In *Carter*, as noted above, the Supreme Court unanimously invalidated the *Criminal Code* provisions prohibiting physician-assisted suicide (although the preferred nomenclature is “physician-assisted dying” or “medical aid in dying”, because suicide is not illegal in Canada, and the term is therefore stigmatizing). In doing so, the Supreme Court distinguished its previous 1993 decision in *Rodriguez v British Columbia (Attorney General)*, which narrowly upheld (5-4) these same provisions. But, as noted above, the Supreme Court suspended the declaration of invalidity for 12 months to allow affected stakeholders to establish a legislative and regulatory response.

As such, it is clear the Supreme Court never intended that *Carter* should stand on its own as a “guide”, or even a framework, to medical aid in dying in Canada. *Carter* merely provides the minimum constitutional requirements that any medical aid in dying regime in Canada will need to meet. In order to fully appreciate and understand those requirements (and what is not required), however, an examination of how the Supreme Court arrived at its decision is warranted.

**JUDICIAL HISTORY**

*Carter* came to the Supreme Court as an appeal from the decision of the British Columbia Court of Appeal (the BCCA), overturning (2-1) the trial decision of Justice Lynn Smith. At trial, Justice Smith, after a lengthy review of (a) the history of the impugned *Criminal Code* provisions, (b) expert opinion evidence on medical ethics and medical end-of-life practices, (c) evidence from other jurisdictions and (d) the feasibility of safeguards for physician-assisted dying, concluded (i) that safeguards could be put into place to protect against the risks associated with physician-assisted dying, (ii) that the evidence did not support an increased risk for elderly individuals and (iii) that the risks inherent in permitting physician-assisted dying could be “very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced.”
Justice Smith consequently found that the plaintiffs had been deprived of their right to *life, liberty and security of the person* under section 7 of the Canadian Charter of Rights and Freedoms (the Charter) in a manner that did not accord with the principles of fundamental justice. She also found that they had been deprived of their right to equality before and under the law, and to the equal protection and equal benefit of the law, without discrimination based on *physical disability*, under section 15 of the Charter. (Having agreed with Justice Smith that the plaintiffs’ section 7 rights had been infringed, the Supreme Court found it unnecessary to consider whether their section 15 rights had also been infringed). Justice Smith further found that the *Criminal Code* provisions could not be saved under section 1 of the Charter because they were not reasonable limits prescribed by law as could be demonstrably justified in a free and democratic society.

In so finding, Justice Smith also determined she was no longer bound by *Rodriguez*, despite the legal principle of *stare decisis* that holds that cases involving similar facts, and the same legal principles, must, or should, be decided the same way (and, in particular, that the rulings of upper courts are binding on lower courts through “vertical* stare decisis*). Specifically, Justice Smith cited the Supreme Court’s 2013 decision in *Canada (Attorney General) v Bedford* (legalizing prostitution) for the proposition that it is not inconsistent with *stare decisis* for trial courts to reconsider settled rulings of higher courts: (a) when a new legal issue is raised, or (b) if there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate.”

In applying *Bedford*, Justice Smith recognized that although the existence of “a different set of legislative and social facts” since *Rodriguez* might not on its own warrant a fresh enquiry under section 1 of the Charter on the issue of medical aid in dying, the development of new legal principles applicable to *stare decisis* and Charter analysis, enunciated in *Bedford* after *Rodriguez*, was sufficient to establish that she was no longer bound by it, and that it could be distinguished.

The majority of the BCCA disagreed with Justice Smith in overturning her trial decision, with two of three justices concluding that she was still bound by *stare decisis* to apply *Rodriguez*. In particular, the majority concluded that no new legal issues had been raised in *Carter*, despite the enhanced legal principles enunciated in *Bedford*, because the Supreme Court had expressly considered the deprivation of section 7 rights in *Rodriguez*, and had concluded that, while there *was* deprivation, it occurred in accordance with the principles of fundamental justice.

The majority also concluded that although the Supreme Court had only assumed (and not expressly determined) that there was also a violation of section 15 rights in *Rodriguez*, the Supreme Court conducted a full section 1 analysis on the basis of that assumption, and had concluded that any section 15 violation was saved by section 1, for the reasons given in *Rodriguez* (i.e., to protect vulnerable persons from being induced to commit suicide at a time of weakness), which therefore also bound Justice Smith.

BCCA Chief Justice Finch, in his dissenting reasons, agreed with Justice Smith that although the Supreme Court considered section 7 of the Charter generally in *Rodriguez*, its analysis focused only on the deprivation of *security of the person* (and to a lesser extent, *liberty*) resulting from the *Criminal Code* prohibition on assisted-suicide, and not on the deprivation of *life* that could result from (a) premature death due to self-inflicted death in anticipation of a future physical inability to do so, or even from (b) a loss of all *quality or meaning* of life due to overwhelming suffering (notably, previous Charter jurisprudence on section 7 interpreted “life” in its existential sense, not its qualitative sense). In the somewhat paradoxical result, an individual’s section 7 right to life includes the right to death, when life is no longer worth living.
Chief Justice Finch agreed with the majority, however, that Justice Smith was still bound by Rodriguez on the basis of the full section 1 analysis conducted by the Supreme Court on the assumed section 15 violation. Accordingly, Chief Justice Finch would have allowed the appeal against Justice Smith’s section 15 order, but dismissed the appeal against her section 7 order (which would have been sufficient to uphold the declaratory relief granted by Justice Smith).

Given the importance of the medical aid in dying issue, due to its universal application to all individuals (i.e., everyone dies, and most people will receive some form of end-of-life care), particularly when intertwined with the judicial debate regarding stare decisis and Rodriguez, the Supreme Court, not surprisingly, granted leave to appeal the BCCA’s decision in Carter.

