THE INTERPRETATION OF ASSISTED DEATH UNDER SECTION SEVEN OF THE CANADIAN CHARTER

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Abstract

This study explores the evolution of the Supreme Court of Canada's (SCC's) interpretation of s. 7 of the *Canadian Charter of Rights and Freedoms*. Considering that s. 7 of the *Charter* is one of the most expansive and influential portions of the purposive document, understanding the ways in which the interpretation of the section has changed throughout time, is quite valuable. The fact that even the supreme law of Canada can be understood and applied differently over time, is vital to understand. It then becomes possible to theorize and comprehend how interpretations may change in the future for s. 7, and for other portions of the *Charter* as well. The study begins by examining first, the judicial history of cases pertaining to the matter of assisted death in Canada. Dissecting the changed s. 7 interpretations found in the relevant cases, the study moves to then examine future implications that are significant to the matter of physician assisted death (PAD) in Canada. Speculations are provided on the future of the legislation surrounding medical assistance in dying (MAID), and on how the societal and judicial understanding of s. 7 and MAID are likely to change and further evolve.

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Table of Contents

Table of Abbreviations

ALS ..... Amyotrophic lateral sclerosis

***Bedford* [2013]** ..... *Canada (Attorney General) v. Bedford* [2013] ..... 3 S.C.R. 1101

***Carter* [2015]** ..... *Carter v. Canada (Attorney General)* [2015] ..... 1 S.C.R 331

CCA ..... Council of Canadian Academies

Charter ..... *Canadian Charter of Rights and Freedoms*, Part I ..... of the Constitution Act, 1982, being Schedule B ..... to the Canada Act 1982 (UK), 1982, c11

Criminal Code ..... *Criminal Code*, RSC 1985, c C-46, s 318(1)c C-46

MAID ..... Medical assistance in dying

PAD ..... Physician assisted death

***PHS Community Services Society* [2011]** ..... *Canada (Attorney General) v. PHS Community* ..... *Services Society* [2011] 3 S.C.R. 134

***Rodriguez* [1993]** ..... *Rodriguez v. British Columbia (Attorney* ..... *General)* [1993] 3 S.C.R. 519

SCC ..... Supreme Court of Canada

The Interpretation of Assisted Death Under Section Seven of the Canadian Charter

The matter of physician assisted death (PAD) has long been discussed and debated in Canada. The Court challenge brought forward in *Rodriguez v. British Columbia (Attorney General)* [1993] publicized the issue and brought it to the forefront of considerations with respect to s. 7 of the *Charter*. Many of the principles of fundamental justice that are in effect today had yet to be developed and/or thoroughly explored when *Rodriguez* [1993] was most prominent. A hindsight view of the case suggests that the Supreme Court of Canada (SCC) decision was reflective of such circumstances and limitations. Efforts to contest the absolute prohibition on assisted suicide were quashed at the time, and the appeal was struck down. The decision, while devastating to individuals seeking to obtain an assisted death in Canada, did not result in the complete abandonment of the battle to eventually legalize the practice.

Carter v. Canada (Attorney General) [2015] revived the issue of assisted death approximately two decades after the appeal in *Rodriguez* [1993] had been rejected by the SCC. The social and judicial landscape of Canada had changed significantly since *Rodriguez* [1993], and the final result of the appeal, showed very evidently, the scope and breadth of such changes. The fundamental justice principles of arbitrariness and overbreadth had been expanded, and the new principle of gross disproportionality, had been introduced. Landmark cases such as *Canada (Attorney General) v. PHS Community Services Society* [2011], and *Canada (Attorney General) v. Bedford* [2013] had resulted in the Court being able to further develop their interpretation of s. 7, and thus solidify their stance on the issue of assisted death. The Court which had been so heavily divided in *Rodriguez* [1993], made a unanimous decision in *Carter* [2015], emphasizing that their stance on the matter of s. 7 and assisted death, was final.

Refinement and progression have continued to occur in Canadian jurisprudence, and societal and legal interpretations of the *Charter* have been improved significantly. Prediction into

the future suggests that the understanding of the *Charter* will continue to evolve. The matter of assisted death itself has not yet been completely resolved and thus the Court's understanding of pertinent *Charter* sections is likely to advance further. Canadian courts, while not necessarily the most progressive and forward thinking at times, have tended to make appropriate decisions which mirror not only the judicial view, but which tend also to be reflective of the collective view of certain issues. Evolving social and legal landscapes have served to shape societal and legal understandings, as is evident in the examination of cases relating to s. 7 and assisted death.

The Rodriguez Case

Rodriguez v. British Columbia (Attorney General) [1993] is the landmark case that jumpstarted the Supreme Court's journey into thoroughly understanding and applying s. 7 of the *Charter*. Prior to the case having come to the attention of the Court, the interpretation of s. 7 was somewhat limited and underdeveloped. The *Charter* had been enacted only a few years before *Rodriguez* [1993] was heard at the SCC, and *Rodriguez* [1993] was the first case to truly pose a significant challenge to the SCC's interpretation of s. 7.

Case Facts

Sue Rodriguez sought an assisted suicide when she was diagnosed with amyotrophic lateral sclerosis (ALS), and told that she had a brief and arduous life ahead (*Rodriguez*, 1993, pp. 530-531). Rodriguez' quality of life would decrease significantly due to the debilitating nature of ALS (*Rodriguez*, 1993, pp. 530-531). Choosing to continue life with the disease would mean that she would slowly lose the ability to perform even the most basic of tasks, which included not even being able to breathe without external assistance (*Rodriguez*, 1993, pp. 530-531). Rodriguez chose to pursue the route of a medically assisted death when she knew that waiting for a natural death was not a viable, nor acceptable option (*Rodriguez*, 1993, pp. 530-531).

Confident in her decision that assisted suicide was the correct choice, Rodriguez took her case to the courts; she wanted to continue living while life was still enjoyable, and leave when such was no longer the case (*Rodriguez*, 1993, p. 531). The major obstacle that Rodriguez faced in exercising her desires and free will, was that she knew that she would be physically unable to end her own life when that desire would arise (*Rodriguez*, 1993, p. 531). Medically assisted suicide was the only reasonable option in Rodriguez' view, and thus she began the process of attempting to obtain the procedure in Canada (*Rodriguez*, 1993, p. 531). Despite having been struck down in the British Columbia Supreme Court, and in a split decision at the British Columbia Court of Appeal, Rodriguez eventually took the case to the Supreme Court of Canada (*Rodriguez*, 1993, pp. 532-543). Rodriguez argued that the prohibition on assisted suicide, found in s. 241(b) of the *Criminal Code*, was in violation of her ss. 7, 12, and 15(1) *Charter* rights.

Rodriguez' Section Seven Argument

The *Charter* states in s.7, that "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" (*Canadian Charter*, 1982, s. 7). Currently, the principles of fundamental justice applicable to s. 7 matters, include overbreadth, arbitrariness, vagueness, and more recently, gross disproportionality (*Carter*, 2015, pp. 375-378). Viewing the *Charter* as a purposive document, it is evident that the guarantee of rights and liberties found in s. 7 of the *Charter* is fundamental (Downie, 2004, pp. 51-53). The section helps to ensure that underlying *Charter* values such as liberty, autonomy, dignity, and equality, among many others, are maintained and protected (Downie, 2004, pp. 51-61). In addition, s. 7 acts as a base to many of the other important rights and liberties that Canadians hold in society. The fundamental *Charter* section helps ensure that Canadians are also able to enjoy the legal rights found in ss. 8- 14 of the *Charter* (Downie, 2004, pp. 50-61).

Rodriguez' s. 7 argument was based on the notion that her liberty and security of the person rights were being violated by s. 241(b) of the *Criminal Code* (*Rodriguez*, 1993, p. 520). Rodriguez argued that s. 241(b) was problematic to liberty and security of the person, as it essentially prevented her from exercising personal autonomy over her own body (*Rodriguez*, 1993, p. 521). The impugned section barred Rodriguez from feeling as though she could live the rest of her life in a dignified manner, have control over her body, and also prevented her from feeling as though she was free from governmental control regarding personal decisions (*Rodriguez*, 1993, p. 583).

The protection afforded by s. 7, Rodriguez argued, included the ability for one to be able to choose the manner and timing of their own death, and thus to die with dignity (*Rodriguez*, 1993, p. 584). As explained by Cory J. (1993), death is a major aspect of human life, and if human life is afforded protection and dignity under s. 7, it follows that the integral component of death, must also be provided such protections (p. 630). Forcing an individual such as Sue Rodriguez to wait to die a natural death would violate her human dignity; it would mean that she would die with a very poor quality of life; and it would also mean that she would die feeling that she had absolutely no control and was completely powerless to make decisions about her own body and life (*Rodriguez*, 1993, pp. 629-630). Rodriguez alleged that her security of the person and liberty interests were being violated by s. 241(b), as she was not being given the right to die in a dignified manner, or essentially in a manner that allowed her to exercise rightful control over her own person (*Rodriguez*, 1993, p. 584).

Rodriguez' Section Twelve Argument

The *Charter* states in s. 12 that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment" (*Canadian Charter*, 1982, s. 12). The section is aimed at protecting individuals from being treated unfairly by the Canadian government, and more

particularly, by the Canadian criminal justice system. The rights found in s. 12 aim to ensure that the treatment or punishment received is appropriate, and not disproportionate or unjustifiable in any manner. The *Charter* section serves to protect Canadian values such as human dignity and fairness (Downie, 2004, pp. 56-59).

Rodriguez' s. 12 argument was centered around the idea that by not allowing her to obtain a physician assisted death, the government was subjecting Rodriguez to a form of punishment and/or treatment, that was cruel and unusual (*Rodriguez*, 1993, p. 534). Rodriguez sought a physician assisted death because she knew that suffering from ALS would mean that her quality of life would decrease significantly, as she would eventually lose all external and internal bodily function (*Rodriguez*, 1993, pp. 530-531). In Rodriguez' view, living until natural death was not a viable option, as it would mean that she would not be able to continue living life in a manner with which she was comfortable (*Rodriguez*, 1993, pp. 530-531). She would have to endure a significant amount of pain and suffering, lose her sense of self, and sense of self respect, as well (*Rodriguez*, 1993, pp. 530-531).

Rodriguez argued that the federal government's refusal to allow her to choose the manner and timing of her death, basically constituted cruel and unusual punishment and treatment, as such a refusal forced her to live life in a manner that she found to be utterly unacceptable (*Rodriguez*, 1993, pp. 533-534). Declaring s. 241(b) unconstitutional would mean that human dignity, life, liberty, and security of the person were protected; not doing so, would not only violate s. 7 and be an affront to human dignity, it would also subject certain individuals to cruel and unusual punishment and treatment, in that it would force them to continue living while suffering heavily (*Rodriguez*, 1993, pp. 533-534). Furthermore, s. 241(b) violated Rodriguez' s. 12 rights, she argued, because it forced cruel and unusual punishment and treatment only on those that could not choose the manner and timing of their death without aid (*Rodriguez*, 1993, p.

534). In essence, the impugned legislation resulted in vulnerable individuals enduring cruel and unusual punishment and treatment, simply because they sought a physician assisted death (*Rodriguez*, 1993, p. 534).

Rodriguez' Section Fifteen Argument

S. 15(1) of the *Charter* is aimed at ensuring that every human person in Canada is free from being impacted by discrimination (*Canadian Charter*, 1982, s. 15(1)). The section 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. (*Canadian Charter*, 1985, s. 15(1))

The *Charter* section attempts "… to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration…" (Downie, 2004, p. 59). The rights guarantee found in s. 15(1) ensures that underlying *Charter* values such as dignity, equality, and liberty, are among those protected (Downie, 2004, pp. 51-61), by stating that individuals are equal both before, and under the law, and by stating that individuals should receive equal protections and benefits from the law as well (*Canadian Charter*, 1982, s. 15(1)). The equality guarantee found in s. 15(1) aims to ensure that individuals in Canada are not made to experience discrimination and hardship due to certain attributes and characteristics, and that the law generally treats all individuals as equal to one another (*Canadian Charter*, 1982, s. 15(1)).

