective or democratically legitimate than democratic legislatures. Casting the argument over judicial review on a purely abstract level, however, is like insisting on imagining two rooms to be empty, when debating which one is more liveable. The furniture and decorations Waldron discounts as clutter may very well be decisive features—not, perhaps, to the architect, but certainly to the occupants.

Where one sides in the debate over the constitutionality of the new MAID legislation depends in part on how one thinks disagreements between judicial and legislative branches ought to be resolved in general. Invariably, though, how such conflicts ought to be resolved in particular turns not just on abstract theoretical commitments, but on concrete justifications for one course of action over another.

Hiebert's "relational approach" emphasizes not only the evolutive but also the institutionally collaborative nature of Canadian constitutional law. In particular, her approach highlights Parliament's distinctive and dynamic role in that process.[145]

According to Hiebert, careful consideration by Parliament of the *Charter*'s normative values involves addressing issues, such as "how serious the rights infringement is, whether the initiative represents a compelling objective, and

144. (2006) 115:6 Yale LJ 1346 at 1346.

145. See Hiebert, *supra* note 130. Hiebert stated:

> Parliament's constitutional judgment may have a different focus than legal opinion, reflecting its distinct responsibilities and different vantage point, relative to Charter issues. Parliamentary judgment requires careful consideration of how to pursue legislative objectives in ways that are consistent with the Charter's normative values . . .. Parliament's judgment about how to reconcile conflicting values may be different from expectations of what the courts might say. Yet it may also be reasonable.
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> . . .
>
> Despite the best attempts of legal advisers, it is difficult to anticipate how the judiciary will rule on a particular legislative challenge. Much depends on the quality of the argument a government makes and the strength of the record it is able to compile to demonstrate the reasonableness of Parliament's judgment.

Ibid at 55.

whether it can be accomplished, practically and effectively, by using significantly less restrictive means".[146] She acknowledges that "[w]hile these questions bear a resemblance to the Supreme Court's criteria first developed in *R. v. Oakes* for evaluating the justification of legislative restrictions on rights, they are questions befitting any careful evaluation of social policy."[147] Hiebert cautions that "not all rights claims necessarily warrant strict vigilance in their protection", and that it is those "core" or "fundamental" rights that require Parliament and courts alike to pay greatest heed.[148] Hiebert identifies the core with "the most fundamental reasons why a polity believes that it is necessary to protect certain forms of human conduct from undue interference or from arbitrary coercion by the state".[149] However, it does not dispense with the need for Parliament—or the government—to justify its actions.

The Supreme Court of Canada's record on decisions reviewing so-called sequel or reply legislation does not yield a clear, definite set of guidelines, but some pattern of analysis may be discerned. According to Carissima Mathen, the margin of manoeuvre that the Court is prepared to grant will depend on: "a number of factors, including the Court's perception of the importance of the right, the conduct of the legislature or the government, and the existence of reasonable alternatives".[150]

The Court has already declared that the *Charter* invalidates a criminal law prohibition for interfering with anyone who has an intolerable medical condition from seeking physician assistance to end their life. Defenders of the present MAID legislation's constitutionality will stress that the Court needs to undertake

146. *Ibid* at 68.

147. *Ibid* [footnotes omitted].

148. *Ibid* at 69.

149. *Ibid* at 56.

150. Carissima Mathen, "Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on 'Charter Dialogue Revisited'" (2007) 45:1 Osgoode Hall LJ 125 at 145. Justice Brown's remarks, quoted in a newspaper article, echo this point. When asked "about treading on Parliament's turf, and moving beyond the court's proper role under the Charter of Rights, he replie[d]: 'As a general proposition, that's not helpful. You have to look beyond that. What's the issue? What's the right at stake? What has the jurisprudence established about the content of that right?'" Sean Fine, "Supreme Court Offers Rare Glimpse into Life of a Top Justice", *The Globe and Mail* (21 May 2017), online: <www.theglobeandmail.com/news/national/a-rare-look-into-the-mind-of-supreme-court-justice-russell-brown/article35077450>.

