

The Carter Conundrum: The Impact of the Supreme Court's Suspended Declaration

Lawyers in Canada have debated whether or not to permit physician-assisted dying for over two decades. In the 2015 *Carter v Canada (Attorney General)*[\[1\]](#) decision, the Supreme Court ruled that Canada's prohibition on physician-assisted dying was unconstitutional. The Court issued a suspended [declaration of invalidity](#), giving Parliament time to amend the *Criminal Code*. Parliament was unable to draft new legislation before the suspension ran out.

When the declaration took effect the legal community was divided over what the Supreme Court of Canada had actually declared: were the *Criminal Code* provisions struck down in their entirety, or only *partially* - to the extent that the SCC deemed them inconsistent with the Constitution?

Physician-assisted dying background information

Helping a person commit suicide was forbidden by section 241 of Canada's *Criminal Code*.[\[2\]](#) Section 14 also made it legally impossible for a person to consent to death.[\[3\]](#) These *Criminal Code* prohibitions were controversial because they prevented people from accessing physician-assisted death.[\[4\]](#) Many lawyers raised questions about the constitutionality of these provisions, believing them to breach a person's right to life, liberty and security of the person protected by section 7 of the *Charter of Rights and Freedoms*.[\[5\]](#)

The *Criminal Code* prohibitions were found to interfere with "fundamentally important and personal medical decision-making"[\[6\]](#) and to impose pain and stress on the claimant by "depriving her of control over her bodily integrity."[\[7\]](#) For these reasons, the provisions were found to infringe her rights under section 7 of the *Charter*. The Court did not find that those infringements were justified violations of her rights under [section 1](#).[\[8\]](#)

The Supreme Court provides a suspended declaration of invalidity

After deciding that Canadians' *Charter* rights were violated by the *Criminal Code* prohibitions, the Supreme Court considered how the breach should be remedied. Since the Constitution is the highest law in the land, every other law must conform to it:[\[9\]](#) if there is an inconsistency between a law and the Constitution, the law has no effect, to the extent of the inconsistency.[\[10\]](#) The Court declared the *Criminal Code* prohibitions to be unconstitutional and invalid. However, the Court appreciated that the government might want to enact other legislation controlling aspects of physician-assisted dying.

Generally, a declaration of invalidity by the Court takes effect immediately. But in certain

cases the invalidity of a law can be postponed. Without a great deal of explanation, the Court decided to postpone the effect of their ruling, issuing what is called a suspended declaration of invalidity. The sections of the *Criminal Code* prohibition would become void one year after the ruling was given.

Unfortunately, the government was unable to draft new legislation within the one-year time frame provided by the Supreme Court.[\[11\]](#) Though the government received a four month extension of the deadline from the Court,[\[12\]](#) it still did not pass new legislation within the extended time frame.[\[13\]](#)

This chain of events drew the attention of the legal community. Approximately two-weeks passed between the time the declaration took effect and when a new law was passed. Lawyers debated the impact of the gap: were the *Criminal Code* provisions struck down in their entirety, or only *partially* - to the extent that the SCC deemed them inconsistent with the Constitution? The confusion stemmed largely from the ambiguous language used by Supreme Court in crafting the suspended declaration.

When the Supreme Court declared the *Criminal Code* prohibitions void, it did so only "insofar as they prohibit physician-assisted death."[\[14\]](#) What did the Supreme Court actually intend that declaration to mean? There are two different opinions on the issue.

Opinion 1: *The Code* provisions were invalidated entirely

The first opinion is that the *Criminal Code* provisions were entirely struck down by the *Carter* ruling.[\[15\]](#)

This view is appealing for two main reasons. The first is that this approach is [consistent](#) with prior court rulings which do not accept partial declarations of invalidity.[\[16\]](#)

The second reason this opinion is appealing is its logical rigour. This view recognizes that the Supreme Court can choose between a limited number of remedies when deciding a case. The choices included striking the provisions down entirely,[\[17\]](#) reading the provision down,[\[18\]](#) or making the legislation constitutional by reading new terms into it.[\[19\]](#)

The purpose of suspending a declaration is to "ensure there is a law in place while Parliament responds."[\[20\]](#) The need for this would only arise when the remedy granted is to strike the provision down.[\[21\]](#) If the law is remedied by the Court, rather than struck down, there would be little reason to provide Parliament with time to craft a new law.