The s. 15(1) claim presented by Rodriguez suggested that the prohibitions on assisted suicide in s. 241(b), unlawfully discriminated against those individuals that would be unable to end their lives without external help (*Rodriguez*, 1993, pp. 534-535). The impugned provision

essentially restricted those with disabilities from being able to choose the manner and timing of their death, simply because they could not physically execute such decisions on their own (*Rodriguez*, 1993, pp. 534-535). The main issue arose in the fact that individuals living without disabilities, were free to choose when and how they died; no such restriction was imposed upon any other person in Canada, with regards to their end-of-life decisions (*Rodriguez*, 1993, p. 544).

The Supreme Court's Decision

The Section Seven Decision.

The Supreme Court of Canada split heavily in its decision for *Rodriguez* [1993]. The dissent, which was comprised of Lamer C. J., L'Heureux-Dubé, Cory, and McLachlin JJ., actually consisted of three groups with differing opinions. The majority on the other hand, which consisted of La Forest, Sopinka, Gonthier, Iacobucci, and Major JJ., came to the conclusion that s. 241(b) should be upheld (*Rodriguez*, 1993, p. 615).

The s. 7 analysis provided by the majority revolved around determining first, if Rodriguez' s. 7 rights had been violated by s. 241(b); and second, if such violations were contrary to the principles of fundamental justice (*Rodriguez*, 1993, p. 583). Rodriguez had argued that her s. 7 security of the person and liberty rights were being violated by the impugned provision, as she was not being given the opportunity to die with dignity, or to have control over her own body, or to be free from external interference (*Rodriguez*, 1993, pp. 583-584). Interestingly, the majority agreed with Rodriguez, conceding to the fact that s. 241(b) did in fact constitute a violation in terms of security of the person, and liberty (*Rodriguez*, 1993, p. 583).

In the majority analysis, Sopinka J. also emphasized that the value of life had been engaged as well (*Rodriguez*, 1993, pp. 584-586). Rodriguez' desire to pursue an assisted death, the SCC alleged, suggested that she had essentially chosen death over life; this meant that the s. 7 value of life had been brought into the discussion, and needed to be considered (*Rodriguez*,

1993, p. 585-586). In the decision-making process, the majority brought forth the notion that no singular s. 7 value could be given supremacy or preference over another. While the SCC acknowledged the fact that s. 241(b) violated Rodriguez' security of the person and liberty rights, they could not disregard the fact that a value protecting sanctity of life, had also been engaged (*Rodriguez*, 1993, pp. 584-586). Significant attention was drawn to the fact that all of the values protected by s. 7 were of equal importance; if sanctity of life was a value protected by s. 7, then it could not be ignored simply because security of the person and liberty were at stake (*Rodriguez*, 1993, pp. 584-586).

Having acknowledged that s. 241(b) infringed upon Rodriguez' s. 7 rights, the SCC began examining the underlying *Charter* values that s. 7 sought to protect (*Rodriguez*, 1993, pp. 585-586). The majority found that s. 7 affirmed societal notions that human life should be afforded a high degree of dignity and respect, and in essence that human life should be protected whenever possible (*Rodriguez*, 1993, p. 585). The analysis proved to the majority that the impugned provision should be upheld, as maintaining the assisted suicide prohibition would in turn ensure that the sanctity of human life was not violated (Sharpe & Roach, 2017, pp. 273-275). The SCC also found that sanctity of life had only ever focused on preserving life (*Rodriguez*, 1993, p. 585). The value had not yet been associated with suicide or assisted suicide, and the Court was therefore unwilling to regulate such matters, or deem them acceptable (*Rodriguez*, 1993, p. 585). The lack of shift in the societal understanding and expectations surrounding sanctity of life, lead the majority to conclude that the provision in question, should be upheld (Sharpe & Roach, 2017, pp. 273-274). The majority found that legalizing assisted suicide would not only make constitutional the notion that choosing to die was acceptable, it would undermine core *Charter* and societal values (*Rodriguez*, 1993, pp. 585-586).

The SCC rationale consisted also of a walkthrough of relevant precedent relating to security of the person, and an explanation of how the s. 7 value evolved over time (*Rodriguez*, 1993, pp. 586-588). *R. v. Morgentaler* [1988] was an influential precedent case that helped inform not only the general decision, but helped to define security of the person (*Rodriguez*, 1993, pp. 586-587). Sopinka J. delved into the varying definitions for security of the person, mentioning that Beetz J. defined the s. 7 value with relation to abortion, as one that helped ensure that individuals would be able to obtain medical treatment without fear of criminal sanction (*Rodriguez*, 1993, p. 586). Dickson C. J. in the *Morgentaler* [1988] case, provided a definition of security of the person that was not limited only to abortion; he suggested that the value was one of great importance that would result in serious harm to individuals if withheld, as it protected "… physical or mental integrity and one's control over these…" (as cited in *Rodriguez*, 1993, p. 587). In addition, Wilson J. in agreement with Dickson C. J., stated that the s. 7 value "protects both the physical and psychological integrity of the individual" (as cited in *Rodriguez*, 1993, p. 587). In essence, the consensus from the *Morgentaler* [1988] decision for security of the person, was that personal autonomy should be protected, that the state should avoid potentially causing any type of mental stress, and that the state thus should have very limited interference with an individual's bodily integrity (*Rodriguez*, 1993, pp. 587-588). The explanations for security of the person found in *Morgentaler* [1988] lead the majority in *Rodriguez* to believe that s. 241(b) violated s. 7, as the impugned provision negatively impacted individuals' bodily integrity, and could cause psychological stress as well (*Rodriguez*, 1993, pp. 587-589).

Having made the determination that the assisted suicide prohibition violated s. 7, the majority went on to examine whether the principles of fundamental justice were also being breached. Before starting the analysis fully, Sopinka J. made a point to mention that while it would be the responsibility of the Court to ensure that no *Charter* violation was occurring, it

would also be important to ensure that longstanding values and principles were not being unnecessarily changed (*Rodriguez*, 1993, pp. 589-590). Perhaps one of the most important and influential aspects of the majority decision, Sopinka J. discussed the manner in which principles of fundamental justice should be determined, and what criteria effective and useful fundamental justice principles satisfy (*Rodriguez*, 1993, pp. 590-592). Principles of fundamental justice, Sopinka J. argued, should be legal principles that are able to yield tangible results, and be applicable in reality, as well as those that are, "… vital or fundamental to our societal notion of justice…" (*Rodriguez*, 1993, p. 590). Such principles while founded on societal notions of ethics and morality in some sense, would need to avoid being overly abstract or vague, to ensure that they could be legitimately administered within the Canadian criminal justice system (*Rodriguez*, 1993, pp. 590-591).

Despite the notion that a historical approach would help the Court to understand relevant principles in a case, Sopinka J. suggested that a historically focused analysis would not truly be beneficial in helping decide if a *Charter* violation had indeed occurred (*Rodriguez*, 1993, pp. 591-592). Historical legislation would only support the notion that the impugned provision should be upheld, considering that it would not have been consistently amended to reflect advances in the relevant fields (*Rodriguez*, 1993, pp. 591-592). In addition, longstanding precedent would suggest that legislation remain as is, because of its continued existence in such a state, and due to a lack of successful challenges (*Rodriguez*, 1993, pp. 591-592). Attempting to ensure that the Court was not relying solely on tradition and precedent to make a decision regarding the principles of fundamental justice in the present case, Sopinka J. advised that the Court consider not only the reasoning that supports the prohibition, but also the underlying principles (*Rodriguez*, 1993, p. 592).

Rodriguez argued that human dignity and autonomy should be seen as principles of fundamental justice by the Courts, and that the obvious violation of such values in the present case, was unconstitutional (*Rodriguez*, 1993, p. 592). Although the majority found the values of human dignity, autonomy, and self-determination, to be those that helped inform many *Charter* rights, and even many principles of fundamental justice, they did not agree that the values could be considered to be fundamental justice principles in themselves (*Rodriguez*, 1993, pp. 592-593). Suggesting that human dignity should be a fundamental justice principle, would mean that any violation of s. 7 in terms of life, liberty, or security of the person, would automatically constitute a violation of fundamental justice (Sharpe & Roach, 2017, pp. 259-260). In essence, to suggest that a value underlying s. 7 and many other *Charter* sections, could be viewed as a principle of fundamental justice itself, would make the whole notion of the principles moot; an Oakes analysis would perhaps be more logical to pursue, if a preliminary s. 7 violation would automatically constitute a fundamental justice violation, as there would be absolutely no need for the additional step of the principles (*Rodriguez*, 1993, pp. 592-593).

Explaining the majority rationale further, Sopinka J. also emphasized the importance of balancing individual interests and those of the state (*Rodriguez*, 1993, pp. 592-594). While infringements upon individual rights and freedoms are undoubtedly concerning, the *Charter* has always recognized the notion that state interests must also be considered; the state focuses on protecting society as a whole, and maintaining a fair balance between the two opposing sides (*Rodriguez*, 1993 p. 593), through measures such as the principles of fundamental justice, and the s. 1 Oakes analysis. While the majority recognized the importance of ensuring that Rodriguez' rights and liberties were not unnecessarily being infringed upon, they noted that an important aspect of the decision, was to focus on the rationalization behind the impugned provision (*Rodriguez*, 1993 p. 593). Consideration of varying angles within a case would be key

in determining whether a violation existed, and to make a decision in general. In the *Rodriguez* case, the issue being considered was whether the state interest of protecting sanctity of life and vulnerable individuals, was achieved through a complete assisted suicide prohibition (*Rodriguez*, 1993 pp. 594-595).

The blanket prohibition found in s. 241(b) of the *Criminal Code*, was described as having the objective of protecting the sanctity of human life, by providing both dignity and respect (*Rodriguez*, 1993, p. 595). The state suggested that vulnerable individuals, such as those that could potentially be coerced or forced into assisted suicide, would be at risk if the prohibition were to be removed, and also that the respect that society has historically held on preserving human life, would be diminished as well (*Rodriguez*, 1993, pp. 594-596). Taking a brief historical approach, the majority drew attention to the fact that Canadian society has often chosen to protect, rather than harm human life, through initiatives such as those that abolished capital punishment, and allowed actions such as assault and murder, to be considered criminal (*Rodriguez*, 1993, pp. 594-596). The opposing side, which suggested that sanctity and preservation of life should not necessarily trump the desire to live a life of better quality, or to exercise one's desires freely, was also considered in the analysis (*Rodriguez*, 1993, pp. 594-596). Additional support for the appellant's argument was seen through the fact that disciplines outside of law, such as science and medicine, supported decriminalization, and because measures allowing the withdrawal and/or refusal of medical treatment, were available at the time (*Rodriguez*, 1993, pp. 596-599).

The Court then delved into the assisted death legislation of other Western countries as a last attempt to support the lifting of the prohibition, however the examination generally proved that the impugned legislation should remain in place (*Rodriguez*, 1993, pp. 601-605). The majority found that many other countries held similar values to Canada in terms of the sanctity

and preservation of human life and thus that activities such as aiding and abetting in the suicide of another were often prohibited (*Rodriguez*, 1993, pp. 602-603). Concerns regarding a "slippery slope" into illegal forms of ending life were prevalent in the examination, and issues with implementing adequate safeguards, were also found (*Rodriguez*, 1993, pp. 602-605). Focused on ensuring that individuals would be free from coercion and abuse, the majority found the blanket prohibition on assisted suicide to be the most favourable option, despite the fact that some individuals such as Sue Rodriguez, would be deprived of their s. 7 rights and liberties (*Rodriguez*, 1993, p.605).