a new *Charter* analysis because at issue is a new law. The Court may accept Parliament's interpretation of what *Carter* and the *Charter* require for the law to be constitutional—not just out of respect for the democratic legitimacy of the legislative process, but out of an acknowledgment that the regulatory balance Parliament has sought to strike through its inclusion of the reasonable foreseeability requirement is substantively reasonable. Indeed, the Court may not just show itself to be alive to the kinds of concerns that shape law-making, but also to the factors informing the making of this particular law. At the same time, it may also identify problems and perverse effects with how the legislature has drawn its line. The threshold contributes to a standard, permitting the health care professional to base his or her eligibility assessment on more than the patient's intolerable suffering from a medical condition. Moreover, it appears to be one of sufficient latitude that a wide range of patients beyond those facing imminent death can receive access to MAID.[151] It may very well be that the flexibility it affords (and the political judgment it reflects) turns out to be the legislation's saving grace.[152]

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151. See e.g. "Clinical Practice Guideline: The Clinical Interpretation of 'Reasonably Foreseeable'" (2017), online (pdf): *Canadian Association of MAID Assessors and Providers* <www.camapcanada.ca/cpg1.pdf> (interpreting "natural death has become reasonably foreseeable"). A similarly wide, flexible interpretation is endorsed by Downie & Chandler, *supra* note 61. For examples of MAID provider interpretation recognizing up to ten years as the temporal limit, after consulting actuarial tables, see Martin, *supra* note 74. According to the College of Physicians and Surgeons of Nova Scotia, "natural death will be reasonably foreseeable if a medical or nurse practitioner is of the opinion that a patient's natural death will be sufficiently soon or that the patient's cause of natural death has become predictable". "Professional Standard Regarding Medical Assistance in Dying" (8 February 2018) at 5, n 9, online (pdf): *College of Physicians and Surgeons of Nova Scotia* <cpsns.ns.ca/wp-content/uploads/2016/06/Professional-Standard-regarding-Medical-Assistance-in-Dying.pdf>. Meanwhile, the government states that "[t]o have become 'reasonably foreseeable,' a natural death must be reasonably anticipated to occur by one of a range of predictable ways, *and* within a period of time that is not too remote." *Lamb v Canada (Attorney General)* (27 July 2016), Vancouver, BCSC No S-165851 (Response to Civil Claim at Part 1, para 36), online (pdf): <eol.law.dal.ca/wp-content/uploads/2016/10/2016_07_27_Response_to_Civil_Claim.pdf> [*Lamb* Response] [emphasis added]. Unsurprisingly, perhaps, the College of Physicians and Surgeons of Ontario suggest that "[p]hysicians may wish to consult their own lawyer or the Canadian Medical Protective Association (CMPA) for independent legal advice." "Medical Assistance in Dying" (2016) at n 8, online (pdf): *College of Physicians and Surgeons of Ontario* <www.cpso.on.ca/CPSO/media/documents/Policies/Policy-Items/medical-assistance-in-dying.pdf?ext=.pdf>.

152. Although the Court will not uphold overly vague laws that engage section 7 rights, to

VII. Conflicting Ideas of Reasonable Limits on *Charter* Rights

While the Supreme Court of Canada's section 7 analysis has become wider-reaching and more robust in its scrutiny of impugned laws,[153] the Court may nevertheless find a section 7 infringement justified under section 1. Even though the Court has not done so in the past, this does not foreclose the possibility of the Court doing so in the future; in fact, in *Bedford* and *Carter*, the Court undertook a more detailed and engaged section 1 analysis than it has historically done in section 7 cases.[154] Moreover, the Court in *Carter* noted that "in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the Charter."[155] The Court proceeded to stress, however, that "where the competing societal interests are themselves protected under the Charter, a restriction on s. 7 rights may in the end be found to be proportionate to its objective."[156] In other words, the greater difficulty the government has in translating its justification for infringing an individual's section 7 rights into a *Charter*-based argument, the less disposed the Court will be to accepting it.

The Court introduced the "proportionality test" early on in its *Charter* jurisprudence, in the 1986 case of *R v Oakes*.[157] The Court was tasked with determining whether a law found to be infringing the accused's right to be presumed innocent and receive a fair trial nonetheless constituted, in the words of section 1, "such reasonable limits prescribed by law as can be demonstrably justified in

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qualify as such, the impugned law would have to fail to provide any intelligible standard at all. See Stewart, *Fundamental Justice*, *supra* note 42 at 127–31; *R v Levkovic*, 2013 SCC 25.

153. See Hogg, "The Brilliant Career of Section 7"*, supra* note 43; Stewart, *Fundamental Justice*, *supra* note 42.

154. See Hamish Stewart, "Bill C-14: A Constitutionally Sufficient Response to *Carter v Canada*" (10 May 2016) [unpublished, archived at the Senate of Canada] [Stewart, "Bill C-14"].

