A TIME AND MANNER TO DIE:

A STUDY OF MEDICAL ASSISTANCE

IN DYING IN CANADA

By

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DEDICATION

To my late mother, Lilla, and my father, Salvatore,
to whom I owe everything, especially my education. Thank you.

ABSTRACT

At the heart of one's decision to seek medical assistance in dying lie a person's autonomy and bodily integrity. In *Carter v Canada (Attorney General)*, the Supreme Court of Canada applied this reasoning to hold that every adult person, who has a grievous and irremediable medical condition and is enduring intolerable suffering has the *right* to a physician-assisted death. I argue in this paper that if a life is no longer worth living due to the very high price to pay to live it, then a person should be permitted to "waive" his/her right to life. In my view, just bearing the grievous and irremediable medical condition that has the effect of causing enduring intolerable suffering to an individual constitutes a very high price to pay. Expecting that individual to have a *reasonably foreseeable natural death* as well is an affront to that person's autonomy, bodily integrity and human dignity. I contend that this is the effect of Bill C-14, Parliament's response to Carter, and Quebec's *Act Respecting End-of-Life Care*. Both laws require a patient to prove the elements of a grievous and irremediable medical condition, as the condition is defined in each respective legislation, but in addition, this patient must prove that his/her natural death is *reasonably foreseeable* and, in Quebec, that he/she is at the end of life. I argue that both laws contravene the essence of *Carter* and the Canadian constitution on both grounds of *federalism* and the Canadian *Charter of Rights and Freedoms* (*Charter*).

As the notion of *dialogue* or *Charter dialogue* often surfaces to describe the relationship between the courts and a competent legislative body, this paper invokes this notion as the basis for its theoretical framework. This paper adopts a *normative* perspective in anticipation that the SCC will take another look at the issue of medical

assistance in dying. It argues what Parliament should have done, or, perhaps, more accurately, what it should not have done in response to *Carter*. I raise similar arguments in the case of the Quebec legislation. In my opinion, the two laws could successfully be challenged in court.

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I. INTRODUCTION

At the heart of one's decision to seek medical assistance in dying lie a person's autonomy and bodily integrity. In *Carter v Canada (Attorney General)*, the Supreme Court of Canada (SCC or the Court) applied this reasoning to hold that every adult person, who has a grievous and irremediable medical condition and is enduring intolerable suffering has the *right* to a physician-assisted death.[1] The specific issue that I examine in this thesis is that Parliament's legislative response to this landmark decision has gone too far because it denies this right to persons with disabilities, who are able to prove all of the legal requirements of a grievous and irremediable medical condition provided in Bill C-14 except for the requirement that their natural death is *reasonably foreseeable* found in paragraph 241.2(2)(d).[2] Because these individuals are unable to meet this particular aspect of their medical diagnosis, they will be denied access to MAiD. In my view, Bill C-14 is unduly restrictive with respect to this group.

A person's desire to die as a result of challenging medical circumstances is not an easy decision to make. Yet, in my opinion, Parliament has sought to limit this

[1] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*]. Throughout the Reasons for Judgment in *Carter*, the Supreme Court used the terms physician-assisted death or physician-assisted dying to describe the type of care at issue in that case, but, in Bill C-14 (note 2 below), Parliament adopted the term *medical assistance in dying* [MAiD]. This paper will use MAiD for any references to the current legislation or administration of this type of care in Canada and "physician-assisted death" or "physician-assisted dying" for any references directly related to the Court's decision in *Carter*. In Part III, section (c), *The Evolution of Values and Its Impact on Rights*, I explain the use of the word "right" to describe one's entitlement to this type of medical care since the right is not stipulated anywhere in the constitution or a law.

[2] *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* S.C. 2016, c. 3 [*Bill C-14*], amending Canada's *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*]. Bill C-14 received royal assent on June 17, 2016. Subsection 241.2(1) of Bill C-14 provides that to receive MAiD, a person must…(iii) have a grievous and irremediable medical condition; 241.2(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria: …. and (d) their *natural death has become reasonably foreseeable*, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining. [Emphasis added] Subsections 241.2(1) and (2) of Bill C-14 are shown in full at note 153, below.

right through legislation with objectives that have no rational connection or are not minimally impairing on these individuals, as will become evident from my discussion of section 1 of the Canadian *Charter of Rights and Freedoms*.[3]

As the notion of *dialogue* or *Charter dialogue* [hereinafter "*dialogue*"] often surfaces to describe the relationship between the courts and a competent legislative body, this paper invokes this notion as the basis for its theoretical framework.[4] Its authors maintain that a *dialogue* seems to take place between the courts and the legislatures in the context or as a result of the judicial review of legislation struck down for breach of the *Charter*. They also express a need to respond to an *anti-majoritarian objection* to the effect that it is undemocratic for unelected judges, who are unaccountable for their decisions, to be empowered to strike down legislation that was enacted by elected officials. This paper does not engage in the academic debate that challenges whether "dialogue" is the correct term for this phenomenon or whether it actually exists. However, I examine and challenge why the authors regard this form of Canadian judicial review as "weak".[5] They suggest that Canadians knew when they made the decision to adopt the *Charter* in 1982 that some rights were so important that they should be protected from *majoritarian* politics.[6] Whether or not one agrees with this statement, there is little doubt that the notion of *dialogue* has

[3] *The Constitution Act, 1982*, RSC 1985, Appendix II, No. 44 is identified as Schedule B of the *Canada Act 1982*, 1982, c.11 (U.K.), [*Constitution Act, 1982*]. The *Canadian Charter of Rights and Freedoms* is Part 1 of Schedule B to the *Constitution Act*, 1982 [*Charter*] and came into force on April 17, 1982. Section 1 of the *Charter* reads: The Canadian *Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. See Part IV, section (d), below, *Section 1 Justification*.

[4] Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* Isn't Such A Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75 [*Charter* Dialogue].

[5] In their subsequent article on *dialogue*, the authors write that as a result of the *Charter*'s structure, Canada "adopted a halfway house between a strong form of judicial review typified in the United States and the statutory *Bill of Rights* of 1960". See Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "*Charter* Dialogue Revisited: Or "Much Ado About Metaphors"" (2007) 45:1 Osgoode Hall LJ 1 at 29-30. [*Charter* Dialogue Revisited]

[6] *Ibid.,* at 29.

contributed greatly to the debate surrounding *judicial review* and, as its authors claim, to the public debate about *Charter* values.[7] Dialogue is examined in part II of the paper.

This paper adopts a *normative* perspective in anticipation that the SCC will take another look at the issue of medical assistance in dying. It argues what Parliament should have done, or, perhaps, more accurately, what it should not have done in response to *Carter*. Therefore, in Part III, I analyze the Court's decision in *Carter*, including why it did not follow its decision in *Rodriguez v British Columbia (Attorney General)*.[8] However, to understand the full scope of *Carter*, it is necessary to analyze the decision in its various dimensions. I propose to examine how the SCC formulated the rule allowing the right to physician-assistance in dying in Canada, how courts take note of evolving social values and how this evolution impacts rights development, how a trial judge must carefully scrutinize social science evidence given its importance on rights adjudication, and how the expert evidence presented at trial revealed distinct levels of expertise among medical and other professionals, thereby potentially impacting how they assess competence and view their patients' medical conditions.