After considering all aspects brought forward by the by the appellants and respondents, the majority came to the conclusion that no principles of fundamental justice were violated (*Rodriguez*, 1993, p. 609). The majority emphasized the intentions surrounding end-of-life decisions, suggesting that the current system which supported a natural death, was favourable in comparison to one that would allow a forced death (*Rodriguez*, 1993, pp. 607-608). It was noted that as a large portion of the Canadian justice system is centered around intentions in the form of mens rea, that the intentions behind end-of-life decisions, should also be afforded a high degree of attention (*Rodriguez*, 1993, pp. 607-608). A lack of consensus in terms of wanting to preserve human life whenever possible, or allowing people to be self-determinate, discouraged the majority in finding a violation with regards to fundamental justice (Sharpe & Roach, 2017, pp. 273-274). In addition, the SCC was hesitant to suggest that suicide would be found acceptable in any situation, and was also concerned with the lack of adequate safeguards to prevent abuse in such permanent end-of-life care decisions (*Rodriguez*, 1993, pp. 607-608). The majority concluded that although s. 241(b) did violate Rodriguez' security of the person and liberty rights, that no principles of fundamental justice had been violated (*Rodriguez*, 1993, p. 608).

The Section Twelve Decision.

The majority decision surrounding the s. 12 claim presented by Rodriguez, was very brief, as it was found that s.12 did not actually apply to the case (*Rodriguez*, 1993, pp. 609-612). Sopinka J. clarified that for a s. 12 claim to take effect, the claimant would first need to prove that the state was subjecting an individual to a certain treatment and/or punishment; and second, that said treatment and/or punishment, was cruel and unusual (*Rodriguez*, 1993, p. 609). The argument advanced by the appellant in the *Rodriguez* [1993] case was that the blanket prohibition constituted cruel and unusual punishment, as it forced Rodriguez to end her life in a manner which she did not see fit, despite her very adamantly desiring an assisted suicide (*Rodriguez*, 1993, p. 609).

Sopinka J. found that denial of access to assisted suicide did not constitute punishment by any means (*Rodriguez*, 1993, p. 609). However, some speculation was afforded to the idea that the denial could be seen as cruel and unusual treatment (*Rodriguez*, 1993, p. 609). The majority eventually found that as the treatment was not directly being caused by the state and because Rodriguez was not in the hands of the state, that no treatment was being imposed upon her (*Rodriguez*, 1993, pp. 609-612). Rodriguez was simply being subjected to the same criminal provisions as all other Canadians through the *Criminal Code*; no cruel or unusual treatment could be seen as having been applied, as the only issue was due to Rodriguez' special circumstances (*Rodriguez*, 1993, pp. 609-612).

The Section Fifteen Decision.

The majority found that s. 241(b) violated s. 15, as the prohibition either deprived certain individuals of their right, or subjected them to a burden (*Rodriguez*, 1993, p. 612). Sopinka J. suggested that the two main issues regarding s. 15, were first whether the discrimination claim could be supported, as the provision denied assisted suicide to all disabled people regardless of if

they were terminally ill; and second if the assisted suicide deprivation would be beneficial or burdensome (*Rodriguez*, 1993, pp. 612-613). The majority declined to consider any s. 15 issues, as they found that s. 1 would save the provision regardless (*Rodriguez*, 1993, pp. 613-614). In addition, the majority briefly went through an Oakes analysis, and found that s. 241(b) met the criteria of pressing and substantial, rational connection, minimal impairment, and the balancing of salutary and deleterious effects (*Rodriguez*, 1993, pp. 613-615). Upholding the provision was the most favourable and logical option from every aspect in the view of the majority, and thus no issues were found with regards to s. 15 (*Rodriguez*, 1993, pp. 613-615).

Concluding their analysis, the majority decided that the appeal should be dismissed without costs (*Rodriguez*, 1993, p. 615). No s. 12 applicability was found, and despite the fact that a s. 7 violation was found for security of the person and liberty, it was determined that no principles of fundamental justice had been violated by the impugned provision (*Rodriguez*, 1993, p. 608). Similarly, while, a s. 15 violation was acknowledged, an Oakes analysis would prove that the infringement was reasonable (*Rodriguez*, 1993, p. 615). The assisted suicide prohibition while undoubtedly problematic in some aspects, was overall found to be sound, and more favourable if upheld (*Rodriguez*, 1993, p. 631).

The Carter Case

Carter v. Canada (Attorney General) [2015] has already proven to be a very iconic and influential case in Canadian jurisprudence. The case has now created precedent over the previous SCC decision in *Rodriguez* [1993], and essentially resulted in the matter of assisted death coming full circle. The unanimous decision served to clarify the Court's stance on the matters of assisted death discussed in *Rodriguez* [1993], and more importantly, sent the message that the Court had advanced not only their view of s.

7, but also developed a strong understanding of how to apply and interpret the fundamental *Charter* section.

Case Facts

Decision at the British Columbia Supreme Court.

The assisted suicide prohibition found in s. 241(b) of the *Criminal Code*, proved to have significant adverse impacts on many individuals, including Kay and Lee Carter, Hollis Johnson, William Shoichet, those represented by the British Columbia Civil Liberties Association, and also for Gloria Taylor (*Carter*, 2015, p. 331). A newfound and renewed momentum for the push to decriminalize assisted suicide in Canada, was expressed to the courts when Gloria Taylor was diagnosed with ALS in 2009 (*Carter*, 2015, p. 346). Taylor did not want to die naturally through a slow and painful process, and just as Sue Rodriguez, she instead preferred to end her life by obtaining an assisted death (*Carter*, 2015, pp. 346-347).

The five appellants claimed that s. 241(b) violated s. 7 and s. 15 of the *Charter*, and thus chose to bring the matter to the British Columbia Supreme Court in 2012 (*Carter*, 2015, pp. 346-347). Smith J. began the decision by thoroughly examining information and data available with regards to assisted death (*Carter*, 2015, pp. 353-357). The first part of the trial judge's analysis began with an examination into end-of-life care in Canada that was available at the time, and was concluded with the idea that assisted death would be found socially acceptable in certain circumstances (*Carter*, 2015, pp. 353-354).

Practices that bring death about much faster than natural, such as palliative sedation and the right to refuse lifesaving medical treatment, were already available in Canada, and generally seen as ethical and acceptable (*Carter*, 2015, p. 353). The trial judge found that a general consensus existed among physicians and ethicists, that assisted death was not more ethically heinous than other end-of-life care practices (*Carter*, 2015, pp. 353-354). Thus, many Canadian

physicians would feel comfortable with assisted death, if it were to be legalized (*Carter*, 2015, pp. 353-354). The examination into Canadian end-of-life care, lead Smith J. to conclude that assisted death would generally be seen as ethically and morally acceptable in Canada, provided that those eligible for the practice were competent adults that were choosing the practice of their own free will, and also suffering from a grievous and irremediable medical condition (*Carter*, 2015, p. 354).

Continuing her analysis, the trial judge went on to examine data and evidence from other countries, which had already legalized some form of assisted dying (*Carter*, 2015, pp. 354-355). Smith J. reviewed the various safeguards each regime had implemented to protect the vulnerable against abuse, and also the effectiveness of such safeguards (*Carter*, 2015, p. 354). Smith J. concluded that safeguards were generally adhered to, that other rules and regulations were effective in preventing abuse, and that fears of coercion, misuse, and the exploitation of a permissive assisted death system, had not come to fruition in any examined regime (*Carter*, 2015, p. 354). Warning against taking evidence from other countries too seriously, Smith J. suggested that the relevant data had shown that assisted suicide systems could be implemented safely and effectively, without negatively impacting palliative care, or deteriorating a respect for life (*Carter*, 2015, p. 355).

The trial judge also explored the risks surrounding assisted suicide, and the options available to manage and minimize those risks (*Carter*, 2015, p. 355). Evidence proved to the Court that physicians would be able to effectively guard against coercion and abuse surrounding end-of-life care practices, and also that they would be able to accurately determine competence and the voluntary desire for assisted death (*Carter*, 2015, p. 355). In addition, Smith J. found that measures such as informed consent practices, would help ensure that patients did not make decisions with haste, or under some type of external influence (*Carter*, 2015, p. 355). Assisted

suicide in Canada, Smith J. suggested, would be possible and safe, provided that the potential risks were minimized through a "… carefully designed system… that imposes strict limits that are scrupulously monitored and enforced" (*Carter*, 2015, p. 355).

Rodriguez [1993] had set binding precedent for assisted suicide related matters, and thus the decision to reconsider the same matter in a lower Court was somewhat difficult for Smith J. (*Carter*, 2015, pp. 355-356). Despite the binding SCC decision, Smith J. concluded that it would in fact be appropriate to revisit the matter, as the new case had come at a time after many changes had occurred not only with the Canadian interpretation of s. 7, but with the Canadian and international understanding and acceptance of assisted death in certain situations (*Carter*, 2015, pp. 355-356). The trial judge cited that the s. 7 value of life had not previously been considered within the realm of assisted suicide; that the fundamental justice principles of overbreadth and gross disproportionality had not yet been developed nor considered; that the s. 15 violation was not thoroughly addressed; and that the changes made to the s. 1 analysis based on *Alberta v. Hutterian Brethren of Wilson Colony* [2009], had not yet been developed or applied in the *Rodriguez* [1993] decision (*Carter*, 2015, pp. 355-356). The changes that had taken place since *Rodriguez* [1993], in addition with the changed Canadian landscape, allowed Smith J. to apply new knowledge to the *Carter* [2015] decision, despite opposing precedent (*Carter*, 2015, pp. 354-357).

Smith J. concluded after having conducted intensive research into the matter, that the assisted suicide prohibition violated both s. 7 and s. 15 of the *Charter* in an inexcusable and unjustifiable manner (*Carter*, 2015, pp. 356-358). The judge found that the three values of life, liberty, and security of the person, had been engaged by the provision in question, and that the principles of overbreadth and gross disproportionality had been violated (*Carter*, 2015, p. 357). It was found that liberty was impinged upon, as anyone seeking an assisted suicide would be

subjected to state interference into their personal decisions, that security of the person was violated because individuals were being deprived of autonomy and self-determination with regards to their own bodies, and that the value of life was being harmed because the provision introduced the potential that some individuals would end their lives prematurely, while it was still possible to do so without aid (*Carter*, 2015, p. 357).

The prohibition was also found to be unnecessarily broad (*Carter*, 2015, p. 357). It imposed an absolute prohibition on assisted suicide when it had been seen that systems that offered such end-of-life care practices could be used safely as long as certain precautions were introduced (*Carter*, 2015, p. 357). In addition, the provision was also seen as imposing a grossly disproportionate negative impact on those individuals that would be unable to execute their end-of-life decisions without aid (*Carter*, 2015, p. 357). The effect of the prohibition included consequences such as individuals taking their lives prematurely; suffering through to a natural death despite not wanting to do so; losing a sense of personhood and/or self-dignity; and potentially imposing criminal sanction on another individual that provides illegal aid (*Carter*, 2015, p. 357). The trial judge also found that s. 241(b) could not be deemed acceptable under s. 1 of the *Charter*, and thus declared it unconstitutional and void (*Carter*, 2015, p. 357).

The examination into constitutionality also indicated to Smith J., that the impugned provision violated s. 15 of the *Charter* (*Carter*, 2015, p. 356). Smith J. stated that s. 241(b), "…imposed a disproportionate burden on persons with physical disabilities…" (*Carter*, 2015, p. 356), and that it essentially singled out the physically disabled by forcing them to resort to drastic means to be able to take control of their end-of-life decisions (*Carter*, 2015, p. 356). The trial judge found that the discrimination inflicted upon the physically disabled was unacceptable, and that it could not be justified under s. 1; while the provision met the first three aspects of the Oakes criteria, in that the reasoning behind the provision was well intentioned, the law failed at

minimum impairment (*Carter*, 2015, p. 356). Smith J. proposed that the government revisit the issue of assisted suicide, to implement a system that would be less impairing and achieve governmental objectives, while also achieving the needs and desires of negatively impacted individuals (*Carter*, 2015, p. 356). Smith J. found in conclusion, that s. 241(b) was unconstitutional, and thus ordered a suspension of invalidity, while also providing Gloria Taylor with a constitutional exemption (*Carter*, 2015, p. 357).

Decision at the British Columbia Court of Appeal.