155. *Carter* SCC No 1, *supra* note 2 at para 95.

156. *Ibid*.

157. [1986] 1 SCR 103, 26 DLR (4th) 200. See also Grant Huscroft, Bradley Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) (providing theoretical examinations of the *Oakes* test, and the significance of proportionality analysis in a variety of constitutional systems worldwide).

analysis (with the third step consisting of three additional steps): (1) What is the a free and democratic society".[158] The Court outlined the following three-step objective of this legislation? (2) Is this goal "pressing and substantial"? (3) Are the proposed means proportionate to that objective? To determine proportionality, the court asks: (a) Do the ends and means rationally connect? (b) If so, is the impairment of the rights in question minimal? (c) Is there proportionality between the deleterious and salutary benefits of the impugned law?[159]

Although an impugned piece of legislation may falter at any of these steps, it is the test of "minimal impairment" that the government failed when arguing in *Carter* that even if the blanket prohibition on voluntary euthanasia infringed sections 7 and 15, it was nevertheless justified under section 1. Responding in the negative, a unanimous Court put it this way: "The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective."[160]

Lamb and the BCCLA argue that the legislative response is not minimally impairing, since a less drastic means of restricting sections 7 and 15 would be to adopt the access parameters endorsed in *Carter* by the Court itself. There, the Court clearly enumerated a set of *Charter*-compliant access criteria—a reasonably foreseeable natural death was not one of them. What is more, the Supreme Court of Canada dismissed the argument that active physician-assistance in dying gives rise to different kinds of concerns than does passive assistance in dying (e.g., withholding and withdrawing life-saving or life-sustaining treatment on a patient's voluntary request).

Presenting physician-assisted suicide of a piece with other "end-of-life medical decision-making in Canada",[161] the Court stated:

> Logically speaking, there is no reason to think that the injured, ill and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less

158. *Charter*, *supra* note 9, s 1.

159. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (application of the proportionality test that the Court in *Carter* references repeatedly in its judgment).

160. *Carter* SCC No 1, *supra* note 2 at para 103.

161. *Ibid* at para 115.

> susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.[162]

The government maintains, however, that the eligibility criteria Parliament has legislated are "minimally impairing and reasonably tailored to the particular objectives of the legislation", which include suicide prevention and the protection of the vulnerable.[163] The Court in *Carter* characterized the purpose of the previous law as to "protect vulnerable persons from being induced to commit suicide at a time of weakness" and concluded the blanket prohibition was overbroad and disproportionate to achieving that objective.[164] The government states:

> Recognizing the different and greater risks of permitting assistance in dying for those whose natural death is not reasonably foreseeable, and based on the experience in jurisdictions with broad eligibility, Parliament had a reasonable basis for concluding that a broader approach would frustrate its objectives of affirming the equal value and dignity of all human lives regardless of age, state of health or disability, supporting rather than undermining suicide prevention, and protecting vulnerable individuals who might be induced in a moment of weakness - by another person or by circumstance - to end their lives. The resulting legislation represents a constitutionally compliant way of attaining a variety of important objectives.[165]

In the government's view, the legislative access criteria constitute safeguards tailored to address potential harms that the Court's more permissive parameters do not. Even if the risk of bias may be equal in the context of active and passive MAID, the government would insist that a patient may experience the

162. *Ibid*.

163. *Lamb* Response, *supra* note 151 at Part 3, para 15.

164. *Supra* note 2 at paras 74, 86.

165. *Lamb* Response, *supra* note 151 at Part 3, para 17.

effects of refusing life-sustaining, and requesting life-terminating, treatment differently. The former can represent a longer, more painful path to death than the latter. A person may be pressured in either case, but having one's life ended swiftly and painlessly does not contain the same intrinsic deterrent that, for example, the decision to forego nutrition and hydration does. Making it easier to die can make it harder to live; it may subtract material reasons to resist (thus, taking away a counterweight to) the social pressures to choose death over suffering. In this respect, the more likely imminent death is, the less of a difference it may make whether one receives passive or active medical aid in dying. The more remote natural death is, the more distinguishable MAID becomes from passive approaches to assistance in dying. Broadly speaking, the government argues that its approach is proportionate, because it "respects autonomy during the passage to death, while otherwise prioritizing respect for human life and the equality of all people regardless of illness, disability or age". [166] In effect, those who are suffering intolerably (but whose natural death has not become reasonably foreseeable) are still subject to the cruel choice the Court denounced in *Carter*, since they are "condemned by the legislation either to put up with intolerable suffering and an irreversible decline in capability *indefinitely* or to find a way to kill themselves without assistance".[167]