In Canada, the inquiry into a law's validity requires two questions to be asked: first, is the law within the lawmaking power of the competent legislative body enacting it (*federalism* ground); and second, is the law in conformity with the Canadian *Charter of Rights and Freedoms* (*Charter* ground).[9] A court will treat both the *federalism* and

[7] *Charter* Dialogue, above note 4, at 79.
[8] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 [*Rodriguez*].
[9] *Charter*, above note 3. On the issue of the validity of a law, see Peter W Hogg, *Constitutional Law of* Canada, Student ed. (Toronto: Thomson Reuters Canada, 2017), at 15-3 [*Constitutional Law*].

the *Charter* grounds separately.[10] A determination that a law is invalid under either ground will preclude the necessity to decide the law's validity on the other ground. Accordingly, in section (a) of Part IV, I examine Bill C-14's MAiD regime on the *federalism* ground and argue that the *pith and substance* of numerous provisions in the legislation, but, particularly, its paragraph 241.2(2)(d) requiring a *reasonably foreseeable natural death*, extends beyond the ambit of *decriminalizing* physician-assisted death. Consequently, it is not a valid exercise of Parliament's criminal law power under the *Constitution Act, 1867*.[11] For this section, I review several cases to decipher the constitutional law principles applicable to this *division of powers* analysis under Canada's federalist structure.

In sections (b) and (c) of Part IV, my analysis focuses on whether paragraph 241.2(2)(d) of Bill C-14 violates the *Charter*. Specifically, I propose to demonstrate that this legislative requirement, in and of itself, has the effect of narrowing the rule pronounced in *Carter* and, consequently, violates a person's *Charter* rights under both sections 7 and 15(1).[12] In two separate discussions, I argue why these *Charter* provisions are engaged – section 7 because the legislative requirement has the effect of compelling certain individuals with disabilities to continue to endure prolonged intolerable suffering, and subsection 15(1) because the legislative

[10] *Constitutional Law*, previous note, at 15-4.

[11] *Constitution Act, 1867*, 30 & 31 Vict. c 3 (UK), reprinted in RSC 1985, App II, No. 5, formerly the *British North America Act* [*Constitution Act, 1867*]. The *Canada Act* 1982, 1982, C. 11 (UK), allowed Canada to have its own Constitution and signified the end of any further laws passed by the United Kingdom to apply to Canada. [*Canada Act 1982*]. Section 52(2) of the *Constitution Act, 1982*, above note 3, which is Schedule B to the *Canada Act, 1982*, stipulates that Canada's Constitution includes, among other acts and orders, the *Canada Act, 1982* and a series of *British North America Acts*, all of which have been re-named the *Constitution Acts*, followed by the year of their enactment, including the *Constitution Act,1867*.

[12] *Charter*, above note 3. Section 7 reads: 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. Subsection 15(1) reads: Every individual is equal before and under the law and has the right to the equal protection and equal benefits 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.

requirement has the effect of creating an *intragroup* distinction within a group of persons with disabilities, and is discriminatory against the members of the group affected. The targeted *intragroup* is necessarily smaller than the one considered in *Carter*.

Although the focus of my study is the federal statute, I also examine Quebec's provincial legislation[13] with a view to showing that the *end-of-life* requirement for access to MAiD found in the legislation falls within provincial health power under the constitution's *division of powers* scheme, but infringes sections 7 and 15(1) of the *Charter*. The impugned provisions found in both Bill C-14 and the Quebec legislation constitute *state* interference that violate Canada's *Charter* and the Quebec *Charter*.[14] In my opinion, both the federal and provincial requirements would fail a court challenge under both Canada's *Charter* and the Quebec *Charter*.

This paper is limited to the issue that the permissive legislative framework for medically assistance in dying adopted in Canada is narrow in scope and the legal challenges this presents. It does not cover other issues that may be current but could not be treated in the paper given the limited resources available. For example, requests for physician-assisted death from mature minors or from persons whose sole underlying condition is mental illness will not be covered. The approach used in this paper is doctrinal in that the sources of my research are cases, primarily by the Supreme Court, statutes, Canada's constitution, reports and other documents such as Hansard involved in the legislative process.

[13] *La Loi concernant les soins de fin de vie*, L.R.Q. c. S-32.0001 [*Act Respecting End-of-Life Care*]. The law came into force on December 10, 2015.
[14] *Charter of Human Rights and Freedoms*, RSQ, c. C-12 [Quebec *Charter*]. Section 1 of the Quebec Charter reads: Every human being has the right to life, and to personal security, inviolability and freedom.

II. DIALOGUE

As stated in the introduction, the notion of *dialogue* has been used to describe the relationship between the courts and the legislatures in the context of the judicial review of legislation struck down for breach of the *Charter*. Its authors maintain that a *dialogue* is engaged when a court reviews legislation to determine whether there is a *Charter* violation and then the competent legislative body (Parliament or the provincial legislature) considers whether to reverse, modify or avoid the court's decision with a new law. They claim that this process is proper in a *constitutional democracy* where final authority with respect to interpreting the *Charter* rests, and should continue to rest, with an independent arbiter – the courts.[15] The authors of *dialogue* feel compelled to respond to an *anti-majoritarian objection* to the effect that it is undemocratic for unelected judges, who are unaccountable for their decisions, to be empowered to strike down legislation that was enacted by elected officials. This objection appears to be targeting the legitimacy of *judicial review* – is one institution subordinate to the other?[16] *Dialogue*'s authors answer this question by stating: "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue".[17] They describe this phenomenon as a "recurring

[15] *Charter* Dialogue Revisited, above note 5, at 31.
[16] *Charter* Dialogue, above note 4, at 79, 80. Section 52(1) of the *Constitution Act, 1982* reads: The Constitution of Canada is the supreme law of Canada, and any act that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect. *Constitution Act, 1982*, above note 3.
[17] *Charter* Dialogue, above note 4. at 79.

sequence of judicial decision followed by legislative amendment that we observed and documented".[18]

Though I do not challenge the validity or deny the existence of *dialogue*, in my opinion, it is neither a theory nor a rule or requirement. I intentionally avoid using the expression *dialogue theory*[19] as I do not believe it is a theory. Repeating the same experiment as the authors' original experiment would neither disprove their results nor prove what a court will actually do in a given situation. Will a court *read in*, *read down*, give immediate effect or suspend a declaration of invalidity for a period of time in a given situation? A court is required to issue "such remedy as the court considers appropriate and just in the circumstances".[20] Therefore, I question whether the notion should be elevated beyond the status of a valid or justifiable observation based on limited empirical evidence that was gathered or documented by the authors. In my opinion, the phenomenon can be better characterized as "a complex and

[18] *Charter* Dialogue Revisited, above note 5, at 26. In their first article, *Charter* Dialogue, the authors stated that their research consisted of 65 court cases surveyed over a 13-year period from 1983 to 1996, in which cases they observed the laws that were struck down for breach of the *Charter* and which were followed by some form of legislative action. *Charter* Dialogue, above note 4, at 81.