The Canadian government chose to appeal the trial decision, and the matter was thus heard at the British Columbia Court of Appeal, in 2013 (*Carter*, 2015, p. 358). The most controversial and pressing issue considered in Court at the time, was that the trial judge had deviated from the precedent set in *Rodriguez* [1993], and formulated a completely unique decision (*Carter*, 2015, p. 358). Although Smith J. had thoroughly discussed and explained the logic behind her choice to depart from the decision in *Rodriguez* [1993], the majority in the Appeal Court did not share the same beliefs (*Carter*, 2015, p. 358). Comprised of Newbury and Saunders JJ. A., the majority expressed that the reasoning applied in the trial had been flawed, and that, "… neither the change in legislative and social facts nor the new legal issues…permitted a departure from *Rodriguez*" (*Carter*, 2015, p. 358).

The majority revisited the case, and found that the trial judge had erred in much of the decision that had been rendered (*Carter*, 2015, p. 358). Perhaps most significant, Newbury and Saunders JJ. A., found that the introduction of the two new principles of fundamental justice, since *Rodriguez*, did not actually provide sufficient grounds to revisit the matter and depart from precedent (*Carter*, 2015, p. 358). In addition, the majority suggested that contrary to the trial judge's claim that the SCC had declined to consider a violation of the s. 7 value of life, the Court had in fact found that no such violation existed (*Carter*, 2015, p. 358). The majority also found

that the s. 15 claim had been considered and then dismissed in *Rodriguez* [1993], as it was found that s. 1 would have deemed the infringement to be reasonable (*Carter*, 2015, pp. 358-359). Similarly, an Oakes analysis for s. 7 would have resulted in any infringements being seen as reasonable (*Carter*, 2015, pp. 358-359). Concluding their analysis into the decision made at the lower Court, the majority at the Court of Appeal, found that the decision rendered in *Rodriguez* [1993] required adherence (*Carter*, 2015, p. 359).

The dissent at the British Columbia Court of Appeal, generally agreed with the findings presented by the trial judge (*Carter*, 2015, pp. 359-360). Although agreeing with the precedent set in *Rodriguez* [1993], that the s. 15 claim would need to be dismissed due to it being saved by s. 1, Finch C. J. B. C., found that the analysis conducted by Smith J., was correct (*Carter*, 2015, pp. 359-360). The dissent at the Court of Appeal, found that, "... the trial judge's assessment of *stare decisis*, her application of s. 7, … [and] the corresponding analysis under s. 1" (*Carter*, 2015, p. 359), was well reasoned, and generally sound (*Carter*, 2015, pp. 359-360).

Appellant Claims to the Supreme Court of Canada

The appellants advanced the claim that s. 241(b) violated both ss. 7 and 15 of the *Charter* (*Carter*, 2015, p. 360). The first main argument presented, was that the impugned provision violated all three values meant to be protected by s. 7, in that it forced additional and prolonged suffering onto competent adults already suffering from grievous and irremediable medical conditions (*Carter*, 2015, p. 360). The second claim argued, was that s. 241(b) discriminated against the physically disabled by singling them out, and depriving them of their right to be treated as equals (*Carter*, 2015, p. 360). The appellants suggested that the alleged *Charter* violations were unconstitutional, and sought an appropriate remedy to alleviate the resulting harms (*Carter*, 2015, p. 360).

The Supreme Court Decision

Preliminary Issues.

The decision rendered by the Supreme Court in *Carter* [2015], was among the most iconic and influential judgements from the Court. The understanding of s. 7 implemented in *Rodriguez* [1993], while very informed and insightful for the time, was very much underdeveloped, in comparison to the understanding that came about after the *PHS Community Services Society* [2011], and *Bedford* [2013] cases had been decided. The Court made use of *Carter* [2015] to provide a judgement that clearly expressed their fully developed interpretation of s. 7, especially in relation to assisted death, while also emphasizing their unified stance.

The inquiry into the constitutionality of s. 241(b) in relation to ss. 7 and 15, first began with the consideration of two auxiliary issues of jurisdiction (*Carter*, 2015, p. 360). A major and controversial component of the *Carter* [2015] case before it had come before the SCC, was that the trial judge had gone against the precedent set in *Rodriguez* [1993], and that the Appeal Court had disproved of the action (*Carter*, 2015, pp. 359-360). The SCC, while acknowledging that precedent from higher Courts was generally not to be opposed, noted that specific circumstances, did in fact warrant reconsideration of higher Court decisions (*Carter*, 2015, p. 361).

McLachlin C. J., speaking for the unanimous Court in *Carter* [2015], stated that, "… trial courts may reconsider settled rulings of higher courts… (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Carter*, 2015, p. 361). As the fundamental justice principles of overbreadth and gross disproportionality had not yet been developed, nor considered in *Rodriguez* [1993], the Court found it to be clear that the legal framework had changed significantly (*Carter*, 2015, pp. 361-362). Furthermore, a newfound abundance of evidence surrounding the benefits, risks, and safety of assisted suicide systems, proved to the SCC that the

evidence parameter had been met as well (*Carter*, 2015, pp. 361-362). Although the Court disagreed that the advancements to the s. 1 analysis, introduced in *Hutterian Brethren*, could warrant a reconsideration of s. 15, they did find that the general differences in the two cases, would allow for a re-visitation of the *Rodriguez* decision (*Carter*, 2015, pp. 362-363). The case facts lead the SCC to believe that the actions of the trial judge were appropriate, and the Court therefore was in full support of Smith J. (*Carter*, 2015, pp. 361-363).

The second auxiliary issue the Court considered, was whether Parliament had wrongfully infringed upon provincial jurisdiction into health care matters, by imposing an absolute prohibition on assisted suicide (*Carter*, 2015, p. 363). The appellants had advanced the claim that the impugned prohibition was unconstitutional. It violated the doctrine of interjurisdictional immunity, which suggests that, "…the heads of power in ss. 91 and 92 are "exclusive", and therefore each have a "minimum and unassailable" core of content that is immune from the application of legislation enacted by the other level of government" (*Carter*, 2015, p. 363). The Court, although agreeing that the provinces hold power over a realm of health care matters, required that the appellants prove that s. 241(b), violated that specific set of exclusively provincial health care issues (*Carter*, 2015, p. 363). The submission from the appellants was found to be too vague and ambiguous to truly distinguish provincial and federal jurisdiction, and as done in *PHS Community Services Society* [2011], the Court decided that "… both Parliament and the provinces may validly legislate on the topic" (*Carter*, 2015, pp. 363-365).

Section Seven.

The s. 7 analysis at the SCC began with an examination into each value encompassed by the *Charter* section, followed by a determination of whether the principles of fundamental justice were being violated (*Carter*, 2015, pp. 365- 384). Beginning with the right to life, McLachlin C. J. established that the value had indeed been engaged by the impugned provision, using the

reasons provided by the trial judge in the British Columbia Supreme Court (*Carter*, 2015, p. 366). The Court found that the determinations by Smith J., that some individuals barred from assisted suicide would end their lives earlier than they would otherwise, had the prohibition not been in place, were sufficient cause to have engaged life as a value (*Carter*, 2015, p. 366).

The second part of the analysis into the value of life, centered around the varying approaches and viewpoints as to what exactly is protected by the value (*Carter*, 2015, p. 366-368). The appellants advanced the viewpoint that the value of life should protect more than just the preservation of physical life itself, and instead should also highlight the importance of quality of life, autonomy, and dignity (*Carter*, 2015, p. 366). The qualitative approach, supported the notion of dying with dignity and maintaining a good quality of life, as well as being self-determinate and having the freedom to choose when and if, to terminate life (*Carter*, 2015, pp. 366-367). Dissenting parties in both the Appeal Court for *Carter* [2015], and the SCC for *Rodriguez* [1993], took such an approach, suggesting that the value of life encompassed not only physical existence, but also an individual's personhood, expectations for life, and the worth placed on life (*Carter*, 2015, pp. 366-367).

The SCC opted for the approach taken by Smith J. at the trial however, maintaining that "…the right to life is only engaged when there is a threat of death as a result of government action or laws" (*Carter*, 2015, p. 367). In essence, the idea was that life as a value, is only engaged when some governmental provision harms or impedes an individual's ability to live (Sharpe & Roach, 2017, p. 249). The SCC found that liberty and security of the person, would better address the issues of dying with dignity and having self-determinacy, as life would only truly be relevant, if the ability to physically exist, was being threatened (*Carter*, 2015, p. 367). A very significant distinction drawn by the Court in their explanation, was that the right to live does not equate to the duty to live (*Carter*, 2015, p. 367). The Court stated that while Canadian

values afforded a great significance and weight to the sanctity and preservation of life, it would be incorrect to suggest "… that individuals cannot "waive" their right to life" (*Carter*, 2015, p. 367). Allowing individuals to refuse or withdraw from lifesaving medical treatment, showed that the values of liberty and security of the person are also respected values (Sharpe & Roach, 2017, pp. 249-250). The Court drew attention to the fact that "… the sanctity of life "is no longer seen to require that all human life be preserved at all costs… [and that] in certain circumstances, an individual's choice about the end of her life is entitled to respect" (*Carter*, 2015, 367-368).

The next portion of the analysis into s. 7, examined liberty and security of the person. Liberty, McLachlin C. J. noted, protected "... the right to make fundamental personal choices free from state interference" (*Carter*, 2015, p. 368), and security of the person, protected an individual's right to be self-determinate and have control over one's own body, while being free from governmental interference (*Carter*, 2015, p. 368). The Court found that both interests had been engaged in the present case, as the assisted suicide prohibition had the effect of limiting both the personal choices an individual could make in relation to their body, as well as causing significant psychological and/or physical suffering, by interfering with an individual's bodily integrity (*Carter*, 2015, p. 368).

The Court found that an individual's choice to opt for an assisted suicide as opposed to any other form of palliative care, was a reflection of "... deeply personal and fundamental belief[s] about how they wish to live, or cease to live" (*Carter*, 2015, p. 370). In essence, while the Court recognized the importance of preserving life, attention was also drawn to the fact that individuals are entitled to a degree of dignity, respect, and autonomy, when making end-of-life decisions (*Carter*, 2015, pp. 369-371). The SCC concluded that s. 241(b) and s. 14 of the *Criminal Code*, had the effect of violating both liberty and security of the person, by prohibiting

access to assisted suicide, and by impinging on an individual's right to consent to death in certain circumstances (*Carter*, 2015, pp. 370-371).

The Principles of Fundamental Justice.

The last portion of the s. 7 analysis considered whether the principles of fundamental justice had been violated. Before beginning the analysis, McLachlin C. J. pointed out that the principles of fundamental justice currently in place, were those that had been developed through years of s. 7 adjudication, and those that the Court had decided could not be violated, if s. 7 values were to be protected (Sharpe & Roach, 2017, pp. 259-260). The Court had determined that the three most relevant principles for the case at hand, would include arbitrariness, overbreadth, and gross disproportionality, and that it would be necessary to measure the principles against the objective of the impugned provision, to determine a violation (Sharpe & Roach, 2017, pp. 259-260).

Protecting vulnerable individuals from being coerced into ending their lives, was seen as the main objective of the assisted suicide prohibition, although Canada added that the provision also aimed to preserve life in general as well (Canada, 2015, p. 372). The Court found issue with Canada's specification of the object of the provision (Canada, 2015, pp. 372-373). Citing that in *Rodriguez* [1993], the majority had expressly stated that the prohibition's objective of protecting vulnerable people from being wrongfully forced into suicide, was only based on societal values surrounding the protection and preservation of human life (Canada, 2015, pp. 372-373). Preservation of human life was not seen to be a main objective of s. 241(b), and viewing it as such would be problematic according to the Court, in that it would essentially "…immunize the law from challenge under the *Charter*" (as stated in *Carter*, 2015, p. 373). Broad objectives such as the preservation of human life, would make it very difficult to suggest that the measures used to achieve an objective were against the principles of fundamental justice, and thus the

classification presented by Canada for s. 241(b), was not accepted (*Carter*, 2015, pp. 372-373). The Court further added that "... the jurisprudence requires the object of the impugned law to be defined precisely… holding that the object of the prohibition should be confined to measures directly targeted by the law" (*Carter*, 2015, p. 373). Jurisprudence surrounding s. 7 essentially suggested that as the assisted suicide prohibition only had the effect of protecting vulnerable individuals from being wrongfully coaxed into obtaining an assisted suicide, that it could not be suggested that other objectives such as the preservation of life, or prevention of suicide, existed and were relevant (*Carter*, 2015, p. 373).

