



Physician assisted suicide: The great Canadian euthanasia debate



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ABSTRACT

A substantial majority of Canadians favours a change to the Criminal Code which would make it legally permissible, subject to careful regulation, for patients suffering from incurable physical illness to opt for either physician assisted suicide (PAS) or voluntary active euthanasia (VAE). This discussion will focus primarily on the arguments for and against decriminalizing physician assisted suicide, with special reference to the British Columbia case of *Lee Carter vs. Attorney General of Canada*. The aim is to critique the arguments and at the same time to describe the contours of the current Canadian debate. Both ethical and legal issues raised by PAS are clarified. Empirical evidence available from jurisdictions which have followed the regulatory route is presented and its relevance to the slippery slope argument is considered. The arguments presented by both sides are critically assessed. The conclusion suggested is that evidence of harms to vulnerable individuals or to society, consequent upon legalization, is insufficient to support continued denial of freedom to those competent adults who seek physician assistance in hastening their death.

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1. Introduction

Ms. Gloria Taylor (aged 63) suffers from amyotrophic lateral sclerosis (ALS). She is claiming a constitutional right to choose physician assistance in hastening her death at a time and place of her choosing. A public opinion survey was conducted by Forum Research, in December of 2011, just after Ms. Taylor began her legal challenge to the Canadian law prohibiting physician-assisted suicide.¹ The Forum poll showed that more than two-thirds of Canadians support a change to the *Criminal Code* — a change which would make it legally permissible for doctors to help the terminally ill to kill themselves. Forum's President, Lorne Boznikoff, commented that “you don't often find that many Canadians agreeing on anything” (Blackwell, 2011). The results of this public opinion survey are consistent with what Canadians have been telling pollsters for at least the past 15 years.

I have begun this discussion with a snapshot of current public attitudes because, in a liberal democratic society, widely accepted social attitudes set (or at least strongly influence) the parameters

for policy and legislative options. This is not to say that controversial issues of constitutional rights should be settled by opinion polls. Nevertheless, in an earlier constitutional challenge to the prohibition of assisted suicide (*Rodriguez v. British Columbia (Attorney General)*, 1993), the majority of the Supreme Court of Canada (SCC) made a point of commenting that there was (at that time) “no public consensus” among Canadians that “the autonomy interest of people wishing to kill themselves is paramount to the state interest in protecting the lives of its citizens” (para 155). Also in *Rodriguez*, but writing for the minority, Justice McLachlin, took judicial notice of what she called “the pulse of the nation” (para 224). Today, almost 20 years later, Canadian public opinion appears to have undergone a marked shift in favor of the autonomy interest of people wishing to kill themselves.

In *Lee Carter*, the British Columbia Supreme Court has now ruled in favor of Ms. Taylor and her fellow plaintiffs. Madam Justice Lynn Smith found that Canada's prohibition of PAS discriminates against people who are too ill to take their own lives. The case is at present under appeal² and it is expected that, once it has been heard by the B.C. Court of Appeal, whichever side loses will appeal to the SCC. This will give the SCC an opportunity to revisit its 1993 decision in the case of Sue Rodriguez, referred to above. Ms. Rodriguez also suffered from ALS and, like Gloria Taylor in *Lee Carter*, challenged the prohibition against PAS. Ms. Rodriguez lost her case but only by the narrowest of margins: The SCC divided five to four against her (with then Chief Justice McEachern voting with the minority).

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¹ Gloria Taylor was the last named of four plaintiffs in a current legal challenge to the Canadian ban on physician assisted suicide. The case is generally referred to as *Lee Carter*, after the first named plaintiff, Ms. Lee Carter who, along with her siblings, accompanied their mother, Kay Carter, to the Dignitas Clinic in Switzerland. At this clinic, Kay was assisted to die. Lee Carter and her siblings may have violated the legal prohibition against assisting suicide. The case was heard in Vancouver from November 14th to December 16th, 2011. The Court's judgment, in favor of Ms. Taylor and her fellow plaintiffs, was delivered on 15th June, 2012.

² As of 10th August, 2012.

The discussion which follows will deal with a range of philosophical and legal arguments pertaining to end of life decision-making in Canada, but the discussion will focus most particularly on the issue of decriminalizing PAS. In the almost two decades which separate *Rodriguez* from *Lee Carter*, PAS has now become legally permissible in several American states (Oregon, Washington State and Montana) and in a number of European nations (the Netherlands, Belgium, Switzerland, and Luxembourg). The Dutch see no significant moral difference between PAS and voluntary active euthanasia (VAE) and therefore make no legal distinction between them. In the Netherlands and Belgium, both are legally permissible once a rigorous set of safeguards has been satisfied. Many bio-ethicists share the view of the Dutch that PAS and VAE are morally equivalent and, hence, that they should either both be legally permitted, subject to safeguards, or that they should both be legally prohibited (Brock, 1992).

In practical terms, however, it seems unlikely that the legalization of VAE will be on the Canadian political agenda anytime in the foreseeable future. For this reason, I will focus my discussion, in what follows, on the justifiability of PAS. That is “where the action is”, for the moment, at least, in Canada and in other North American jurisdictions.

2. Physician-assisted suicide: the Canadian debate

Both euthanasia and PAS are presently illegal in Canada. A physician who kills or otherwise helps to end the life of his or her patient at the request of that patient and from the motive of mercy would nevertheless be guilty of “culpable homicide” (under Sections 222 and 229 of the *Criminal Code* of Canada). Section 14 of the *Criminal Code* provides that: “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...” Nor does the motive of mercy provide a defense to a culpable homicide charge (*R. v. Lewis*, 1979).