[19] *Charter* Dialogue Revisited, above note 5, at 19, 27 and 28. The SCC has described the notion of *dialogue* in multiple ways: in *M v H*, Bastarache J. stated that "judicial review was not a veto over the politics of the nation", but the beginning of dialogue". *M v H* [1999] 2 SCR 3 [*M v H*]. In *Hall*, Iacobucci J., writing for the minority, criticized the majority's deferential stance toward Parliament's redrafted grounds for bail as transforming "dialogue into abdication". *R v Hall* [2002] 3 SCR 309 [Hall]. In *Sauvé v Canada*, McLachlin C.J. stated that the "promotion of dialogue between the legislature and the courts should not be debased to a rule…". *Sauvé v Canada*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*]. In *Vriend*, the Court addressed the notion of *dialogue* for the first time. Iacobucci J., writing Joint Reasons for the majority with Cory J., stated that in reviewing legislation "courts speak to the legislative and executive branches" and this dialogue has the effect of enhancing the democratic process. *Vriend v Alberta*, [1998] 1 SCR 493, at paras 138-9. [*Vriend*]. This case is discussed below in this section and throughout the paper. See also Carissima Mathen, "Dialogue Theory, Judicial Review and Judicial Supremacy: A Comment on "*Charter Dialogue* Revisited"" (2007) 45:1 Osgoode Hall LJ 125, at 127. [Mathen, *Dialogue Theory*]. In the *Funk & Wagnalls* dictionary, one of the definitions for the word *theory* is a proposed explanation or hypothesis designed to account for any phenomenon. Another is a scheme existing in the mind only, but based on principles verifiable by experiment.

[20] Subsection 24(1) of the *Constitution Act, 1982* reads: Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. *Constitution Act, 1982*, above note 3. In his article, *Dialogic Judicial Review and its Critics*, Kent Roach states that "dialogue is not a theory of judicial review that will tell judges how to decide hard cases. Judges do not dialogue with legislatures. They decide cases according to their view of the law". Kent Roach, *Dialogic Judicial Review and its Critics*, 23 Sup. Ct. L. Rev. (2nd) 49 at 51. [Roach, *Judicial Review*]

unpredictable relationship"[21] – or, more precisely, a *complex and unpredictable co-existence* between two bodies assuming important roles in a constitutional democracy. To the extent that a court can lawfully strike down legislation due to a *Charter* violation and the competent legislative body can respond to this judicial decision in any number of ways, including by inaction, this paper assumes that some form of interplay between the judiciary and the legislature exists. To claim that it is "undemocratic" for unelected officials to invalidate legislation enacted by elected officials because they are making important decisions that impact Canadians is far-reaching and, arguably, misleading. On this point, Professor Roach suggests that "dialogue theorists should be addressing their arguments as much to the public and legislators as to the judges".[22] The claim brings into question every decision ever rendered by a court as it suggests that a court cannot or should not do what it was designed to do in the first place – adjudicate. When called upon, courts must determine whether the rights of members of an unpopular minority group have been violated and ought to be protected as a result of a law passed by a popular legislature. Why are the rights of individuals belonging to an unpopular minority group worth protecting? The reason is that they are entitled to equal protection of their rights guaranteed by the *Charter* against possible violations by majoritarian politics, attitudes and critics.

The authors of *dialogue* also maintain how Parliament has used statutory preambles in anticipation of *second look* cases. These are cases where the Court examines legislation adopted after an earlier statute was struck down for infringing

[21] Mathen, *Dialogue Theory*, above note 19, at 128.
[22] Roach, *Judicial Review*, above note 20, at 51.

the *Charter*.[23] Should the Court eventually decide to review the issue of medical assistance in dying, given that there are cases currently before the courts dealing with it, this would constitute the Court's *second look* at this right since legalizing it in *Carter*. Several reasons have been proposed to explain why a competent legislative body adds a preamble in its legislation: to enunciate the objectives and scope of the legislation, and perhaps as a means to justify the measure under section 1 in the event of a *Charter* challenge. It seems that this is the legislature's way of engaging in a dialogue with the courts, a phenomenon to which the *dialogue* authors refer as "*Charter*-speak". The authors also claim that, in some cases, the Court has also used the notion of *dialogue* as the reason it is deferring to the competent legislative body and upholding the second law and, in other cases, the Court has shown itself not to be so deferential simply because the legislature has re-enacted a previously invalid law.[24] Without commenting on whether *dialogue* would be the reason for upholding or invalidating (and suspending the declaration of invalidity of) a law, I would suggest that the Court has considered the metaphor, either positively or negatively, in several cases. *Dialogue* and the legislative bodies' use of preambles are discussed below in section v of Part IV, *Bill C-14 and Dialogue*.

The *dialogue* metaphor has been criticized for several reasons. One of the criticisms is whether *dialogue* bears or lacks *normative* content.[25] As stated earlier, while I do not deny the existence of *dialogue*, I do not regard the phenomenon as anything more than a valid or justifiable observation based on limited empirical

[23] *Charter* Dialogue Revisited, above note 5, at 19.
[24] *Ibid.,* at 19.
[25] *Ibid.*, at 26. Critique by Andrew Petter, "Twenty Years of Charter Justification: From Liberal Legalism to Dubious Dialogue" (2003) 52 UNBLJ 187 and Keith Ewing, "Human Rights" in Peter Cane & Mark Tushnet, eds., The Oxford Handbook of Legal Studies (Oxford: Oxford University Press, 2003) 298.

evidence. A second criticism is whether *dialogue* can exist where final authority rests with the courts and legislatures do not have the *effective* means to interpret and assert their view of the constitution.[26] Closely related to and, perhaps, more fundamental than, this criticism is the one directed at judges' objectivity, which the authors characterize as the "political bias embedded in the Court's decision making".[27] Another critic has opined that the *judicial review* process in this country could more appropriately be described as a *deference* (to the legislatures), a strong-form judicial review or even a "balance of power in a state with a written constitution".[28] Although the authors identify and respond to all of their critics' concerns in their article, I offer my own opinion with respect to all of these issues by addressing the following: whether the Canadian form of *judicial review* is *weak*, the appropriateness of the *anti-majoritarian objection* and the objectivity of judges.