The Court also made a point to emphasize the fundamental differences between a s. 1 analysis, and one that determined whether the principles of fundamental justice had been violated (*Carter*, 2015 pp. 374-375). The Court stated that "… courts are not concerned with competing social interests or public benefits conferred by the impugned law" (*Carter*, 2015, p. 374), and that such an analysis would be appropriate only under s. 1 (*Carter*, 2015, p. 374). Attempting to provide clarification, the Court stated that the principles of fundamental justice had been "… derived from the essential elements of our system of justice…" (*Carter*, 2025, p. 374), and been designed to protect inherent human dignity and worth (*Carter*, 2015, pp. 374-375). The Court emphasized that violations could only exist when human dignity and worth were harmed, through the restriction of rights and liberties, in a manner that was arbitrary, overbroad, and/or grossly disproportionate (*Carter*, 2015, pp. 374-375). Concluding the introduction into the principles of fundamental justice, the Court also pointed out that s. 7 claimants would have the sole responsibility of proving a violation of life, liberty, and/or security of the person, as well as a violation of the principles of fundamental justice (*Carter*, 2015, p. 374); directing claimants to also "… establish the efficacy of the law versus its deleterious consequences… would

[wrongfully] impose the government's s. 1 burden on claimants under s. 7" (as cited in *Carter*, 2015, p. 374).

Arbitrariness.

Beginning the substantive analysis into the principles of fundamental justice, the Court defined arbitrariness as occurring when there was "… no rational connection between the object of the law and the limit it imposes…" (as cited in *Carter*, 2015, p. 375). The objective of the assisted suicide prohibition had already been determined to be centered around the protection of vulnerable individuals, from being coerced or forced into an assisted death (*Carter*, 2015, pp. 372-373). The Court found that the absolute ban on assisted suicide did in fact have the effect of protecting vulnerable individuals from making drastic end-of-life decisions under external influence, and thus found that the impugned provision was not arbitrary (*Carter*, 2015, p. 375).

Overbreadth.

The inquiry into whether any principles of fundamental justice had been violated, continued with an examination into overbreadth (*Carter*, 2015, pp. 375-377). Overbreadth was defined as being relevant, when a provision unduly restricted the rights and liberties of some individuals, despite such restrictions not being necessary to achieve the objective of the law (*Carter*, 2015, pp. 375-376). Although the Court did not require that the provision be as minimally restricting as possible in the overbreadth discussion, it was determined that overbreadth could be violated if "… the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature" (*Carter*, 2015, p. 376). In essence, if a law limited s. 7 rights in a manner that had no actual relation to the objective intended to be achieved by the law, such as when laws are overbroad simply for ease of enforcement, overbreadth could be determined to have been violated (Sharpe & Roach, 2017, pp. 264-267).

Having defined and explained the principle of overbreadth, the Court determined that the reach of the impugned provision did in fact constitute a violation of the principle (*Carter*, 2015, p. 376). Canada had acknowledged that the absolute ban found in s. 241(b) actually negatively impacted individuals that did not need protection, in that they were not vulnerable or likely to be coerced into committing suicide (*Carter*, 2015, p. 376). As the provision was meant to protect only vulnerable individuals, the Court found that a violation existed, and that the law was overbroad (*Carter*, 2015, p. 376). Canada responded that creating a distinction between the vulnerable and non-vulnerable would be difficult, but citing similar argumentation and reasoning from *Bedford* [2013], the Court quashed the argument (*Carter*, 2015, p. 376). The Court found that s. 1 would better address issues of where to draw the line between those requiring or not requiring protection, as the fact of overbreadth could not be denied (*Carter*, 2015, p. 377).

Gross Disproportionality.

The Court turned next, to examine the principle of gross disproportionality in relation to the assisted suicide prohibition (*Carter*, 2015, pp. 378). McLachlin C. J. explained that gross disproportionality would have been considered to have been infringed upon, in instances where "... the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure" (*Carter*, 2015, p. 377). As with the principle of overbreadth, the Court emphasized that the focus when determining whether the principle had been violated or not, was to consider not the negative impact on society, but on the individual alone (Sharpe & Roach, 2017, p. 267).

Examining both the reasoning provided by the trial judge, and by Canada, the SCC expressed difficulty and hesitation in determining whether a gross disproportionality violation had occurred (*Carter*, 2015, pp. 377-378). The trial judge had found that a violation was in place, citing that "... the prohibition's negative impact on life, liberty and security of the person was

"very severe" and therefore grossly disproportionate to its objective" (as cited in *Carter*, 2015, p. 377). On the other hand, Canada had advanced the argument that protecting vulnerable people from coercion and external influence in such permanent end-of-life care decisions, was also a valid objective that warranted respect (*Carter*, 2015, p. 378).

Further examining the principle itself, McLachlin C. J. drew particular attention to the fact that the threshold required to be fulfilled before gross disproportionality could be accepted as having been violated, was incredibly high (*Carter*, 2015, p. 377). Any type of disproportionality between the object of a law and the negative impact on an individual in terms of their rights restriction, could not automatically be seen as grossly disproportionate (Sharpe & Roach, 2017, pp. 267-269). In fact, the negative impact would have to be very significant, before the fundamental justice principle could be seen as having been violated (Sharpe & Roach, 2017, pp. 267-269). The fact that one fundamental justice principle had already been seen as being infringed upon, allowed the Court to avoid making a concrete determination for gross disproportionality in the present case (*Carter*, 2015, p. 378). The Court, while acknowledging that both sides of the debate had valid concerns, declined to consider the potential violation of gross disproportionality (*Carter*, 2015, p. 378).

Parity.

The last consideration in relation to the principles of fundamental justice, was concerned with a new principle of parity (*Carter*, 2015, p. 378). The appellants had asked the Court to consider a new fundamental justice principle, that would "... require that offenders committing acts of comparable blameworthiness receive sanctions of like severity" (*Carter*, 2015, p. 378). In essence, the principle would ensure that all end-of-life care practices were paired with a criminal sanction, as opposed to only physician assisted death being accompanied by a criminal sanction (*Carter*, 2015, p. 378). The Court declined to consider the principle however, as such a principle

had never before been recognized by the Court, and since it had already been determined that the restriction imposed by s. 241(b) violated the fundamental justice principle of overbreadth (*Carter*, 2015, p. 378).

Section 15.

The s. 15 claim that had been presented by the appellants was also not considered by the SCC (*Carter*, 2015, p. 378). The Court had already determined that one *Charter* violation was in place; the impugned provision infringed on life, liberty, and security of the person, and did so in a manner that was inconsistent with the fundamental justice principle of overbreadth (*Carter*, 2015, pp. 377-378). Inquiring into a possible s. 15 violation would provide no benefit in terms of further repairing the harm accrued by s. 241(b), and the Court thus declined to consider a potential violation (*Carter*, 2015, p. 378).

The Oakes Analysis.

The last aspect of the analysis into the principles of fundamental justice, was to conduct the Oakes analysis to determine whether the infringement on s. 7 rights, could be reasonably justified (*Carter*, 2015, p. 378). The first step in the Oakes analysis, which asks whether the provision is pressing and substantial, was conceded as having been fulfilled (*Carter*, 2015, p. 379). The law had been prescribed in the *Criminal Code*, and the objective, which was to protect the vulnerable from undue coercion, was unanimously seen as being valid (*Carter*, 2015, p. 379).

The proportionality step of the Oakes analysis revealed some fundamental issues (*Carter*, 2015, pp. 379-380). Despite admitting that "proportionality does not require perfection…" (as cited in *Carter*, 2015, p. 379), and that a degree of deference should generally be afforded to Parliament, the Court found that the government had erred in their actions (*Carter*, 2015, pp. 379-380). The SCC found "… that the absolute prohibition could not be described as a "complex regulatory response"…" (as cited in *Carter*, 2015, p. 380) by Parliament with regards to the

competing issues surrounding assisted suicide, and thus that the amount of deference generally given to Parliament, should be decreased (*Carter*, 2015, p. 380).

Inquiring further into proportionality, the Court examined the stages of rational connection and minimal impairment (*Carter*, 2015, pp. 380-388). The absolute prohibition, while not the ideal method of protecting vulnerable individuals from coercion into assisted suicide, was found to be effective in achieving the objective (*Carter*, 2015, pp. 380-381). The provision in question aimed to protect vulnerable individuals from being harmed or exploited under a more lax assisted suicide system; although the current enforcement system could have been better refined, it was overall found that "it is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable…" (*Carter*, 2015, p. 381).

Minimal impairment was seen as having been violated through the Oakes analysis (*Carter*, 2015, pp. 381-388). The SCC made use of the evidence collected and used by the trial judge, to determine whether the absolute prohibition was necessary, or whether a significantly less impairing system could be put into place (*Carter*, 2015, pp. 381-383). Those opposed to reducing restrictions on assisted suicide, feared the consequences that would arise:

> … if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive juris- dictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life. (as cited in *Carter*, 2015, p. 382)

Concerns about the permissive regime were dismissed by the trial judge, as she had found through extensive research and investigation, that all potential risks could be managed and minimized (*Carter*, 2015, pp. 382-383).

Canada argued that the conclusions presented by the trial judge were weak and not as heavily supported as being portrayed, however the SCC rejected this argument (*Carter*, 2015, pp. 381-388). Previous cases had supported the idea that "… a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings" (as cited in *Carter*, 2015, p. 384). Canada's attempt to dispute the findings of the trial judge by presenting some opposing evidence, was not seen as warranting consideration (*Carter*, 2015, pp. 381-388). In addition, Canada's arguments that the assisted suicide ban should only be changed if all risk could be removed, was seen as unacceptable by the SCC, as the approach reversed the onus of proving minimal impairment or freedom from risk, onto the claimant (*Carter*, 2015, p. 387). The SCC agreed with the findings of the trial judge, and thus concluded that the absolute ban on assisted suicide, was not justifiable (*Carter*, 2015, pp. 381-388).

Remedy.

The SCC found that s. 241(b) and s. 14 of the *Criminal Code*, were void due to the unjustifiable restriction they imposed on individuals seeking assisted suicide (*Carter*, 2015, p. 389). The Court stated that the violation of s. 7 was not in accordance with the principles of fundamental justice, nor reasonably justifiable under s. 1 of the *Charter*. The remedy of a declaration of invalidity, was therefore found to be appropriate (*Carter*, 2015, pp. 389-390). The declaration of invalidity was suspended for 12 months to allow for Parliament to create new legislation surrounding assisted suicide, as the current system would only allow for competent minded, consenting adults, that were experiencing grievous and irremediable medical conditions, to access assisted suicide (*Carter*, 2015, pp. 389-390).

Addressing a final issue, the Court noted that the decriminalization of assisted suicide did not impose any burden or responsibility on physicians, to oppose their morals, religion, or conscience, and participate in assisted death (*Carter*, 2015, pp. 390-391). Physicians choosing to

participate in such end-of-life care could do so legally, but those that did not agree with the practice, were under no force either (*Carter*, 2015, pp. 390-391). Concluding the analysis, the Court expressed that there was no need to issue any constitutional exemptions, instead deciding simply to allow the appeal with costs (*Carter*, 2015, pp. 391-396).

Current Assisted Dying Legislation

The decision rendered in *Carter* [2015], lead to a new stage in the assisted death regime in Canada. The absolute ban on assisted dying that was subjected to scrutiny in *Rodriguez* [1993], as well as in *Carter* [2015], was ultimately determined to be unconstitutional, in that s. 7 and the principles of fundamental justice had been violated in an unjustifiable manner (*Carter*, 2015, pp. 389-390). Parliament was given 12 months to make amendments to the *Criminal Code*, given that the SCC had determined that assisted death would thereafter be an available option for every "… 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" (*Carter*, 2015, p. 396).