According to this view, not only did the Supreme Court choose to entirely strike down the provision, it is impossible to think otherwise because of the suspended declaration they provided. As Professor Peter Sankoff puts it: "the very existence of the suspension is proof that s241(b) is completely invalid on June 7."[\[22\]](#)

If this opinion is believed, there would be significant implications for Canadian law. Since the suspended declaration of invalidity elapsed before a law was put in place, Canada temporarily had no prohibitions on helping someone commit suicide. Indeed, this would

mean even a person without medical training could have helped someone commit suicide.[23] The only restriction in this situation would have been ensuring that an assistant's actions did not constitute homicide,[24] which remains illegal in Canada.[25]

Opinion 2: *The Code* provisions were partially invalidated

The second opinion is that the *Criminal Code* provisions were only partially struck down by the *Carter* ruling.[26]

This opinion recognizes that the Constitution does not prevent the Supreme Court from declaring a law partially invalid. In fact, the Constitution dictates that a law violating *Charter* rights is invalid “only to the extent of the inconsistency.”[27] Thus, the *Carter* ruling does not actually delete provisions of the *Criminal Code*: all it does is “[narrow] the ambit” of those prohibitions.[28] From this point of view, though the remedy may not be supported by past rulings, the Supreme Court was just doing what the Constitution entitled it to do.

However, lawyers of this opinion were confronted with the question: if this is the case, why suspend the declaration?[29] The answer they provide is that the Court was respecting Parliament's role in the legislative process.[30] It shows an “implicit acceptance ... that it would be far better for Parliament to set out the precise circumstances under which physician-assisted suicide is non-criminal, rather than leave it to the lower courts to interpret.”[31]

If this opinion is preferred, the impact on Canadian law would be comparatively minor. Since the Court only *partially* struck down the law, the rest of the law stays untouched. Thus, physician-assisted dying would have been permitted only to the extent that it was allowed by the *Carter* decision: other forms of assisted dying or assisted suicide would have remained prohibited.[32]

[1] 2015 SCC 5 .

[2] *Criminal Code*, RSC 1985, c C-46 s 241(b).

[3] *Ibid*, s 14.

[4] “End-of-Life Law & Policy in Canada”, *Health Law Institute, Dalhousie University* (2016), online: <eol.law.dal.ca/?page_id=236> (“Historically, all forms of assisted suicide were an offence under s 241 of Canada's *Criminal Code*).

[5] Joan Bryden, “Leading constitutional expert says assisted dying law unconstitutional”, *Macleans* (6 June 2016), online: <<http://www.macleans.ca/news/canada/leading-constitutional-expert-says-assisted-dying-law-unconstitutional/>>.

[6] *Ibid* at para 65.

[7] *Ibid*.

[8] *Ibid* at para 123.

[9] *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[10] *Ibid*.

[11] *Carter v Carter (Attorney General)*, 2016 SCC 4 at para 2.

[12] *Ibid* at para 2.

[13] Joan Bryden, "Trudeau insists assisted-dying bill must pass by June 6" *CTV News* (28 May 2016), online: www.ctvnews.ca/politics/trudeau-insists-assisted-dying-bill-must-pass-by-june-6-1.2921900>.

[14] *Carter 2015*, *supra* note 1 at para 127.

[15] Peter Sankoff, "Fifteen Minutes on Carter, The Assisted Dying Bill and Constitutional Remedies" (May 31, 2016), online: YouTube <www.youtube.com/watch?v=JnWXzUyoLlo> at 00h:12m:51s.

[16] Peter Sankoff, "29/ Thus, to conclude, I see no jurisprudential precedent for this interpretation. It is also illogical in light of the suspension." (1 June 2016 at 7:44) online: Twitter <www.twitter.com/petersankoff/status/738003273504808960?ref_src=twsrc%5Etfw>; see also Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Carswell, 2015) (loose-leaf release No. 26), ch 14 at 14-5.

[17] *Ibid* at 14-1..

[18] *Ibid* at 14-15

[19] *Ibid* at 14-52.3.

[20] Peter Sankoff, "11/ Hear me out. You suspend a declaration to ensure there is a law in place while Parliament responds." (1 June 2016 at 7:28am) online: Twitter <www.twitter.com/petersankoff/status/737999373833928707?ref_src=twsrc%5Etfw>.

[21] Peter Sankoff, "12/ But if s241(b) was not invalidated completely, there is no need to suspend. It was always there, just w/ new judicial exceptions." (1 June 2016 at 7:29am) online: Twitter <www.twitter.com/petersankoff?ref_src=twsrc%5Etfw>.

[22] Peter Sankoff, "16/ Hence, the very existence of the suspension is proof that s241(b) is completely invalid on June 7, otherwise it has no reason for being." (1 June 2016 at 7:33am)

online:

Twitter

<www.twitter.com/petersankoff/status/738000446032207872?ref_src=twsrc%5Etfw>.

[23] Sankoff, *supra* note 15 at 13:39.

[24] Sankoff, *supra* note 15 at 14:10.

[25] *Criminal Code*, *supra* note 2, s 222.

[26] Michael Plaxton, "After June 6th: What was the remedy in Carter" *CBA National* (June 2, 2016), online:

<www.nationalmagazine.ca/Blog/June-2016/After-June-6th-What-was-the-remedy-in-Carter.aspx>.

[27] *Constitution Act, 1867*, *supra* note 9.

[28] Plaxton, *supra* note 26.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*