As stated earlier, *Vriend* is a key decision because it was the first to acknowledge the existence of *dialogue*. However, equally-important is how the Court characterized the nature of this phenomenon. It stated that *dialogue* was the result of the *Charter* giving rise to "a more dynamic interaction among the branches of governance".[29] In quoting the authors' 1997 work in *Charter Dialogue*, Iacobucci J. acknowledged that the "courts speak to the legislative and executive branches…[and]…each of the branches is made somewhat accountable to the other".[30] Thus, since the enactment of the *Charter*, the *dialogue* among the various

[26] *Charter* Dialogue Revisited, above note 5, at 30. Critique by Christopher P. Manfredi & James B. Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 Osgoode Hall L.J. 513.
[27] *Charter* Dialogue Revisited, above note 5, at 30. Critique by F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).
[28] Critique by Mathen, *Dialogue Theory*, above note 19, at 129, 131.
[29] *Vriend,* above note 19, at para 138. [Iacobucci J. writing Joint Reasons for the majority with Cory J.].
[30] *Ibid.,* at para 138-9, [Iacobucci J.].

branches of governance appears to have become more dynamic. These comments imply that some form of *dialogue* in regards to the *judicial review* of legislation existed prior to the *Charter*, but simply remains undocumented. However, Cory J. explained that posing the question as a contest between the courts, who are represented by unelected officials, and the legislatures, who are represented by democratically-elected officials, is to confuse and misconstrue the issue. He stated as follows:

> Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution which must be interpreted by the courts that limit the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*. In my view, for reasons that will follow, there is no legal basis for drawing such a distinction. In this as in other cases, the courts have a duty to determine whether the challenge is justified.[31]

The confusion to which Cory J. was referring was whether the Court should defer or intervene when a legislature intentionally decided to omit a provision from its human rights legislation. In that case, the Court assessed whether the Alberta legislature was justified in omitting *sexual orientation* as a ground of discrimination from the *Individual's Rights Protection Act*.[32] Even though the Alberta legislature had

[31] *Ibid.,* at para 56, [Cory J.].
[32] R.S.A., 1980, c. I-2. The legislation was amended several times and was eventually re-named *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7. Even though the decision was released in 1998, in their Reasons, the Justices refer to the law by its original name, the *Individual's Rights Protection Act* [*IRPA*].

considered, debated and decided to omit the provision as a protected ground, the Court held that the legislature was not justified in its legislative choice and determined that the appropriate remedy in the case was to *read in* the additional ground of discrimination into the *IRPA*. In fact, the Court applied the protected ground to all of the matters covered by the legislation, and not limit it to just employment matters.[33]

In principle, policy is determined by the legislatures and the interpretation of laws to determine whether the policy is consistent with the *Charter* falls to the judiciary. Each body functions in its own way to make sure the values enshrined in the *Charter* are respected. Yet, because the courts' influence on public policy is less when legislatures may reverse, modify or even avoid court decisions, the authors of *dialogue* regard this form of Canadian judicial review as "weak".[34] In other words, a legislative body could literally have the *last word* on policy outcomes. I would suggest that the authors' position on this issue seems unsatisfactory as they themselves admit that "legislators pay more attention to the liberty of the individual and show more respect for minorities than they are likely to do in the absence of judicial review".[35] While I do not advocate that courts are primarily motivated by the desire to implement public policy, I am arguing that they are obligated to ensure that the values enshrined in the *Charter* are respected. Hence, their decisions may have the *effect* of influencing legislative public policy, but not defeating or displacing it.

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[33] *Vriend,* above note 19, at para 46, [Cory J.]. The Attorneys General of Alberta and Canada argued that the Court's remedy of *reading in* should be limited to the employment issue raised by the complainant, Vriend. The *IRPA* prohibited discrimination in a number of areas of public life such as public notices, public accommodation and tenancy.

[34] *Charter* Dialogue Revisited, above note 5, at 29.

[35] *Ibid.,* at 39.

Vriend illustrates well how courts may at times influence legislative policy. The Court considered that omitting *sexual orientation* as a ground of discrimination violated the equality rights guaranteed by subsection 15(1) of the *Charter*. However, this should not be viewed as a policy change. S*exual orientation* is part of one's value system. The policy that was being challenged was the *equality* of the citizens of Alberta in its "diverse racial and cultural" society, which policy the provincial legislature itself had recognized as a fundamental principle in the *IRPA's* preamble, as seen in the following passage:

> WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status.[36]

Even though it was the legislative intent to exclude *sexual orientation*, the Court considered that the protected ground should be *read in* and explained as the reason the "intrinsic worthiness and importance of every individual" regardless of personal characteristics, which should lead to a sense of dignity.[37] *Vriend* illustrates how courts observe that social values evolve over time even in the face of a reticent legislature. Like the authors of *dialogue*, I subscribe to the view that judicial interpretation of laws is authoritative.[38] Unlike them, however, I do not regard this form of judicial review as *weak*. In my opinion, it is well-balanced.

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[36] *IRPA*, above note 32, preamble. [Emphasis added]
[37] *Vriend*, above note 19, at para 67.
[38] *Charter* Dialogue Revisited, above note 5, at 31.

The purpose of the foregoing analysis is not to illustrate *judicial supremacy* because courts seem to have final authority on the validity of legislation. What courts possess is an obligation to ensure that *Charter* values are respected. This is the way the process is played out among the institutions of governance – the legislative, the judicial and the executive branches – in a constitutional democracy like Canada that views itself as *free and democratic*.[39] This does not diminish the importance of the legislature, but rather enhances the argument for democracy. As Iacobucci J. stated in *Vriend*: "…[D]emocracy is broader than the notion of majority rule, fundamental as that may be".[40] In their follow-up article, *Charter* Dialogue Revisited, the authors suggest that Canadians knew when they made the decision to adopt the *Charter* in 1982 that some rights were so important that they should be protected from *majoritarian* politics.[41] Whether or not one agrees with this statement, there is little doubt that the notion of *dialogue* has contributed greatly to the debate surrounding *judicial review* and, as its authors claim, to the public debate about *Charter* values.[42] Perhaps, the more relevant issue that should be debated in the literature is how much greater is the impact of judicial decision making on shaping public policy after the *Charter* compared to before the *Charter*. Judicial review is not a novelty of the *Charter*.

However, the *anti-majoritarian objection* is troubling on another level. It seems to be targeting the objectivity of judges, who are bound to interpret laws based on the

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[39] *Charter* Dialogue, above note 4, at 77. The authors suggest that this *rule of law* argument seems unsatisfactory. See Section 1 of the *Charter*, above note 3, for the expression "*free and democratic*".

[40] *Vriend*, above note 19, at para 140. Kent Roach also expressed the view that "The Charter and the courts can force governments to confront issues of principle that they may well be inclined to ignore and finesse, but in most cases they cannot force a committed legislature to accept the court's resolution of the larger matter of policy". Roach, *Judicial Review*, above note 20, at 75.

[41] *Charter* Dialogue Revisited, above note 5, at 29.