Parliament was unable to legislate on assisted death in time for the originally assigned deadline of February 6, 2016, and a four-month extension was therefore granted by the SCC (CBC News, "2 B.C. Women", paras. 4-6). The new legislation was passed on June 6, 2016, and consisted of new and amended provisions which among other things; exempted certain people aiding in assisted death from criminal sanctions, specified the necessary safeguards and who is eligible for the procedure, made reporting certain information about assisted death mandatory, and which created new sanctions and offences for not complying with safeguards, or the many specified rules and requirements (Canada, 2019, Summary, paras. 1-5).

The new legislation that replaced and supplemented the absolute assisted suicide ban in s. 241(b), can be found from s. 241 to s. 241.4 of the *Criminal Code* (*Criminal Code*, 1985). Prohibitions against counselling or aiding another in suicide are still found in s. 241(1), however s. 241(2) now outlines the exemptions available for medical assistance in dying, and ss. 241(3), 241(4), and 241(5) specify that those aiding medical practitioners, pharmacists, and those aiding patients obtaining medical assistance in dying (MAID), may also be exempt from criminal sanctions (*Criminal Code,* 1985). In addition, s. 241.1 provides definitions relating to MAID, and ss. 241.2(1) and 241.2(2) discuss which individuals are eligible for MAID, and which mandatory criteria must be met before the procedure can be obtained (*Criminal Code,* 1985). An extensive list of safeguards, which includes requiring informed consent, confirmation from two medical practitioners for the procedure, witness confirmation, mandatory waiting periods between the confirmation date and date of actual procedure, and etc., can be found in s. 241.1(3) (*Criminal Code,* 1985). Lastly, the criminal sanctions that have been put in place for failure to comply with such safeguards, can be found in s. 241.3, and the sanctions for failure to file information properly and for committing forgery in relation to MAID, can be found in ss. 241.31 and 241.4, respectively (*Criminal Code,* 1985). The amendments and additions made by Parliament, while initially having taken longer to formulate and implement, are quite extensive, and thus likely to help in the avoidance of potential issues with MAID.

Critical Analysis

Controversies Surrounding the New MAID Legislation

The new assisted dying legislation, while mandated by the SCC, has not been completely free from controversy and debate (Chochinov & Frazee, 2016, pp. 543-544). The Canadian government has long since expressed concerns with assisted suicide, as was seen in the arguments in both *Rodriguez* [1993], and *Carter* [2015]. The main qualms that conservative

members of Parliament fear may materialize, are that vulnerable individuals will fall prey to an assisted suicide system that cannot protect them from abuse (Chochinov & Frazee, 2016, p. 543), and that the system which now only supports assisted suicide for select individuals, will become one which eventually allows for euthanasia (Schafer, 2013, pp. 528-529). Advocates of assisted dying, while satisfied that the practice has at the very least become accessible for some individuals, have also raised concerns that those barred from accessing the service, will continue to be subjected to rights violations; for example, mature minors and those individuals that are not of competent mind when seeking an assisted death, will be among the many of those excluded from the practice (Kermode-Scott, 2016, paras. 6-8). Opponents of the practice continue to raise concerns of the many potential risks that could actualize, while advocates suggest that the constitutionality of the new MAID legislation, may need to be revisited in terms of potential ss. 7 and 15(1) violations (Kermode-Scott, 2016, paras. 6-10).

Opponents of Assisted Death.

Concerns surrounding assisted death centre mainly around the idea of a descent into a permissive and lax regime, which will be unable to shield vulnerable individuals from abuse and exploitation (Govier, 2005, para. 1). The “slippery slope” argument essentially suggests that a system which allows physician assisted death for those individuals identified by the SCC, will eventually become a more sinister system which allows not only for voluntary death, but for involuntary death, and death for those individuals who have few valid reasons for pursuing such medical procedures (Shariff, 2012, pp. 146-147). Conservative Parliament essentially fears that the decriminalization of assisted suicide for some individuals, will inevitably lead to the allowance and infliction of assisted death onto those who can be easily coerced and manipulated (Schafer, 2013, p. 528), and/or the allowance of involuntary euthanasia; the infliction of death onto another person who does not, or cannot freely consent (Shariff, 2012, pp. 146-147).

The argument that preservation of life is not the only valid consideration when attempting to ensure sanctity of life, was recognized and accepted by the opposition (*Rodriguez*, 1993, pp. 594-596). In supporting the complete ban on assisted suicide in the interest of protecting the vulnerable, and avoiding the devaluation of human life, it was understood that quality of life is also an important consideration in end-of-life care decisions (*Rodriguez*, 1993, pp. 594-596). Groups opposing assisted suicide, found that lifting the absolute ban would, among other issues, decrease the quality of palliative care in Canada (Schafer, 2013, p. 525). Conservative members of Parliament raised concerns that it would be illogical to "…offer expensive comfort care to dying patients when it is cheaper simply to offer them the option of a hastened death" (Schafer, 2013, p. 529). The slippery descent into a society which placed little value on human life, and thus allowed for voluntary and involuntary euthanasia, and which created the possibility for misconduct and mistakes, would be inevitable, conservatives argued (Shariff, 2012, pp. 146-147).

Apprehension towards a permissive assisted death regime, also stems from the fact that sanctity of life has long been a protected and greatly valued quality in Canadian society (*Rodriguez*, 1993, pp. 594-596). Ethical and moral issues surrounding assisted suicide have been a primary concern in the debate; the question being grappled, is whether a balance can be struck between the desire to protect the value of human life, and the desire to allow individuals to exert autonomy over their own bodies (Chochinov & Frazee, 2016, p. 543). Concerns were also raised on whether physicians would be in ethical support of the practice; would those individuals dedicated to healing and preserving life, find a practice that hastened and inflicted death, to be ethically and morally acceptable (Upshur, 2016, pp. 545-546)? In addition, opponents of assisted death emphasized the problematic nature of articulating public support of suicide in any form, especially amidst a time of multiple suicide crises in Indigenous communities across Canada

(Upshur, 2016, pp. 545-546). Similarly, attention was drawn to the idea that the availability of assisted death, would increase the guilt felt by some individuals opting for other end-of-life care practices (*Rodriguez*, 1993, pp. 594-596). Parliamentary members opposing PAD suggested that it would be paramount to ensure that individuals in alternative end-of-life care, understood that their lives were of value, and that their existence was not a burden on any person or system (*Rodriguez*, 1993, pp. 594-596). Opponents of assisted death, emphasized through their arguments, the importance of spreading the message that human life is valuable, and thus worth protection and preservation (Schafer, 2013, pp. 525-526).

Proponents of Assisted Death.

Supporters of the decriminalization of assisted death, have found issue with the fact that many individuals will be barred from accessing the service, despite recent legalization (Chochinov & Frazee, 2016, pp. 543-544). The current assisted death legislation allows MAID only for those individuals that among other requirements; are at least 18 years of age; are of sound mind and capable of making their own decisions; possess a grievous and irremediable medical condition; are very likely to naturally die in the reasonably foreseeable future; and that have provided informed consent for the procedure (*Criminal Code*, 1985). The safeguards for assisted death, while implemented with the intention of protecting vulnerable individuals from potential abuses and misconduct, serve to deprive others of their right to access MAID, and to die with dignity (Chochinov & Frazee, 2016, pp. 543-544).

The restrictive nature of the MAID legislation created by Parliament in 2016, has lead to concerns surrounding the constitutionality of such limitations (Upshur, 2016, pp. 545-546). Proponents of assisted dying have found particular issue with the idea that mature minors, or individuals suffering from mental illnesses, or those who suffer heavily despite death not necessarily being reasonably foreseeable; or those that would like to opt for a physician assisted

death in advance, due to illnesses that would prevent doing so later on, would be unable seek MAID under the current legislation (Webster, 2016, p. 1893). Upshur (2016) reports that the new MAID legislation has already begun to be challenged, and that disputes are likely to continue, until a higher degree of equality is achieved in terms of end-of-life decision making (p. 545).

Advocates of a permissive assisted death system have advanced the argument that ss. 7 and 15(1) violations may be occurring due to the new MAID legislation (Upshur, 2016, pp. 545-546). The restrictive laws put in place by Parliament, essentially continue to have the same negative impacts as articulated in *Rodriguez* [1993], and in *Carter* [2015], by preventing certain classes of individuals from accessing assisted death (Upshur, 2016, pp. 545-546). The laws may prove to be grossly disproportionate after having violated life, liberty, and security of the person, by having a significant and unnecessary negative impact, by preventing individuals from being self-determinate and autonomous in their end-of-life decisions (*Carter*, 2015, p. 377). In addition, the impugned legislation may prove to be discriminatory by restricting MAID to only certain classes of individuals, and thus depriving others of their right to equal benefit and protection of the law (*Canadian Charter*, 1982, s 15(1)).

Resolving Controversies.

Controversies surrounding MAID are not likely to subside until the concerns raised by both opponents and proponents of the practice, are addressed in a serious and conclusive manner. The Government of Canada (2018) has thoroughly supervised MAID since its legalization, and provided three interim reports which have helped to showcase the need, value, and effectiveness of the new legislation, as well as highlight areas requiring improvement (“Monitoring and Reporting”, paras. 1-3). Reporting on MAID will continue to occur, so as to ensure that no misconduct, abuse, or exploitation is taking place, and also simply to provide a detailed outline of MAID in Canada (Health Canada, 2018, para. 4). Individuals and groups opposing assisted

death can find solace in the fact that MAID is being consistently supervised and scrutinized, and therefore that any potential risks will likely be effectively managed, if they do happen to materialize.

The issues presented by proponents of assisted death, have also been somewhat addressed through the independent reports conducted by the Council of Canadian Academies (CCA) (Government of Canada, 2018, Independent Reviews, paras. 1-4). The CCA has conducted research into the possibility of extending MAID to mature minors, those with mental illnesses as sole reasons for seeking MAID, and those who would require advance requests for MAID, due to deteriorating mental and physical conditions (Government of Canada, 2018, Independent Reviews, paras. 1-4). Relevant claims, evidence, and safeguards, have been examined and discussed in the available studies thus far (Council of Canadian Academies, 2019, Overview, paras. 1-2). The reports, although not able to resolve the issues surrounding the constitutionality of the restrictive MAID legislation, have served to provide insight into what could potentially become a more permissive assisted death regime (Council of Canadian Academies, 2019, Overview, paras. 1-2).

Constitutionality of the New MAID Legislation

Implementation of new MAID legislation has lead to claims that the ss. 7 and 15(1) *Charter* rights of certain individuals are being violated (British Columbia Civil Liberties Association, 2016, “Troubling Aspects”, paras. 1-5). Parliament’s decision to refuse to allow MAID for specific classes of people, including mature minors, the mentally ill, and those requiring advance directives, has forced the assisted dying debate to continue, and Court challenges to come forth (British Columbia Civil Liberties Association, 2016, “Troubling Aspects”, paras. 1-5). The life, liberty, and security of the person interests of certain classes of people are seen to have been violated by the new assisted dying laws, in that governmental

interferences have had the effect of preventing such individuals from exercising control over their own bodies and lives (British Columbia Civil Liberties Association, 2016, "Troubling Aspects", paras. 1-5). In addition, s. 15(1) rights are thought to have been violated because restrictions have been placed on individuals simply due to their age, and mental disability; such individuals are unable to enjoy equal protection and benefit of the law, due to unfair discrimination (*Criminal Code*, 1985). Problematic policies have ensured that individuals excluded from accessing MAID, continue the fight for fair and accessible end-of-life care (British Columbia Civil Liberties Association, 2016, "Troubling Aspects", paras. 1-5).

The Section Seven Claim

The s. 7 claim by individuals excluded by the current legislation, would essentially mirror the claims presented in *Rodriguez* [1993], and in *Carter* [2015]. The appellants in *Carter* [2015] just as in *Rodriguez* [1993], had suggested that the absolute prohibition on assisted dying, had the effect of infringing upon individuals life, liberty, and security of the person rights (*Carter*, 2015, p. 360). The examination conducted in *Carter* [2015] by the SCC, found that the appellant claims had been correct, and that all three s. 7 values had in fact been engaged and violated (*Carter*, 2015, pp. 366-371).