In response, the government contends that: "The purpose of the legislation is to allow those who are in decline and whose natural death has become reasonably foreseeable the choice of a medically assisted death. It does not provide a general right to medically assisted death as a response to suffering in life. Nor does anything in the *Carter* decision provide for such a right."[168] Distinguishing *Carter* and highlighting the extensive process of consultation and debate in both houses (including a debate over whether to remove the impugned provisions),[169] the government will endeavour to show not only that its preamble

166. Department of Justice, *supra* note 67 at 20.

167. Hamish Stewart, "Constitutional Aspects of Canada's New Medically-Assisted Dying Law" (2018) 85 SCLR (2nd) 435 at 454 [Stewart, "Constitutional Aspects"]. In this way, Stewart departs from his earlier stance on the constitutionality of Bill C-14. *Contra* "Legal and Constitutional Affairs: May 10, 2016", *supra* note 76; Stewart, "Bill C-14", *supra* note 154.

168. *Lamb* Response, *supra* note 151 at Part 3, para 9.

169. See *ibid* at Part 1, paras 14–30.

identifies "a variety of legislative objectives affecting eligibility criteria" but that the legislative means chosen to pursue them are proportionate.[170]

Whether one views the MAID legislation as proportionate depends, to an extent, on whether one accepts the premises of fact and logic that informed the Supreme Court of Canada's decision. Lamb and the BCCLA contend that the trial judge in *Carter* already heard the relevant evidence supporting and countering the government's arguments during the lengthy *Carter* trial.[171]

Appellate courts pay deference to the findings of fact that trial courts make because it is the duty of trial judges to hear and evaluate the evidence. The trial judge's findings of fact should not bind Parliament because the judge found them, but because they are facts. When it comes to the question of whether active MAID enlarges the risks that arise in situations where patients choose to stop or forego life-sustaining treatment, judicial opinions on the matter do not foreclose parliamentary inquiry.

Parliament is not bound to merely defer to what the Court accepted as findings of fact. But nor may the government inhabit a state of denial. The crucial findings of Smith J included the fact that not all ethicists agree that a sharp distinction between passive and active MAID is warranted,[172] and that

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170. *Ibid* at Part 1, paras 15, 33. That Canadian courts increasingly look to preambles to divine legislative purposes is curious since the preamble to a proposed piece of legislation is not subject to the rigours of the legislative process the way that the contents of the bill are. My thanks to Charles Feldman (Legislative Counsel, House of Commons) for this observation at the Canadian Law & Society Meeting in Fredericton, January 21, 2017.

171. See *Carter v Canada (Attorney General)*, 2012 BCSC 886 [*Carter* BCSC]. In Lamb's Notice of Civil Claim, the plaintiffs sought to strike portions of the Attorney General's Response to Civil Claim. In the Notice (and reproduced in their Appellant's Factum), the plaintiffs argued that the "factual findings from Carter" are binding and that permitting Canada to re-litigate them is to let "Goliath . . . insist that David start over". Their application was denied but they are appealing the decision. *Lamb v Canada (Attorney General)*, 2018 BCCA 266 (Factum of the Appellant at iv, 28), aff'g 2017 BCSC 1802, leave to appeal to SCC requested.

172. See *Carter* BCSC, *supra* note 171 at para 1336. As the Supreme Court of Canada notes, based on Smith J's findings, the "preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death". *Carter* SCC No 1, *supra* note 2 at para 23. See also *Carter* BCSC, *supra* note 171 at para 357. That a certain number of ethicists agree is a factual finding. That the thing ethicists agree about is correct is not a factual finding; it is a normative claim. The claim is that whether one assists in hastening a patient's death actively (by killing them) or passively (by letting them die) makes no moral difference. As a general proposition, this may be true—a bright-line distinction between active and passive MAID may be overwrought and

a less rights-infringing legal response than a blanket ban would be consistent with realizing the objectives behind the ban.[173] A tailored regulatory regime that restricts access to patients whose "natural death has become reasonably foreseeable"[174] need not be premised on an absolute distinction between active and passive MAID, but on a recognition that, depending on the circumstances, the two sets of practices may present meaningful differences. There is an immediacy, finality and painlessness to active MAID that the withholding or withdrawal of life-sustaining treatment (including artificial hydration and nutrition) does not deliver to the same extent.[175] Part of the appeal of active MAID is that it prevents the prolongation of suffering that accompanies a resort to passive forms of medical assistance in many cases.