[42] *Charter* Dialogue, above note 4, at 79.

facts presented to them. A judge is always bound by the facts presented in court whereas legislators are bound not necessarily by facts, but by studies, expert opinions and, most importantly, by their constituents' wishes. Perhaps, those who raise the objection whether judges should be empowered with the discretion to strike down legislation that was enacted by elected officials understate unfairly the objectivity of judges.

After examining the values at work in *Carter*, the Court formulated a rule in regards to physician-assistance in dying. It declared that an adult person is entitled to physician-assistance in dying if she/he (1) clearly consents to the termination of life, and (2) has a grievous and irremediable medical condition (including an illness, disease or disability), and (3) which causes enduring suffering that is intolerable to this person in the circumstances of her/his condition.[43] In adopting Bill C-14, Parliament considered that the appropriate legislative response would be to enact legislation that imposes an additional burden on the MAiD patient – to prove a *reasonably foreseeable natural death*. As will become apparent from my analysis of *Carter* and Bill C-14, in Parts III and IV, respectively, I argue that Parliament erred in its legislative response to the *Carter* decision. A review of the Parliamentary hearings (Hansard), various committees' reports with their diverging recommendations, the disparate vote of the Members of Parliament on the Bill, and professional association reports all reveal the extent to which limiting the right to *medical assistance in dying* to those who are dying or at the end of life may have played a central role in Parliament's drafting of paragraph 241.2(2)(d). Yet, in its legislative literature

[43] *Carter*, above note 1, at paras 4 and 147.

accompanying Bill C-14 at the time of its enactment, the government through the Department of Justice, claims that the legislation is broader in scope than the Court's parameters set out in *Carter*. In my opinion, the opposite is true.

III. *CARTER v CANADA (ATTORNEY GENERAL)*

Until recently, a person in this country wishing to end his/her life due to a grievous and irremediable medical condition needed to seek medical assistance elsewhere. The prohibition of the *Criminal Code* that the Court considered in *Carter* was absolute in that no person could assist another in the commission of the latter's death under any circumstances.[44] Canadian law prohibited a person from assisting another to intentionally end his/her life even in circumstances involving a severe disability or illness. The person assisting would be committing a criminal offence even with the consent of the person who wished to die. However, in *Carter*, the Supreme Court pronounced specific eligibility criteria for entitlement to physician-assisted dying. The Court reasoned that the decision to seek this type of medical care involves a person's autonomy and bodily integrity and is so fundamentally important as to be protected by the *Charter*.[45] In this Part, I review *Carter* under various subheadings.

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[44] *Criminal Code*, above note 2. The provisions before the Court in *Carter* were section 241 of the *Criminal Code*, which read "[E]very 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" and section 14, which reads "[N]o person is entitled 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."

[45] *Carter*, above note 1, at paras 66-7. The Court relied on its decision in *A.C. v Manitoba, (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 SCR 181 [*AC*]. In *AC*, Abella J., for the majority, used the following expression to describe the importance of patient autonomy: "[the] tenacious relevance in our legal system of the principle that competent individuals are – and should be – free to make decisions about their bodily integrity". *AC*, at para 39. *AC* involved a minor of 14 years and 10 months, who refused blood transfusions as medical treatment on religious grounds. The Court dismissed her arguments that the irrebuttable presumption of incapacity provided in the

(a) Overview of *Carter*

Carter is significant for several reasons. First, the SCC formulated a rule for entitlement to physician-assisted dying. Second, it did not follow its decision in *Rodriguez* distinguishing the two cases even though they raised similar, if not identical, facts.[46] Third, the *Carter* decision also brings to bear how courts must take note of evolving social values over time and the impact that these changing values could have on rights. Fourth, it illustrates the importance of legislative facts and other social science evidence and how a trial judge must carefully scrutinize this evidence. Lastly, the physicians' expert evidence presented at trial in *Carter* showed that even among medical professionals, their areas of expertise could differ and these distinct specialties could impact how they assess their patients' competence and medical conditions. I address each of these topics next.

In *Carter*, the Court's approach to allow a person access to physician-assisted death was both methodical and deliberate. It described the extent to which the prohibition of assisted dying is void arising out of a provision that absolutely prohibited assistance in the death of a person by suicide. The Court declared that the prohibition against assisted suicide in the *Criminal Code* is void insofar as it deprived a competent adult person of physician-assisted death where the person (1) clearly consents to the termination of life, and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) (3) causing enduring suffering that is intolerable to the individual in the circumstances of his/her condition (and could

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Child and Family Services Act, C.C.S.M. c.C80, for young persons under 16 years violated her *Charter* rights under sections 2(a) (freedom of religion), 7 (liberty and security) and 15(1) (discrimination on the basis of age).

[46] *Rodriguez*, above note 8.

not be alleviated by any means acceptable to him/her) (the "*Carter* criteria").[47] The essential elements of the Court's declaration are clear: (a) a competent adult person (b) a consent to the termination of life (c) a grievous and irremediable medical condition, and (d) a medical condition that causes enduring intolerable suffering to this person. This is the meaning of "extent" to which the Court was referring when it declared that sections 241(b) and 14 of the *Criminal Code* are void "to the extent" that they prohibited physician-assisted death.[48] The Court suspended this declaration of invalidity with respect to the prohibition for a period of twelve months, and later agreed to extend the suspension for another four months.[49] It will be noted that in the *Carter* criteria, there is no language referring to a terminal or fatal illness or nearness of death of the person seeking assistance to die.

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[47] *Carter*, above note 1, at paras 4, 127 and 147. [Emphasis added]

[48] *Ibid*. at 147.

[49] *Carter v Canada (Attorney General)*, 2016 SCC 4, [2016] 1 SCR 13 [*Carter 2016*]. The SCC granted the AGC a four-month extension to June 6, 2016 to allow Parliament to craft legislation. It also granted an exemption to Quebec and to those individuals who wished to exercise their right for physician-assisted death under *Carter* by applying to the superior court of their jurisdiction. Cases that have either followed or considered *Carter* include: *Canada (AG) v E.F.*, 2016 ABCA 155 [*E.F.*]. The Alberta Court of Appeal stated: "…[T]he declaration of invalidity in Carter 2015 does not require that the applicant be terminally ill to qualify for the authorization. The decision itself is clear. No words in it suggest otherwise. If the Court had wanted it to be thus, they would have said so clearly and unequivocally. [*E.F.*, at para 41]. Patient 0518 v RHA 0518 2016 SKQB 176, [2016] SJ 280, [*Patient 0518*]. This case was heard subsequent to *Carter* but prior to the coming into force of Bill C-14. The Saskatchewan Court of Queen's Bench considered that the combination of ALS and metastatic bone disease meets the definition of a grievous and irremediable medical condition under Carter**.** The only issue before the Court was whether to grant the applicant's request for physician-assisted death based on the criteria set out in *Carter.* According to the court, the applicant therefore qualified for the constitutional exemption allowing her to proceed with physician-assisted death. *Saba c. Procureure générale du Québec,* 2017 QCCS 5498, [*Saba*] The plaintiff also claimed that the two statutes violated his *freedom of conscience* as a physician. The Quebec Superior Court dismissed his claim for *costs* on the ground that he had failed to show at the interlocutory injunction stage that the *vague* and *imprecise* language and the alleged violation of freedom of conscience arising out of both the federal and Quebec provincial MAID laws were sufficiently exceptional issues to justify an award for costs. *Lamb v Canada (Attorney General),* 2017 BCSC 1802, at para 6 (BCSC) [*Lamb*]. The application before the court involved the legal issues of *estoppel* and *abuse of process* by which, if successful, the AGC would be estopped from arguing certain factual and legal conclusions reached in *Carter.* In *Lamb,* the court was being called upon to decide whether to expand the eligibility criteria provided in the new legislation, namely, subsection 241.2(2). The trial judge concluded that the plaintiffs had failed to demonstrate that it is an abuse of process for the AGC to fully defend the newly enacted legislation having potentially different objectives or that not permitting the plaintiffs to rely on the findings of fact in *Carter* would amount to an abuse of process.