Life.

The effect of the recent MAID provisions is very similar to the negative effects that were imposed by the absolute assisted suicide ban of s. 241(b). The current MAID legislation engages the s. 7 value of life, by potentially forcing individuals to commit to death, much earlier than they would otherwise (*Carter*, 2015, p. 366). Individuals suffering from deteriorating mental conditions, may feel pressure to commit suicide prematurely, knowing that they will be unable to do so, at a later time when they truly feel they would like to die (*Carter*, 2015, p. 366). The refusal of Parliament to accept advance directives for assisted death, essentially imposes two

cruel choices on an individual. First, they can commit suicide prematurely. Second, they can choose to live an unhappy life that will likely be characterized by a loss of personhood and dignity, until natural death occurs.

The assisted death prohibitions also have the effect of imposing a "duty to live", by excluding certain classes of individuals from accessing assisted death services. Mature minors are essentially defined as those individuals that are under the age of 18, yet deemed to be mature enough to be able to make independent decisions regarding health care (Department of Justice, 2019, "Proceedings About Health", para. 1). Mature minors, along with any other class of individual, currently hold the right to refuse, or withdraw from medical treatment (*Carter*, 2015, p. 367). The ability to refuse lifesaving treatment suggests that the Court recognizes that the preservation of life, is not always paramount to other rights; quality of life is also an important value that must be recognized and respected (*Carter*, 2015, pp. 367-368). The notion that certain individuals, especially those experiencing grievous and irremediable medical conditions at young ages, or those with severe and intolerable mental illnesses, or those with diminishing mental capacity should be barred from MAID, is illogical. Canadian jurisprudence has already acknowledged that individuals can sometimes waive their right to life. To bar those individuals most in need, from valuable end-of-life care services, simply attacks their s. 7 right to life, while also serving to further diminish their quality of life (*Carter*, 2015, p. 367). The new assisted suicide provisions violate the value of life, as the "…law or state action imposes death or an increased risk of death…" on those individuals currently excluded from accessing the practice (*Carter*, 2015, p. 367).

Liberty.

The MAID legislation enacted after *Carter* [2015], can also be seen as having violated the s. 7 value of liberty. The claims advanced by the appellants in *Carter* [2015] are reflected in

terms of the liberty violation in the present case, in that one effect of the new MAID legislation, is to violate "… the right to make fundamental personal choices free from state interference" (as cited in *Carter*, 2015, p. 368). The recently enacted provisions restrict certain groups of individuals seeking MAID, from being able to make deeply personal choices (e.g. mature minors, those requiring advance requests, and those experiencing mental illnesses). The stringent requirements found in the assisted dying laws, impose state control over individuals personal life choices, and also prevent the execution of such decisions.

Security of the Person.

Security of the person is characterized as being the s. 7 value which protects autonomy, and the ability of an individual to have control over their own physical and psychological integrity (*Carter*, 2015, pp. 368-371). The s. 7 value is again, violated in the same manner in the present situation, as it was in *Rodriguez* [1993], and in *Carter* [2015]. In essence, the governmental interference- to forbid those individuals that do not meet the requirements laid out in s. 241.2(1) of the *Criminal Code*- has the effect of harming an individual's ability to be self-determinate. The prohibitions in the new MAID legislation prevent specific classes of individuals from living in a manner that "…is consistent with their life-long values and that reflects their life experience" (as cited in *Carter*, 2015, p. 369), because the opportunity to make serious intimate decisions, is denied.

The s. 7 value is also infringed upon, in that individuals are being denied the right to die in a dignified manner. The people seeking to obtain the drastic measure of MAID in the present case, are those individuals who are already suffering heavily in a physical and psychological sense (*Carter*, 2015, pp. 370-371). The emphasis that Canadian society has, and continues to place, on the sanctity of life, ensures that such decisions are not taken lightly, and that individuals accessing assisted death services, are those that have genuine need (*Carter*, 2015, pp.

387-388). The decision to continue to prevent mature minors, the mentally ill, and those requiring advance requests, would be one which emphasized that the dignity, autonomy, personhood, and suffering, of some individuals, is not recognized nor respected, in Canada (*Carter*, 2015, pp. 368-371).

The Principles of Fundamental Justice

The confirmation that life, liberty, and security of the person have been infringed, leads to the next step of making a determination of whether any principles of fundamental justice, have been violated by the impugned legislation. The SCC, in formulating the conditions required to obtain a physician assisted death, simply ensured that no s. 7 values were being violated, with particular reference to the fundamental justice principles of arbitrariness and overbreadth (*Carter*, 2015, pp. 389-390). The Court did not consider whether any infringements for the fundamental justice principle of gross disproportionality existed, when examining the constitutionality of the absolute ban, and many concerns have been raised over the bypass, especially in light of the new legislation (British Columbia Civil Liberties Association, 2019, "Get the Facts", paras. 2-3).

Gross Disproportionality.

The fundamental justice principle of gross disproportionality is a fairly recent development in the Canadian jurisprudence surrounding s. 7 (Sharpe & Roach, 2017, pp. 267-268). The principle was first fully recognized in *Canada (Attorney General) v. PHS Community Services Society* [2011], in which it was stated that, "gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest…" (*PHS Community Services Society*, 2011, p. 187). In essence, the principle can be seen as having been engaged and/or violated, when it has been determined

that the drastic negative impacts of the provision, are severely detached from the originally intended objectives (*PHS Community Services Society*, 2011, p. 187).

The understanding of gross disproportionality was refined in *Canada (Attorney General) v. Bedford* [2013], when the Court further elaborated on the fundamental doctrine (*Bedford*, 2013, pp. 1150-1152). Gross disproportionality, the SCC explained, was a principle that focused only on the severe negative impacts incurred by an individual person; the s.1 balancing of salutary and deleterious effects, was clarified as being the only instance in which the positive or negative impact to society, would be considered (*Bedford*, 2013, pp. 1150-1151). The Court emphasized that claimants for s. 7 would not need to weigh the negative impacts personally accrued, against the potential positive benefits to society, as such a task would be more appropriately addressed in an Oakes analysis (*Bedford*, 2013, p. 1151). The s. 7 principle would be determined to have been violated, even on the basis of a single individual being able to prove that their s. 7 rights had been infringed upon, in a manner where the intense, negative effects of the provision, were severely inconsistent with the stated objectives of that provision (*Bedford*, 2013, pp. 1150-1152).

Expanding further on the fundamental justice principle, the Court emphasized that violations of gross disproportionality would only be considered valid, in very extreme circumstances (*Bedford*, 2013, pp. 1150-1151). Gross disproportionality was characterized as the principle applicable when the disconnect between the impact of the law and its stated purpose, was severe enough that society would find no logical or rational reasons, to support such an inconsistency (*Bedford*, 2013, pp. 1151-1152). A minor discrepancy between the objective and the impact, or a law that imposed only trivial harms onto an individual, would not meet the criteria of gross disproportionality; both the negative impact actually felt, and the inconsistency

with the stated objective, would have to be very severe for the principle to apply (*Bedford*, 2013, pp. 1151-1152).

The Present Case.

The fundamental justice principle of gross disproportionality can be considered to have been violated in the present situation. The recently enacted MAID laws serve to deprive certain classes of individuals, of their rights to life, liberty, and security of the person, in a very severe manner. Individuals suffering from grievous and irremediable medical conditions, and seeking MAID while they are mature minors; or those suffering from degenerative disorders, and thus seeking MAID through advance directives; or those seeking MAID while suffering strictly from severe mental illnesses; or those experiencing grievous and irremediable medical conditions where death is not reasonably foreseeable, are all denied their s. 7 rights.

The SCC explained in *Bedford* [2013], that a violation of gross disproportionality could be determined, based on "… whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose" (p. 1152). The purpose of the assisted dying laws in question, essentially mirrors the purpose of the absolute prohibition on assisted suicide, but in a less restrictive manner; to ensure that the lives of vulnerable individuals are given an appropriate amount of respect and dignity, and to ensure that such individuals are not wrongfully coerced into making the drastic decision to obtain an assisted death (*Carter*, 2015, p. 378).

The effect of the impugned provisions and stringent conditions on assisted death, have been to ensure that many of the individuals needing MAID most, are denied access to the service (Dying with Dignity Canada, 2018, paras. 2-6). Many of those suffering heavily due to grievous and irremediable medical conditions are unable to access MAID due to the trivial requirements imposed by the legislation (Dying with Dignity Canada, 2018, paras. 2-6). The negative impacts

of the new MAID laws are also very severe, in that some of the individuals most needing such end-of-life care services, will be forced to choose between two cruel and harsh fates; the choice to suffer unhappily and discontentedly until a natural death, or to commit suicide in an unideal, and potentially illegal, time and manner (*Carter*, 2015, p. 343). Individuals unable to obtain an assisted death, will also be harmed through the s. 7 life, liberty, and security of the person violations incurred; knowing that the state does not value the autonomy, dignity, and personhood of all people, will cause severe harm (Dying with Dignity Canada, 2018, paras. 2-5).

The purpose of the assisted dying legislation in question is clearly connected to the actual effects that have ensued. The desire to ensure that vulnerable individuals are safe from the potential misconduct, exploitation, mistakes, and abuses of a permissive assisted death regime, is fulfilled by restricting MAID to only a narrow scope of individuals. The problem with the legislation arises however, when the next step in the gross disproportionality analysis is examined; are the negative impacts of the impugned legislation, grossly disproportionate to the stated purpose of the legislation? (*Bedford*, 2013, p. 1152). Gross disproportionality can be considered to have been violated, because the effects of the recently enacted MAID legislation, are in fact grossly disproportionate to the object of the law.

The new MAID legislation imposes the same effect that was placed on individuals deprived of assisted suicide in *Rodriguez* [1993], and in *Carter* [2015], on additional categories of individuals. The effect of the deprivation on life, liberty, and security of the person, is very significant and extreme, as impacted individuals will be made to endure intolerable suffering for unjustifiable periods of time, or be forced to illegally end their lives with the aid of another person (*Carter*, 2015, pp. 377-378). Smith J., at the trial decision before *Carter* [2015], noted that negative effect imposed by the absolute prohibition was "…very severe… [and] grossly disproportionate to its effect on preventing inducement of vulnerable people to commit suicide,

promoting palliative care, protecting physician-patient relationships, protecting vulnerable people, and upholding the state interest in the preservation of human life" (*Carter*, 2012, para. 1378). The effect of the newfound restrictive MAID laws is very similar; in effect, the impugned legislation deprives individuals of their life, liberty, and security of the person, in a manner that is very harsh and significant, and which is completely unnecessary to fulfill the objectives of protecting vulnerable individuals from abuse and exploitation, and preserving the sanctity of life. The analysis into gross disproportionality suggests that the restrictive MAID legislation enacted by Parliament in 2016, is problematic, in that the s. 7 values of life, liberty, and security of the person, are violated in a manner not in accordance with the principles of fundamental justice.

The Oakes Analysis.

The determination that the assisted dying legislation in question, violates s. 7 in a manner that is not in harmony with the principles of fundamental justice, requires that the Oakes analysis be done next. The first portion of the Oakes analysis asks whether a pressing and substantive need exists for the legislation, and its objective (*Oakes*, 1986, para. 69). The impugned legislation aims to protect vulnerable individuals by preventing coercion into assisted suicide, by recognizing individual autonomy, and by aiming "… to affirm 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…" (Government of Canada, 2016, Preamble, paras. 1-4). The objective of the legislation is clearly pressing and substantial, as it serves to address important social issues surrounding the sanctity and value of human life.

