Dec 30, 2015

The Arrival of Assisted Dying in Canada: Legal Implications for Healthcare Institutions and Professionals

Author(s): Michael Watts, David Solomon

It has been almost a year since the Supreme Court unanimously invalidated the Criminal Code of Canada prohibitions on physician assisted suicide on February 6, 2015, in Carter v Canada (Attorney General). It also suspended its “declaration of invalidity” until February 6, 2016, to allow stakeholders to establish a legislative and regulatory response. On January 11, 2016, however, the Supreme Court will hear oral arguments from several parties over the new federal Liberal government’s request to extend the declaration of invalidity for another six months to ensure “a thoughtful, sensitive and well-informed response.” In making its request, the federal government will argue that giving effect to the landmark decision on physician-assisted dying will require “full parliamentary consideration” as well as provincial legislation.

Such a process has, quite coincidentally, already taken place in Quebec, where the province’s An Act Respecting End-of-Life Care (the Quebec Act) became law on December 10, 2015, after six years of stakeholder consultations, and in the midst of legal challenges to its constitutionality. On December 1, 2015, in D’Amico v Quebec (Attorney General), the Quebec Superior Court declared the Quebec Act’s medical aid in dying provisions inoperable until the declaration of invalidity in Carter becomes effective. On December 9, 2015, however, the Quebec Court of Appeal (the QCA) granted leave to appeal that decision, which had the effect of allowing the Quebec Act to become law as scheduled. That appeal was heard on December 18, 2015, and three days later, on December 22, 2015, the QCA released its decision upholding the Quebec Act on the basis that (a) the pith and substance of the legislation is health care, which is a provincial matter, and (b) the legislation is precisely the legislative response the Supreme Court called for in Carter (even though the Quebec Act evolved independently).

Because these two paths to legalization of medical aid in dying have evolved independently of each other, the contrasts between the two make for interesting medico-legal and ethical analysis, and raise questions that medical communities across Canada need to answer in order to provide medical aid in dying in a principled, consistent and, one might hope, provincially-harmonized manner.

Indeed, questions abound from the confluence of Carter and the Quebec Act. Will the Supreme Court’s decision in Carter lead to the development of a uniform “standard of care” for medical aid in dying across...
Canada? Or will the common law provinces follow Quebec’s “go-it-alone” approach by selecting the elements of comparative regimes from other “permissive jurisdictions” that they find most relevant and appropriate to their circumstances? Or will some provinces simply not be able to muster the political will to pass any legislation at all, similar to what has (not) occurred since the Supreme Court legalized abortion over 25 years ago in R v Morgentaler?

This article (set out in the links below) examines the anticipated impact of Carter on the Ontario healthcare landscape, with reference to stakeholder responses to date, the Quebec Act and, to a lesser extent, the experience of other permissive jurisdictions discussed in Carter. This is done in order to consider what issues remain unresolved, what an Ontario framework might look like and what preparations Ontario physicians and healthcare institutions need to make by February 6, 2016.

- Carter v Canada (Attorney General)
- Anticipated Impact of Carter on Hospitals and Physicians
- The Impact of An Act Respecting End-of-Life Care, RSQ c S-32.0001
- The Supreme Court Extends its Declaration of Invalidity in Carter for Four Months

Osler, Hoskin & Harcourt LLP’s Health Industry Group has industry-leading expertise in assisting hospitals and other healthcare institutions develop policies and procedures that reflect best practices in complying with a complex and ever-evolving medico-legal landscape. Please contact us if your institution requires assistance navigating medical aid in dying in Canada.

Michael Watts is a Partner in the Toronto office of law firm Osler, Hoskin & Harcourt LLP, and is Chair of the firm’s Health Industry Group. Michael can be reached at mwatts@osler.com or at 416-862-6605.

David Solomon is an Associate in the Toronto office of law firm Osler, Hoskin & Harcourt LLP and is a member of the firm’s Health Industry Group. David can be reached at dsolomon@osler.com or at 416-862-4200.
The Arrival of Assisted Dying in Canada: Legal Implications for Healthcare Insitutions...

TORONTO
Michael Watts, Partner, Corporate Commercial
416.862.6605
mwatts@osler.com

Osler, Hoskin & Harcourt LLP's member of the firm's Health Industry Group. David can be reached at dsolomon@osler.com or at 416-862-6605.

© Osler, Hoskin & Harcourt LLP. This content is for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind. You can subscribe to receive updates on a range of industry topics at osler.com/subscribe.