The effect of this decision is that, if Parliament failed to act within the time frame imposed by the Court, it would still be prohibited for individuals to aid another person to end his/her life by suicide *outside* of the physician-assisted death context. However, Parliament re-enacted a similar, but not identical, prohibition in Bill C-14. The prohibition is examined in the *Pith and Substance of Bill C-14 (The Main Thrust Stage)* section of Part IV, below.

(b) The *Carter* and *Rodriguez* Decisions Distinguished

The journey recognizing the right to physician-assisted death in Canada has been a difficult – and tragic - one. The opportunity to have it recognized came before the Court in 1993 in an unsuccessful challenge brought by Sue Rodriguez, who, like the principal plaintiff, Gloria Taylor, in *Carter* suffered from the progressively degenerative disease known as amyotrophic lateral sclerosis (ALS), or *Lou Gehrig's disease*.[50] Ms. Rodriguez failed in her attempt to end her life through medical assistance even though she raised similar arguments based on similar adjudicative facts before the Court.[51] However, more than twenty years later, a unanimous Supreme Court signing the judgment as *The Court*[52] in *Carter* considered that it was

[50] *Rodriguez*, above note 8. In *Carter*, the Supreme Court noted that Kathleen ("Kay") Carter, whose daughter, Lee Carter, appeared as one of the plaintiffs in the case, had also suffered from a progressive neurodegenerative disease known as *spinal stenosis*.

[51] *Carter*, above note 1, at para 42. In *Rodriguez*, the plaintiff invoked that she had "(a) the right to live her remaining life with the inherent dignity of a human person, (b) the right to control what happens to her body while she is living, and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life." She argued that the prohibition against assisted suicide to the extent that it prevented her from terminating her life when she became incapable was unconstitutional because it deprived her of her liberty and her security of the person guaranteed by section 7 of the *Charter*. *Rodriguez*, above note 8, at 583.

[52] The use of the expression "The Court" illustrates the SCC's resolve to speak as one voice in the decision at hand thereby communicating that the case is to carry more weight as a precedent. This situation is unlike the one whereby the majority of the Court "agrees to decide a case in a certain way and several judges write concurring opinions for the majority", sometimes differing substantially in their reasoning. On this latter point, see Nancy McCormack, John Papadopoulos & Catherine Cotter, *The Practical Guide to Canadian Legal Research*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2015), at 5 [*Practical Guide*]. I wish to thank both Professors Beverley Baines of Queen's

time to *crystallize* this right. New "legislative" facts played a key role in the Court's decision to distinguish this case from the earlier one of *Rodriguez*.[53]

The Court distinguished the *Carter* and *Rodriguez* decisions for several reasons. First, it noted that the debate over physician-assisted death raged on long after its decision in *Rodriguez*. The debate involved concerns over life rendered valueless and the inadequacy of safeguards to protect the vulnerable, on the one hand, and concerns for protection of individual autonomy, control over one's bodily integrity and the importance of human dignity, on the other.[54] These concerns were raised in *Rodriguez*, but the Court at the time was not persuaded that a consensus had emerged opposing the state interest to protect human life.[55] However, in *Carter,* it confirmed the trial judge's findings that a consensus on physician-assisted death had been reached whereby if the *Carter* criteria are met and "where the assistance is "clearly consistent with the patient's wishes and best interests, and [provided] in order to relieve suffering"", then the patient is entitled to physician-assisted death.[56] The pendulum that life must be preserved at all costs had shifted.

Second, the Court also observed that the *legislative landscape* had changed significantly. A new "matrix of legislative and social facts" had emerged both abroad and in Canada as several jurisdictions in the United States, Europe and South America had adopted assisted dying legislation.[57] The Court noted that the ethicists'

University Law Faculty and David Lametti, formerly of McGill University Law Faculty, for their valuable input on this point.

[53] *Carter*, above note 1, at para 47.

[54] *Ibid.* at para 6.

[55] *Rodriguez*, above note 8, at 585.

[56] *Carter,* above note 1, at para 24.

[57] Legislative facts are social and economic facts assisting in contextualizing the issue of the case whereas the adjudicative facts are directly related to the parties involved in the dispute. The permissive jurisdictions for physician-

evidence before the trial judge demonstrated on balance that that there was no longer an "ethical distinction between physician-assisted death and other end-of-life practices whose outcome is likely to be death".[58] The expert evidence also showed that in permissive jurisdictions, the predicted abuse against the vulnerable had not "materialized".[59] At home, the Quebec National Assembly had instituted a *Select Committee on Dying with Dignity* in 2009 to study the matter and was forging ahead with its own medical-assistance-in-dying legislation.[60] All of these initiatives for reform in this area have a common theme: the issue of human suffering in grievous medical and irremediable circumstances needed to be addressed, and the need continues to this day.

(c) The Evolution of Values and Its Impact on Rights

Carter constitutes a turning point in the development of the right to physician-assisted death in Canada. As part of Canada's Constitution, the *Charter* has been instrumental in this change and the focus of how policy objectives embedded in legislation are tested against the values enshrined in the document. One of the challenges for both the courts and legislatures has been understanding the ever-changing nature of social values and identifying the rights that reflect those values – at any given point in time. Another has been who should have the last word on identifying social values and circumscribing social policies – the court or the competent legislative body, or both.

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assisted dying at the time of the *Carter* decision were Oregon, Washington, Netherlands, Belgium, Switzerland, Luxembourg, and Colombia. Several others have been added since the decision.

[58] *Carter,* above note 1, at para 23.

[59] *Ibid.,* at para 25.

[60] *Ibid.,* at paras 7, 8. *Act Respecting End-of-Life Care,* above note 13. In 2012, the Committee issued its *Québec Select Committee Report* in which it recommended legislation in favour of this type of care, which has come to be known as *medical aid in dying* in Quebec.