ISSUES, DECISION AND REASONS ON APPEAL TO THE SUPREME COURT

At the Supreme Court, the appellants in Carter continued to challenge the constitutionality of (among others) the following provisions of the Criminal Code:

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

241. Every one who
   (a) counsels a person to commit suicide, or
   (b) aids or abets a person to commit suicide,
   whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The Supreme Court noted that Justice Smith had concluded at trial that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness. This called into question whether the prohibition accorded with principles of fundamental justice. Although section 7 of the Charter does not catalogue the principles of fundamental justice, the Supreme Court has, over time, defined the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet. While the Supreme Court has recognized a number of principles of fundamental justice, three have emerged as central in its recent jurisprudence: “laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad or have consequences that are grossly disproportionate to their object.”

The Supreme Court agreed with Justice Smith that the impact of the prohibition was severe. It imposed unnecessary suffering on affected individuals, deprived them of the ability to determine what to do with their bodies, and how those bodies will be treated, and may have caused those affected to take their own lives sooner than they would were they able to obtain a physician’s assistance in dying. The Supreme Court identified the question on the appeal to be whether the prohibition violated the plain meaning of Charter rights to life, liberty and security of the person. This was a question that asked The Supreme Court to balance competing values of great importance: (a) the autonomy and dignity of a competent adult who...
seeks death as a response to a grievous and irremediable medical condition, and (b) the sanctity of life and the need to protect the vulnerable.

The Supreme Court concluded that the prohibition on physician-assisted dying was void insofar as it deprives “a \textbf{competent adult} of such assistance where (1) the person affected \textbf{clearly consents} to the termination of life, and (2) the person has a \textbf{grievous and irremediable medical condition} (including an \textit{illness, disease or disability}) that causes \textit{enduring suffering that is intolerable} to the individual in the circumstances of his or her condition.” The Supreme Court therefore allowed the appeal from the BCCA’s decision overturning the trial decision, but suspended its declaration for 12 months until February 6, 2016, to allow government and other stakeholders to respond.

Notably, the Supreme Court’s criteria for when medical aid in dying may be lawfully provided is broader than Justice Smith’s criteria from the trial decision, which more prescriptively provided that medical aid in dying is only lawful when provided “by a medical practitioner in the context of \textit{physician-patient relationship}, where the assistance is provided to a \textbf{fully informed, non-ambivalent}, competent adult patient who (a) is \textit{free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death}, and (b) is \textit{materially physically disabled}, or is soon to become so, has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is \textit{in a state of advanced weakening capacities with no chance of improvement}, has an illness that is without remedy, as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person, and cannot be alleviated by any medical treatment acceptable to that person.”

These different criteria from two levels of court, considering the same set of facts and reaching similar legal conclusions, highlight the need for a uniform legislative and regulatory framework to govern medical aid in dying in Canada. Indeed, significant further guidance and, in particular, relevant medical training, is required from regulatory colleges and other stakeholders. But draft legislation, whether at the federal or provincial level (save Quebec), appears increasingly unlikely to be in place by February 6, 2016, and may not be forthcoming at all in some jurisdictions. Similarly, the Supreme Court may or may not extend the suspension of the declaration of invalidity in \textit{Carter} pursuant to the federal government’s request.

\textbf{CARTER’S DISCUSSION OF THE EXPERIENCES OF OTHER PERMISSIVE JURISDICTIONS}

The Supreme Court accepted in \textit{Carter} that if there was evidence of social harm in other “permissive jurisdictions” where medical aid in dying had been legalized, the absolute prohibition should not be lifted. In Justice Smith’s view in the trial decision, an absolute prohibition would have been necessary if the evidence showed (a) that physicians were unable to reliably assess competence, voluntariness and non-ambivalence in patients, (b) that physicians fail to understand or apply the informed consent requirement for medical treatment, or (c) if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness or a slippery slope, leading to the casual termination of life.

Justice Smith, however, expressly rejected these possibilities in her trial decision. After reviewing the evidence, she concluded that a permissive regime, with properly designed and administered safeguards, was capable of protecting vulnerable people from abuse and error. While there are risks, a carefully designed and managed system is capable of adequately addressing them. Her review of the evidence on
the experience in permissive jurisdictions led the Supreme Court to agree that the risks inherent in permitting physician-assisted dying could be identified, and substantially minimized, through “a carefully designed system imposing stringent limits that are scrupulously monitored and enforced.”

As to the risk to vulnerable populations (such as the elderly and disabled), Justice Smith found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying. She thereby rejected the contention that unconscious bias by physicians would undermine the assessment process. To the contrary, Justice Smith found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that, in some cases, palliative care actually improved post-legalization. She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized. Finally, she found no compelling evidence that a permissive regime in Canada would result in a “practical slippery slope”. In particular, there was no evidence from other permissive jurisdictions that legalizing medical aid in dying had “opened the floodgates” or placed vulnerable patients at risk.

In distinguishing Rodriguez on the basis of other permissive jurisdictions, the Supreme Court in Carter noted that many other Western jurisdictions have since legalized and regulated medical aid in dying, and that these regimes could inform the development of a Canadian system of safeguards. In 1993, the Supreme Court noted in Rodriguez that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia. The process of legalization began in 1994, when Oregon, as a result of a citizens’ initiative, altered its laws to permit medical aid in dying for a person suffering from a terminal disease. Colombia followed in 1997, after a decision of the constitutional court. The Dutch Parliament established a regulatory regime for assisted dying in 2002. Belgium quickly adopted a similar regime, with Luxembourg joining in 2009. Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted dying, and the efficacy of safeguards for the vulnerable.
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.

© 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.