The government may successfully argue that subjective suffering is an inadequate standard when it comes to justifying the decriminalization of killing where the victim consents, at least for those whose natural death is not yet reasonably foreseeable. Furthermore, the government may also point out that while the parameters in *Carter* are wider than those in Bill C-14, they are not as wide as they could be. The Court did not interpret the *Charter* in such a manner that would invalidate any law that prohibits a competent adult (who gives informed, voluntary consent) from obtaining assistance in ending their lives. The Court drew a line, restricting eligibility to those, for instance, with a medical condition. Why should those who wish to receive medical assistance to end their lives have to be diagnosed with a medical condition first? Since *Carter* itself restricts access to MAID—the argument goes—Parliament should be able to define those parameters in accordance with its legislative objectives.[176]

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unsupportable. In specific factual circumstances, the difference between an act and omission may nevertheless bear moral salience. See also John Keown, "A Right to Voluntary Euthanasia?: Confusion in Canada in *Carter*" (2014) 28:1 Notre Dame JL Ethics & Pub Pol'y 1 at 23. *Cf* LW Sumner, *Assisted Death: A Study in Ethics and Law* (Oxford: Oxford University Press, 2011).

173. See *Carter* BCSC, *supra* note 171 at para 1240.

174. *Criminal Code*, *supra* note 18, s 241.2(2)(d).

175. Of course, there are exceptions. Turning off a pacemaker will likely cause a much swifter end to a person's life than the self-administered ingestion of lethal medication. Of the 1,961 medically assisted deaths reported in Canada in 2017 (excluding Quebec, Yukon, Northwest Territories and Nunavut), only one was self-administered. See Health Canada, *supra* note 73 at 6.

176. Generally, the criminal law impinge on personal autonomy, in some cases even criminalizing the conduct of those who assist in doing what one person wants but what others consider to be harmful for that person; for example, offences related to trafficking illicit drugs.

Central to the Court's reasoning that prohibiting MAID infringed a person's section 7 right to life was the idea that the prohibition was leading to premature deaths.[177] A patient suffering from an irremediable condition may decide to commit suicide while it is still within that person's own physical power to do so. The present law's answer to this individual is: wait. The government will have to demonstrate that the public good justifies restricting lawful access to MAID in this rights-infringing manner. The stronger the argument's footing in the *Charter* (and therefore the Court's *Charter* jurisprudence), the more persuasive it stands to be.[178]

In a contentious constitutional case like Lamb's, one's beliefs about the substantive value claims in contention necessarily figure into one's determination of whether courts should show deference to legislatures or not. And yet, one's opinion of the reasoning in *Carter*, or of the rationale behind the more restrictive regime introduced in Parliament's follow-up legislation, does not automatically determine whether one will view the latter as constitutional or not.[179] One may readily admit that *Carter* binds Parliament, but query whether Parliament is bound to subscribe to all of the premises and findings of fact that inform the decision, or just respect its outcome.

See discussion *infra* notes 186–87. Specifically, the government will point to disagreement over how the law should draw the line determining MAID eligibility and affirm Parliament's approach to be a defensible one. In *Carter*, for example, counsel for the plaintiffs argued in favour of drawing the line at physically debilitating medical conditions: "We definitely don't include someone who is just depressed . . . We are talking about someone who literally physically can't do it without assistance." *Carter*, Transcript, *supra* note 51 at 19. But see William Rooney, Udo Schuklenk & Suzanne van de Vathorst, "Are Concerns About Irremediableness, Vulnerability, or Competence Sufficient to Justify Excluding All Psychiatric Patients from Medical Aid in Dying?" (2018) 26:4 Health Care Analysis 326 (where the authors argue that restricting psychiatric patients from accessing MAID is arbitrary, unjustified and "will force a significant number of patients to live with intolerable suffering when specialist care fails" at 329).

177. See *Carter* SCC No 1, *supra* note 2 at paras 1, 57–58.

178. This rhetorical strategy of constitutional litigants is also reflected in scholarship that challenges the meaning the Court ascribes to certain terms in the *Charter* (as opposed to the very notion of the *Charter* setting the terms). See Jonas-Sébastien Beaudry, "The Way Forward for Medical Aid in Dying: Protecting Deliberative Autonomy Is Not Enough" (2018) 85 SCLR (2nd) 335 at 341.