As in *Rodriguez*, the Supreme Court in *Carter* was asked to balance competing values. On the one hand, proponents of physician-assisted death argued that a permissive regime would respect their dignity and autonomy as human beings. On the other, opponents argued that dying in this manner would devalue the *sanctity of life* and be inadequate to protect the vulnerable.[61] In addressing concerns about how deeply *sanctity of life* was entrenched in section 7 of the *Charter*, the Court said the following:

> This said, we do not agree that the existential formulation of the right to life requires an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal to life-saving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of life "is no longer seen to require that all human life be preserved at all costs".[62] (Emphasis added)

Implicit in this passage is that rights develop because societal beliefs or social values that they embody evolve.[63] Ms. Rodriguez's arguments were valid in her time more than twenty years before *Carter.* She argued that she had the "right" to live her remaining life with the inherent dignity of a human person and the "right" to control what happens to her body while she is living. These values were just as important

[61] *Carter,* above note 1, at paras 1, 10.
[62] *Ibid.* at para 63.
[63] This paper does not address whether rights develop because they are inherently contained in a constitutional document like the *Charter* or contingent upon the occurrence of new facts as this is a discussion that is beyond the scope of this paper.

then as they are today. However, society was not yet prepared to recognize or accept that a person's dignity and equality also meant she could choose the terms of her death. Ms. Rodriguez was.

The right to life is deeply rooted in section 7 of the *Charter*, but the preservation of life or, rather, the *sanctity of life* no longer holds an absolute status.[64] In section 7, the *Charter* does not stipulate a "right" to physician-assisted death, but refers to "the right to life, liberty and security of the person and the right not to be deprived thereof". Why then would entitlement to physician-assisted death be characterized as a "right" – even a fundamental right, as I maintain? Several reasons could be asserted. First, the Court itself in *Carter* refers directly to the entitlement of this type of medical care as a *right*. As the following passage illustrates, after acknowledging its agreement with the trial judge on the issue of choice to make a medical decision, the Court stated:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the <u>right</u> to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty.[65]

Second, there are several examples in *Carter* where the Court uses the word *right* to illustrate the values that are entrenched in section 7: quoting Cory J's

[64] Section 7, above note 12. The Court in *Carter* quoted Sopinka J., writing for the majority, in *Rodriguez*. *Carter*, above note 1, at para 63. Also, in *Rodriguez*, Sopinka J. referred to a 1982 *Working Paper* of the federal Law Reform Commission, in which it described the changing perception of human life as follows: "Over the years, however, the law has come to temper apparent absolutism of the principle [of the sanctity of human life], to delineate its intrinsic limitations and to define its true dimensions". *Rodriguez*, above note 8, at 595.
[65] *Carter*, above note 1, at para 66. [Emphasis added]

statement in *Rodriguez* when he says “the right to life included a right to die with dignity”[66]; citing Abella J. in *AC*: “This right “to decide one’s own fate” entitles adults to direct the course of their own medical care”[67]; and, referring to the Ontario Court of Appeal decision in *Fleming*, “the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient’s decision”.[68] However, it is in *Morgentaler* where the Court describes best how to understand the full ambit of section 7. To conclude that a pregnant woman cannot be secure if, when her life or health is in danger, she is prevented from obtaining effective medical treatment due to a criminal code provision, Beetz J., concurring with the majority, stated:

> "[I]t is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". The full ambit of this constitutionally-protected right will be revealed only over time. Consequently, the minimum content which I attribute to s. 7 does not preclude, or for that matter assure, the finding of a wider constitutional right when the courts will be faced with this or other issues in other contexts. As we shall see, the content of the "security of the person" element of the s. 7 right is sufficient in itself to invalidate s. 251 of the Criminal Code and consequently dispose of the appeal.[69]

As the Court analyzed the issue in *Carter* under section 7 of the *Charter*, in my opinion, the right to physician-assisted death is now fundamentally protected by that provision. A person who satisfies the *Carter* criteria, described above, should have the

[66] *Ibid.,* at para 60. *Rodriguez*, above note 8.
[67] *Carter*, above note 1., at para 67. *AC*, above note 44.
[68] *Fleming v Reid*, (1991) 4 OR (3d) 74 [*Fleming*].
[69] *R v Morgentaler*, [1988] 1 SCR 30, at para 94 [*Morgentaler*].

right to physician-assisted death and any other requirement above and beyond them constitutes state interference.

Death is tragic, but it's what death takes away that makes it so tragic – "the continuation of a life worth living".[70] Stated another way, if a life is no longer worth living due to the very high price to pay to live it, then a person should be permitted to "waive" his/her right to life. A person has a right to live, but not at a high cost. In my view, just bearing the grievous and irremediable medical condition that has the effect of causing enduring intolerable suffering to an individual constitutes a very high price to pay. Expecting that individual to have a *reasonably foreseeable natural death* as well, as Bill C-14 requires, is an affront to that person's autonomy, bodily integrity and human dignity. The essence of the *Carter* decision is that an individual should not be required to live in challenging medical circumstances. This much had evolved since the decision in *Rodriguez* and this evolution shaped the decision in *Carter*. The Court took note of the changing values.

(d) Establishing the Record: The Trial Judge's Responsibility to Evaluate Adjudicative, Social and Legislative Facts and Expert Evidence

In *Carter*, the trial judge established a thorough record. The Court referred to the vast record that Smith J. examined and her findings of fact. The evidence at trial consisted substantially of affidavits and expert testimony on issues such as "medical ethics and current end-of-life practices, the risks associated with assisted suicide, and the feasibility of safeguards".[71] The expert evidence dealt with, among other

[70] *Carter v. Canada (Attorney General)*, [2012] BCSC 886 [*Carter Trial*], at para 351. Smith J. was uttering the words of the witness, Professor Wayne Sumner, who is a Canadian philosopher and retired university professor. His areas of specialty were ethical theory, applied ethics, and bioethics.
[71] *Carter,* above note 1 at para 22.

things, whether physicians perceived there was an ethical difference between physician-assisted death and other end-of-life practices such as the administration of palliative care and the withholding and withdrawal of lifesaving and life-sustaining medical treatment. Smith J. concluded that, on balance, there was no perceived difference and, in fact, she observed that there were physicians who would be willing to provide this type of care.[72]

The Court also reviewed the risks that the trial judge had identified in the administration of physician-assisted death. Smith J. had considered whether there existed appropriate safeguards in jurisdictions that had adopted permissive regimes. Smith J. found that although no regime was perfect, all jurisdictions had taken measures to put adequate safeguards in place. She also found that all systems protected patients against potential abuse and allowed them to properly plan for their deaths.[73] Smith J. then concluded that physicians, given their professional experience, could adequately assess "patient competence, including the context of life-and-death decisions" and detect coercion, undue influence or ambivalence in a patient.[74] In the judge's opinion, in physician-assisted death cases, the informed consent standard could be applied "to ensure a patient is properly informed of her diagnosis and prognosis".[75] After reviewing this evidence, the trial judge concluded that the "risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent

[72] *Ibid.,* at para 23.
[73] *Ibid.,* at para 25.
[74] *Ibid.,* at para 27.
[75] *Ibid.,* at para 27.

limits that are scrupulously monitored and enforced".[76] The Court did not disturb these findings.