The next portion of the Oakes analysis asks whether a rational connection exists between the objectives of the legislation, and the means chosen to achieve such objectives (*Oakes*, 1986, para. 77). The impugned legislation employs the restrictive and stringent conditions required for assisted suicide eligibility, as the means to achieve the stated objectives. The means have the

effect of limiting assisted suicide to only those individuals that are over the age of 18, suffering from grievous and irremediable medical conditions, whose death is reasonably foreseeable, and who possess full mental competence (*Criminal Code,* 1985). These individuals do not meet the stated requirements, are denied access to MAID, and are thus unprotected, no matter how vulnerable, or invulnerable. The rational connection portion of the Oakes analysis is very evidently satisfied, because the restrictive nature of the MAID legislation, has the effect of protecting all individuals denied assisted suicide, from being susceptible to abuse and exploitation.

The Oakes analysis inquires then, into whether the *Charter* infringement imposed by the impugned legislation, is minimally impairing (*Oakes*, 1986, para. 70). In the present situation, the negative impact of the restrictive MAID laws is obviously very severe and detrimental, just as the absolute prohibition was in *Rodriguez* [1993], and in *Carter* [2015]. No evidence or confirmation was provided, which would have indicated that the means chosen to achieve the objectives set out in the MAID legislation, were as minimally restricting as possible. The impugned legislation, and accompanying eligibility requirements and safeguards, serve to protect the respect that has long since been afforded to the sanctity of human life in Canadian society. Unfortunately, the law does not adequately take into consideration, the level of respect that autonomy and dignity, must be afforded. Aiming to protect the vulnerable from abuse, exploitation, and coercion, the impugned provision imposes a significant harm onto vulnerable, and already suffering individuals.

Problematically, thorough explanations for the stringent restrictions were not provided, and they were implemented despite a vast array of evidence and support suggesting that such harsh limitations were not needed. Advocates for a more permissive assisted dying regime argued that "…assessments of vulnerability and competence are routinely made in individual

cases", and that it was therefore unnecessary for Parliament and the courts, to be so restrictive (British Columbia Civil Liberties Association, 2016, "Troubling Aspects", para. 2). Recent reports commissioned by the CCA have examined requests into MAID for mature minors, for those requiring advance requests, and for those seeking MAID with the sole condition of a mental illness (Council of Canadian Academies, 2019, Summary, paras. 1-2). The findings of the reports, while unable to conclusively determine the safety and effectiveness of safeguards, have suggested that assessments for MAID on an individual basis, would likely be acceptable, and able to ensure the protection of vulnerable individuals (Council of Canadian Academies, 2018, pp. 14-39).

A lack of evidence supporting a restrictive assisted dying system, along with the effect of the provision being so severely harmful, suggests that the impugned legislation is not minimally impairing. The failure of the MAID legislation to fulfill the criteria required for minimum impairment, shows that the legislation is not demonstrably justifiable in a free and democratic society. As minimum impairment was determined to be violated, it is not necessary to consider the last Oakes step, of balancing salutary and deleterious effects.

The Section Fifteen Claim

The Kapp test (see *R. v. Kapp* [2008] 2 S.C.R. 483) must be conducted to determine whether a s. 15(1) violation exists due to the assisted dying legislation found in the *Criminal Code*, from s. 241 to s. 241.4 (*Criminal Code*, 1985). The first step in the Kapp test, asks whether the law creates a distinction based on the enumerated or analogous grounds found in s. 15(1).

The MAID legislation in question, restricts assisted dying to only those individuals that meet certain criteria, and is exclusionary on the basis of age, and mental and physical disability (*Criminal Code*, 1985). Individuals eligible for MAID, include those that are; eligible for public

health care in Canada, a minimum of 18 years of age, able to make decisions regarding their own health, suffering from a grievous and irremediable medical condition, voluntarily requesting MAID of their own volition, and those that are able to provide informed consent (*Criminal Code*, 1985). In addition, safeguards for MAID require that natural death be reasonably foreseeable, before an individual can be considered to be suffering from a grievous and irremediable medical condition (*Criminal Code*, 1985). The distinctions present in the legislation, namely that only those individuals that are age 18 and above, of full mental competence, and likely to die naturally in the foreseeable future, will be able to seek and receive MAID, are problematic. The impugned legislation fulfills the first portion of the Kapp test, as it creates direct distinctions on the basis of age, and mental and physical disability.

The second portion of the Kapp test asks whether the distinctions created by the impugned legislation, further serve to create disadvantages by perpetuating prejudices and stereotypes. The newly enacted MAID legislation, creates clear distinctions on the basis of three enumerated grounds found in s. 15(1), and the distinctions allow for problematic prejudices and stereotypes to become further engrained. Disallowing certain individuals from accessing assisted death services, sends the message that such individuals are incapable of being autonomous and of making their own decisions regarding fundamental and personal life matters. Prejudices and stereotypes of the same nature, dominate discussions regarding younger individuals, and those with mental and/or physical disabilities, and imply that some individuals are lesser than others.

The created distinctions are problematic, because their suggestions that the individuals excluded from MAID cannot be self-determinate, and are thus in need of external assistance and guidance, are not accurate. Assessments on a case-by-case basis are enough to prove that all younger people, or those suffering from mental or physical disabilities, are not alike. Instead, individuals differ in their maturity levels, competence levels, and values and beliefs. Completely

barring entire classes of people from having access to valuable end-of-life care services, simply perpetuates the prejudices and stereotypes that most individuals under the age of 18, along with those suffering from mental and physical disabilities, are incapable of making serious decisions for themselves, and thus unable to be self-determinate or autonomous. Individual capabilities, as well as values such as human dignity, autonomy, and privacy, are affronted, when such prejudices are allowed to flourish and expand.

The analysis of the Kapp test demonstrates that a s. 15(1) infringement is caused by the MAID legislation being examined. The MAID laws do not pass the Kapp test, in that they create distinction based on enumerated grounds, and also because they allow for that distinction to be further harmful, by perpetuating prejudices and stereotypes. The impugned legislation must undergo a s. 1 Oakes analysis, which will determine whether the infringement is acceptable.

The Oakes Analysis.

Pressing and Substantive Need.

The first portion of the Oakes analysis asks whether a substantive and pressing need exists for the legislation and objective being questioned. The objective of the MAID laws, has been articulated as helping to ensure that vulnerable individuals are not wrongfully induced into making permanent end-of-life decisions, and instead are only making the decision for MAID, of their own free will. Safeguards and regulations surrounding assisted suicide are necessary, as they ensure that no abuse or exploitation occurs, and also that only those truly requiring assisted death services, are those being allowed access. Regulations also help to ensure that human dignity and sanctity of life are respected, and that palliative care services in Canada do not diminish in quality. The first criteria of the Oakes analysis is very clearly fulfilled, as the MAID laws do in fact, satisfy a substantive and pressing need.

Rational Connection.

The next portion of the Oakes analysis questions whether the measures adopted by the impugned legislation, have a rational connection to the stated objectives. The objectives of the MAID legislation enacted after *Carter* [2015], are well intentioned and logical in nature, focusing on protecting susceptible individuals from an abusive system which could force them into assisted death. Parliament's fears that a permissive assisted suicide system would be inadequate in protecting people from being induced and manipulated into obtaining MAID, resulted in the formulation and implementation of restrictions which would protect the vulnerable (*Carter*, 2015, p. 373). The measures employed by the impugned provisions, are in fact rationally connected to the stated objectives; preventing vulnerable classes of individuals from accessing MAID, ensures that they are shielded from being coerced into obtaining an assisted death.

Minimal Impairment.

Minimal impairment is the step in the Oakes analysis which demands that the impugned legislation inflict the most minimal impairment on *Charter* rights. McLachlin C. J., in *Carter* [2015], found that "the burden is on the government to show the absence of less drastic means of achieving the objective…" (p. 381). In the present case, Parliament failed to adequately explain how and why the chosen restrictions, were the most minimally impairing, and thus the most appropriate measures to adopt.

Substantial amounts of evidence and support suggested that assessing qualification for MAID on an individual, or case-by-case basis, would be effective in ensuring that vulnerable individuals were not exposed to risk and harm (*Carter*, 2015, pp. 381-383). A thorough investigation had been conducted, and data from scientists, physicians, other jurisdictions which allow MAID, was used to make the determination that a permissive regime could be allowed in

Canada. Furthermore, the SCC in *Carter* [2015], had agreed with the findings from the trial judge, that an overwhelming amount of evidence and information, backed the notion that any potential risks surrounding assisted suicide, could be minimized through a properly regulated system (*Carter*, 2015, pp. 381-383). Addressing specifically, disadvantaged and vulnerable populations such as the disabled, the trial judge concluded that evidence from other permissive jurisdictions had proved that such individuals were not at an increased risk of experiencing bias or abuse (*Carter*, 2015, p. 383). The findings suggested that the implementation of safeguards, such as the requirement for informed consent, would successfully protect individuals from harm, and likely result in the development of more robust and fulsome end-of-life healthcare systems, in Canada (*Carter*, 2015, pp. 382-383).

The decision of Parliament to then create restrictive MAID legislation, is incomprehensible. The impugned legislation, while well intentioned and attempting only to protect vulnerable individuals, has had the actual effect of imposing undue pain and suffering onto individuals barred from valuable end-of-life care. Requiring that those accessing MAID are of a certain age, mental ability, and certain stage in their illness, shows the desire to ensure that no mistakes, or purposeful wrongdoings occur; while having an active role in the assisted dying process would be ideal, doing so is not practical or possible, for all of those individuals that would be most likely to access MAID, and benefit most from such services.

Additionally, preventing certain classes of individuals from accessing MAID, may actually achieve the opposite effect intended by the impugned legislation. Concerns that initial requests for MAID may become unwanted closer to the date of the actual procedure, cannot adequately be addressed by the implemented safeguards; forcing an individual to wait for a natural death, or to commit suicide prematurely, would be equally as heinous. Those individuals that would be unable to articulate changed viewpoints for MAID due to deteriorating conditions

or other obstacles, would experience significant disrepute to dignity, autonomy, and personhood, if their requests were ignored while still able to be expressed. The least harmful option to ensure that only those most in need of MAID were accessing such services, would be to become more lax in terms of the restrictions placed on individuals such as mature minors, and the mentally ill. A more permissive, yet properly regulated system, would be able to tackle the needs and wants of patients seeking MAID, while also addressing Parliamentary concerns, and ensuring that vulnerable individuals were protected from harm, that a slippery slope did not develop, and that Canada's healthcare system did not falter.

The impugned legislation would not pass the Oakes test at the minimal impairment stage, and thus cannot be considered to be justifiable in a free and democratic society. The infringements on s. 15(1) rights are much too severe to be deemed acceptable, and the restrictions preventing mature minors, those requiring advance requests, and those suffering from mental illnesses, from obtaining MAID, cannot stand.

Conclusion

The examination into s. 7 and assisted death, has been telling of the changes that have occurred throughout time, in societal and legal understandings of the *Charter*, and pertinent controversial matters. The Court interpretation of s. 7 during the time of *Rodriguez* [1993], was considerably underdeveloped and unrefined in comparison to the understanding which was applied in later cases such as *PHS Community Services Society* [2011], *Bedford* [2013], and *Carter* [2015]. The interpretation of the fundamental *Charter* section, which has the ability to impact the most important and personal decisions taken by Canadians, is everchanging.

The matter of physician assisted death continues to be one that is quite relevant and controversial, despite the fact that the SCC rendered a decision legalizing the practice, in 2015. The post-*Carter* era of medical assistance in dying continues to be characterized by a deep divide

between proponents and opponents of the matter, and as with any other heavily contentious issue, it is unlikely that harmony between the opposing sides will be achieved anytime in the foreseeable future. Although the decision in *Carter* [2015] technically settled the matter of which individuals are eligible for MAID and when, many issues have yet to be considered or resolved. The SCC in its unanimous decision declined to speak on the potential s.15(1) violations that the current legislation poses, and also did not clarify the meaning, application, or interpretation of the fundamental principle of gross disproportionality (*Carter*, 2015, p. 396). The decision in *Carter* [2015] while effectively solidifying the Court's stance and interpretation of s.7, has not had the effect of completely and definitively putting the matter of physician assisted death, to rest. The interpretation of s. 7 is bound to continue to evolve, especially in relation to assisted death, as relevant issues are considered and resolved.

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