179. It is the nature of law to patch over, never to mend, discord. Agreeing to disagree is the linchpin upon which the very possibility of legal order turns. Neither a law's coming into force nor its declaration of constitutional invalidity obliterates extant disagreement with either. The Parliamentarians who cast their votes against a bill and the members of the court who

In this way, the three levels of disagreements are, in a sense, moving, interactive parts. They are reduced to a strict matter of morality or of legality to the detriment of the premise that constitutionality is the governing form, but that its dimensions are themselves subject to contestation through authorized channels. For this reason, the constitutionality debate over MAID can make for strange bedfellows; for example, one may believe that the criminal law should not interfere with an adult patient's autonomous decision to seek MAID rather than to remain suffering intolerably. At the same time, that person may believe that an appointed judiciary ought to accord Parliament, duly elected by citizens, the room the legislature needs to perform a robust role in determining the content of Canadian law.[180] Another person may tend to place greater stock on the counter-majoritarian power of the courts, especially when it comes to guaranteeing equality for members of disadvantaged and marginalized groups but think that making intolerable suffering the threshold of lawful access to euthanasia would reinforce ableist assumptions about what makes life (and whose lives) worth living.[181]

Conclusion

If the Court were to strike down the present law, it would do so because it had concluded that restricting the class of persons eligible to receive MAID to those for whom natural death has become reasonably foreseeable and an

dissent from the decision to strike a piece of legislation down may have to abide, but they do not have to agree. Legislation and judicial decisions bind, but they do not heal the wounds of disagreement. As essential as such bandages are to the body politic, so too are they provisional. Sufficiently widespread belief in their instrumental necessity (as opposed to objective quality) permits the product of political compromise to become respected.

180. In Canada, although decreasingly prominent, such views have been expressed from various points along the political spectrum. From left to right, see Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010); FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000). For an array of contributions on the subject, see James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009).

181. See Pothier, "Doctor-Assisted Death", *supra* note 79.

advanced, irreversible decline in capability has been reached violates the *Charter* in a manner that cannot be demonstrably justified in a free and democratic society. The section 15 argument (which the Court in *Carter* did not consider) could prove persuasive. In David Lepofsky's view, *Carter* was "first and foremost, a disability equality case . . . [in which] a right of access to disability accommodation" was *the* issue and the Court was mistaken to rely on section 7.[182] Even so, the Court could still conclude that the infringement was justified under section 1. In that case, it would likely take pains to minimize the conflict between its decision in *Carter* and the present access provisions. While respect for Parliament's democratic legitimacy, awareness of perceptions of its own deficits in this regard, and sensitivity to the ethically contentious nature of the issue would no doubt implicitly factor into its reasoning, the Court would probably emphasize limitations on the legal effect of its decision in *Carter*.[183]

Until a court declares otherwise, the ongoing criminal prohibition of MAID for those who meet the *Carter* criteria but not the legislative criteria remains the law. That the government has gotten this far may display the air of reality that hangs around the theory of coordinate authority to interpret the Constitution or it may just display the bald power that Parliament has. One's feelings on the matter are likely a complex function of general constitutional sensibility as well as particular policy preference. That the Court no longer seems to invoke dialogue theory as it once did indicates something about the kinds of cases that come before it, but also that the idea figures more as part of the unspoken assumptions informing Canadian constitutionalism.

When this case actually comes before the Supreme Court of Canada (as it undoubtedly will unless Parliament amends the law first), evidence of how the access regime is actually working will be crucial. If the Court is satisfied that, on the evidence, the legislative objectives it deems pressing and substantial are

182. David Lepofsky, "*Carter v. Canada (Attorney General)*, The Constitutional Attack on Canada's Ban on Assisted Dying: Missing an Obvious Chance to Rule on the Charter's Disability Equality Guarantee" (2016) 76 SCLR (2nd) 89 at 91.

183. The Court's reasoning in *Carter*, and the fact the decision was issued *per curiam*, reflects McLachlin CJC's influence—given the substance of her dissent in *Rodriguez* and her reputation as a consensus builder as Chief Justice. In the wake of her retirement, it is impossible to know the fault lines (if any) that the common front in *Carter* may have been concealing. At the very least, changes to the composition in the Court mean that it will not be the same nine jurists ruling on a *Charter* challenge to the present law as those who rendered the unanimous decision in *Carter*.

being met, while at the same time the *Charter* rights of individual patients are not being unjustifiably infringed, then one may anticipate that the constitutionality of the present access regime will withstand judicial scrutiny. But prophesying as to what the Court will do in fact is not the particular preoccupation of this paper. Rather, it has been to offer this analysis as a case study in the way we try to make constitutional law work in Canada.[184]

Aging demographics, increasing social diversity, advances in biomedical technologies and shifting beliefs around ethical questions render the legal governance of end-of-life decision making a pressing area for both research and policy development.[185] It is not just courts, legislatures, and governments—or for that matter hospital administrators and health care professionals—who are at once affected and implicated in these major societal changes. So too are patients, families and ultimately all members of the public.