Both counseling and aiding a person to commit suicide are punishable offenses (Section 241). The voluntary consent of the patient – even when s/he is a competent adult, rational and fully informed – is no defense (according to Section 14).

Although it is a criminal offense, we know that PAS occurs in Canada (Ogden, 2010). Indeed, a 1998 survey of Canadian nurses working in HIV/AIDS care found that, of the 45 nurses sampled, 26 (57.8%) reported that they knew that physicians sometimes took steps to hasten death by voluntary euthanasia or assisted suicide. Thirteen (28.9%) reported that their nursing colleagues perform the same acts (Young & Ogden, 1998). Because of the secrecy occasioned by the criminal prohibition, however, there is virtually no public accountability for these assisted suicides and it is difficult for researchers to obtain accurate data about the frequency with which they occur.

Significantly, however, when cases of PAS have come to public attention, there have been only a very small number of criminal prosecutions. The most famous instance of non-prosecution involved Sue Rodriguez who, despite having lost her case before the SCC, arranged to take her own life with the assistance of a physician. Svend Robinson, then Member of Parliament, publicly acknowledged that he was present when she received physician assistance to end her life. Robinson's claim was subsequently confirmed by special prosecutor Robert Johnston, who reported that “[t]he evidence demonstrates that some person or persons must have assisted Sue Rodriguez to commit suicide on February 12, 1994” (Downie, 2004, p 34). No one was ever prosecuted for this violation of the *Criminal Code* – perhaps because it was judged unlikely that any jury in British Columbia would convict.

The constitutional challenge to Canada's prohibition of PAS brought by Sue Rodriguez is, to date, the only one to have made it to the SCC. Ms. Rodriguez argued that Section 241 (b) of the *Criminal Code* violated her rights under the Charter of Rights and Freedoms.

But the SCC, in a five to four decision, narrowly decided (1993) to dismiss her appeal. Over the past 20 years, the Parliament of Canada has debated the issue of assisted suicide and euthanasia on at least nine different occasions. No government-sponsored legislation has ever been put to a Parliamentary vote, but numerous private members' bills have been introduced into the House of Commons with the declared purpose of decriminalizing PAS or permitting VAE. Many of these private members' bills died in Committee; that is, they did not come to a vote; but all of those which did come to a vote were defeated.

The Canadian Senate has also studied the issue and has issued a number of reports, going back to June 1995, when the Special Senate Committee on Euthanasia and Assisted Suicide recommended that no changes should be made to Section 241 (a) of the *Criminal Code* – the section which prohibits counseling suicide. A majority of the Committee also recommended that no changes should be made to the offense of aiding and abetting suicide, found in Section 241 (b).

But, as the *Canadian Hospice Palliative Care Association* (2010) points out, in its “Issues Paper on Euthanasia, Assisted Suicide and Quality End-of-Life Care”, notwithstanding the fact that there has been no amendment to the criminal law provisions dealing with assisted suicide, there has been a clear trend toward leniency in sentencing and a similar trend toward leniency in prosecutorial discretion as to which charges should be brought. The CHPCA cites several examples of this trend towards leniency, including the case of Marielle Houle (2006). Ms. Houle was sentenced by a Quebec court to only three years' probation with conditions, after she pled guilty to aiding and abetting the suicide of her son, who was struggling with the early stages of multiple sclerosis. The CHPCA Report also cites a number of other cases which support the hypothesis that the courts are using their discretionary powers in the direction of leniency. In the 2006 case of Raymond Kirk, the Ontario Courts gave Mr. Kirk only a suspended sentence and three years' probation after he pled guilty to aiding the suicide of his wife, who had been living with unrelievable and severe back pain. A British Columbia Court, in the 2007 case of Dr. Ramesh Kumar Sharma, imposed only a conditional sentence of two years less a day to be served in the community. By prescribing a lethal dose, Dr. Sharma had assisted his patient, a 93 year old woman suffering from heart problems, to kill herself. That same year, the Royal Canadian Mounted Police decided not to lay charges against the husband of Elizabeth MacDonald. She was suffering with multiple sclerosis, when he accompanied her to Switzerland where she was legally assisted to die.

Since the crime of assisted suicide carries a maximum possible sentence of 14 years, the judicial system seems, by its discretion in charging and by its sentencing practices, to be sending a signal that social norms are changing in the direction of greater understanding and permissiveness. In *Dying Justice*, Jocelyn Downie discusses 10 Canadian cases of death by euthanasia or assisted suicide. Eight of these 10 cases resulted in murder charges but only one yielded a conviction for murder. There were six convictions on lesser charges and only one of these resulted in a prison term. Downie (2004) concludes that the *Criminal Code*, though it appears to treat mercy killing and assisted suicide as gravely serious offenses, in practice allows the exercise of prosecutorial and judicial discretion to transform euthanasia and PAS into much less serious crimes.

Opposition to legalizing PAS in both Houses of Parliament has relied heavily on the fear that legalization could expose vulnerable patients, in particular, the disabled and the frail elderly, to harm. This fear is also expressed by the Government of Canada in its written submissions to the Supreme Court of British Columbia in *Lee Carter*. The gravamen of the Government's case is the contention that if PAS were to be legalized it would be difficult or impossible to protect vulnerable Canadians from the dangers of mistake and abuse.

The Government concedes, in its argument, that there may be cases – albeit, they would claim, few in number – where a patient

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