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184. For a discussion on the contextual nature of such examination, see David Kenny, "Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland" (2018) 66:3 Am J Comp L 537. There is considerable comparative literature on law's role in governing end-of-life decision making. See e.g. Carlo Casonato, "Informed Consent and End-of-Life Decisions: Notes of Comparative Law" (2011) 18:3 MJECL 225. For an example of the relationship between dialogue theory, individual rights and end-of-life decision making being explored by scholars writing in other jurisdictions, see Alison L Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press, 2017). For the discussion of *R (Nicklinson) v Ministry of Justice*, [2014] UKSC 38, see Young, *supra* note 184 at 211–54.

185. The Council of Canadian Academies plans to release a series of reports from its Expert Panel on MAID in December 2018. See Expert Panel on Medical Assistance in Dying, *The State of Knowledge on Medical Assistance in Dying for Mature Minors* [forthcoming in 2018]; Expert Panel on Medical Assistance in Dying, *The State of Knowledge on Advance Requests for Medical Assistance in Dying* [forthcoming in 2018]; Expert Panel on Medical Assistance in Dying, *The State of Knowledge on Medical Assistance in Dying Where Mental Disorder is the Sole Underlying Medical Condition* [forthcoming in 2018]. The Law Commission of Ontario's "Improving the Last Stages of Life" research project has a broader scope than MAID. See "Improving the Last Stages of Life", online: *Law Commission of Ontario* <www.lco-cdo.org/en/our-current-projects/improving-the-last-stages-of-life>. For non-academic but nonetheless evocative meditations on death, see Atul Gawande, *Being Mortal: Medicine and What Matters in the End* (New York: Henry Holt and Company, 2014); Stephen Jenkinson, *Die Wise: A Manifesto for Sanity and Soul* (Berkeley: North Atlantic Books, 2015).

Law is not a static representation of society's values, for society's law is neither singular nor fixed.[186] Any one prohibition stipulated in, for example, a provision of the *Criminal Code*, exists along with all the other sections in that statute—not to mention the constitutional framework, and body of common law, that also inform its meaning. Administrative, professional and social practices interact with positive legal norms, institutions, processes and justifications to frame end-of-life decision making. The Supreme Court of Canada's decision in *Carter* is reflective of a pattern in its jurisprudence, tracing a more attenuated role for the criminal law in matters of private morality.[187] Whether one sees this as a positive or negative development turns on beliefs and ideas about law, liberty and morality,[188] not to mention assumptions about the connection between law and health care policies and practices.[189]

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186. See generally Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham, UK: Ashgate, 2009); Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375; Sally Falk Moore, *Law as Process: An Anthropological Approach* (London, UK: Routledge & Kegan Paul, 1978); Boaventura de Sousa Santos, "Law: A Map of Misreading: Towards a Postmodern Conception of Law" (1987) 14:3 JL & Soc'y 279.

187. See Matthew Gourlay, "Less is More?: Chief Justice McLachlin and Criminal Law Minimalism" (Talk delivered at the Reflecting on the Legacy of Chief Justice McLachlin conference, Faculty of Law, University of Ottawa, 11 April 2018) [unpublished]. Newman reads the phenomenon as the ascendance of a "particularized vision of autonomy and equality", issuing a plea for justices of the Supreme Court of Canada to "write dissenting (or even concurring) opinions to keep alive other moral considerations within the law and our Canadian legal tradition". Newman, *supra* note 126 at 222, n 23.

188. See *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74. See also Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A Knopf, 1993); Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life" (1978) 7:2 Phil & Publ Aff 93; Patrick Devlin, *The Enforcement of Morals* (London, UK: Oxford University Press, 1965); HLA Hart, *Law, Liberty, and Morality* (Stanford: Stanford University Press, 1963); Bernard E Harcourt, "The Collapse of the Harm Principle" (1999) 90:1 J Crim L & Criminology 109.

189. See generally Isabelle Marcoux et al, "Health Care Professionals' Comprehension of the Legal Status of End-of-Life Practices in Quebec: Study of Clinical Scenarios" (2015) 61 Can Family Physician e196. The legal knowledge of medical practitioners—and the impact it has on clinical decision making—is an under-researched area in Canada. White & Wilmott have conducted numerous studies in the Australian context. See e.g. Ben P White et al, "Comparing Doctors' Legal Compliance Across Three Australian States for Decisions Whether to Withhold or Withdraw Life-Sustaining Medical Treatment: Does Different Law Lead to Different Decisions?" (2017) 16:63 BMC Palliative Care 1.

Centring debate over MAID around the question of constitutionality serves to channel disparate, incommensurable normative claims into legally cognizable arguments.[190] Continual reconstruction of the gully—akin to the ongoing renovation of the cellular makeup of our bodies—shapes the dimensions of these constraints. *Carter* shows this process at work, just as the debate over the legal effect of *Carter* speaks to how it should work. *Carter*'s reversal of *Rodriguez* signalled an alteration to the kinds of arguments that would count in a meaningful way to convince the Court. The point that previously had proved so persuasive ("[t]o the extent that there is consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it")[191] no longer held sway. The currents of sections 7 and 1 jurisprudence did not efface the substance of the argument (although the court did rely on the findings of fact by the trial judge to contest the existence of such consensus); they eroded its constitutional footing. Or, put another way—and thereby staying truer to the gully metaphor—the discursive dimensions, as redefined, were no longer as receptive to such a diffuse normative claim.[192]

190. For a discussion of the interpretive and decisional dimensions to adjudication demonstrated amidst a welter of normative disagreement, see Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich* (Oxford: Hart, 2009) 201 at 211. On the facilitative role of constitutional law, Webber notes that although it is common "to think of constitutions as being primarily concerned with limiting state power", "a primary role of any constitution—perhaps *the* primary role—is not to limit collective action but to enable it". Webber, *Constitution of Canada*, *supra* note 59 at 59. The theme of law's facilitative dimension, and even hydraulic metaphors, are of course prominent in the work of Lon Fuller. See Winston, *supra* note 141. See also Karl Llewellyn & E Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) (discussing the channeling function of law but focusing on social behaviour as opposed to normative argument).

191. *Rodriguez*, *supra* note 125 at 608, Sopinka J. See also Frank Iacobucci, "Some Reflections on *Re BC Motor Vehicle Act*" (2011) 42:3 Ottawa L Rev 305 at 313–16.

192. This is expressed when the Court takes up the refrain of the majority in *Sauvé*, inveighing against *Charter* rights-infringing laws that purport to fulfill merely "vague and symbolic objectives". *Sauvé*, *supra* note 103 at para 22. If law's authority depends on its power to symbolize how its subjects should act, in a manner that resonates with them, it would seem that assigning the epithet of 'merely symbolic' to the purpose of a specific law is to register disagreement with the nature of that symbolization, not its symbolic character.

We see the kinds of arguments traditionally used to justify a blanket prohibition on voluntary euthanasia and assisted suicide being squeezed out for being too general to withstand the narrow scrutiny of *Charter* analysis. Of course, court decisions remain consequential to the extent the principle of *stare decisis* maintains its vitality. How to interpret the *ratio decidendi* of a decision, thereby filtering out the *obiter dicta*, and understanding the binding versus persuasive effect of vertical versus horizontal precedent—these are integral for the effective functioning of constitutional law. The debate over *Carter*, however, raises questions not just about how the normative filter function of Canadian constitutional law operates but who gets to operate it. *Carter* may showcase the agency of the courts, but equally at issue in the debate over the constitutionality of the new MAID legislation is the authority of Parliament.

Canvassing the vices and virtues of these two institutions and their processes is different from adumbrating the pros and cons identified with the outcomes of their decisions. The latter brings us back to the optimality or sub-optimality, rightness or wrongness, of the present regime governing MAID. An analysis that is unavoidable, but not the be-all and end-all either. Ultimately, the decision will reflect an exercise of judgment as to whether validation or invalidation of the relevant provisions of the present MAID law provides the best interpretation of Canadian constitutional law at this time. By breaking down the debate into distinct but overlapping elements, I have endeavoured to show the layered and textured character of that judgment. Evidence of the manner in which the new legal regime facilitates access to MAID to those whose rights the Supreme Court of Canada sought to protect in *Carter* may very well end up bearing decisive weight in the Court's deliberations on the constitutional question.