In her article, *Judging the Social Sciences in Carter v Canada (AG)*,[77] Lazare discusses how Smith J. in *Carter* successfully laid down the evidentiary foundation that eventually found its way before the Court. She affirms that the trial judge carefully scrutinized the "extensive amounts of social science evidence typically tendered in *Charter* challenges related to controversial social issues".[78] Moreover, Lazare discusses how the judge properly assessed the reliability of the expert evidence presented at trial. Parties are increasingly seeking to prove their cases with expert evidence and experts are increasing their focus of specialization thereby leading the author to conclude that the admissibility of some of this evidence is doubtful. Lazare cites two examples of how Justice Smith in *Carter* carefully scrutinized the evidence of the numerous witnesses – "psychologists, ethicists, sociologists, human rights experts and legal researchers specializing in assisted dying" – who appeared before her.[79] One of the witnesses was an expert in suicide prevention and the other a clinical psychologist. The former testified with respect to whether depression might impair a person's judgment to request assisted death. His answer was unconvincing. The latter testified that he was unfamiliar with the "test for medical decision-making capacity".[80] Smith J. concluded that neither witness was qualified on giving evidence of *competence assessment*. The author also addresses

[76] *Carter Trial*, above note 70, at para 883. *Carter*, above note 1, at para 27.
[77] Jodi Lazare, "Judging the Social Sciences in *Carter v Canada (AG)*" (2016) 10:1 McGill JL & Health S35 [Lazare, *Judging Social Sciences*].
[78] *Ibid*., at S39.
[79] *Ibid*., at S63.
[80] *Ibid*., at S51.

how the trial judge was able to detect the potential for *bias* that could affect the opinion of an expert witness.

Lazare maintains that Smith J.'s approach should serve as an example for other judges adjudicating similar *Charter* cases with extensive evidentiary records. While the author highlights the trial judge's exemplary performance in *Carter*, she also points to the limits of the judiciary's institutional capacity to properly evaluate evidence involving complex social science issues. She warns that some judges are unskilled in the social sciences involving challenging, and even doubtful, qualitative and quantitative analysis and their failure to properly evaluate this evidence risks relying on flawed evidence.[81] She stresses that "[r]ights adjudication has profound effects on the "lives of Canadians"".[82] Therefore, it is important that a matter be assigned to a skilled trial judge, who can carefully scrutinize the social science evidence, as the Court confirmed in *Bedford*.[83] *Bedford* is also significant because the Court decided that the distinction between the adjudicative and legislative facts as a basis for the standard of review by an appellate court of a trial judge's findings no longer applied.[84] The same standard now applied to both sets of facts – there must be an *overriding and palpable error*. As a result of these increased responsibilities, the trial judge's role becomes more central in balancing *Charter* rights, as seen in *Carter*.

[81] *Ibid*., at S45, S52.
[82] *Ibid*., at S46.
[83] *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], at para 53.
[84] *Bedford*, previous note, at para 54.

IV. AN ACT TO AMEND THE CRIMINAL CODE AND MAKE RELATED AMENDMENTS TO OTHER ACTS (MEDICAL ASSISTANCE IN DYING) S.C. 2016, C. 3 ASSENTED TO JUNE 17, 2016)[85]

As stated above, Bill C-14, adopted sixteen months after the *Carter* decision was released, requires that a person requesting medical assistance in dying be diagnosed with a *reasonably foreseeable natural death* as part of his/her overall medical assessment. In her address in the House of Commons when tabling the legislation on April 22, 2016, the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould, stated that the Bill re-enacts sections 14 and 241(1) of the Criminal Code "to ensure public safety…. but provides exemptions to permit medical assistance in dying for eligible persons."[86] The Minister's remarks acknowledge that the provisions were necessary to protect certain individuals when she says "to ensure public safety". As will be seen below in the section, *Pith and Substance of Bill C*-14, the individuals underlying this public safety issue or somehow requiring protection seem to be those who are at risk of suicide. Given the continued enforceability of sections 14 and 241(1), Parliament's policy concerns stated in the preamble regarding the need to protect the vulnerable, that is, persons who could be induced to end their lives in moments of weakness, should have been appeased without the

[85] *Bill C-14*, above note 2.

[86] Canada. House of Commons Debates, Official Report, Vol. 148, No 45, 42nd Parliament, 1st Session, 16 April 2016, at 3. [*HOC Debates*, April 16, 2016]. Section 14 of Bill C-14 reads: No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent. Subsection 241(1) reads: Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not, (a) counsels a person to die by suicide or abets a person in dying by suicide; or (b) aids a person to die by suicide.

additional requirement of a *reasonably foreseeable natural death* provided in paragraph 241.2(2)(d).

Moreover, when a criminal offence is decriminalized, as the *Carter* Court had in effect done with the crime of aiding and abetting a person to die by suicide, Parliament must be mindful not to exceed its criminal law power when enacting new legislation. It must also be mindful of the impact that certain criminal provisions in the *Criminal Code* could have on the issue. In the case of Bill C-14, sections 14 and 241(1), as revised, relate to the issue of consent and the crime of assisting another person with his/her death by suicide. In my opinion, the two provisions could function against the potential for abuse, coercion or manipulation. Otherwise, they have no use. In *Carter*, the Court referred to the importance of other criminal sanctions when it said: "[w]e should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse".[87] In the next section, The *Federalism* Ground – An Argument That Certain Provisions of Bill C-14 Are Unconstitutional, I argue that in adopting Bill C-14, Parliament went beyond decriminalizing *physician-assisted death*. The legislation seeks to regulate every aspect of health care relating to medical assistance in dying. In so doing, it encroached on provincial jurisdiction regarding health. To examine this question, it is necessary to review certain constitutional law principles regarding the *division of powers* between the federal and provincial legislatures in Canada, as set out in the Canadian constitution. After

[87] *Carter*, above note 1, at para 120.

reviewing these principles, I propose to apply them to various aspects of Bill C-14 relating to its construction, implications and the values underlying it.

a) THE *FEDERALISM* GROUND – AN ARGUMENT THAT CERTAIN PROVISIONS OF BILL C-14 ARE UNCONSTITUTIONAL

Any inquiry into a law's validity requires two questions to be asked: first, is the law within the lawmaking power of the competent legislative body enacting it (the *federalism* ground); and second, is the law in conformity with the *Charter* (the *Charter* ground).[88] Both the *federalism* and the *Charter* issues should be treated separately and alternatively.[89] A determination that a law is invalid under either ground precludes the necessity to decide the law's validity on the other ground. If presented with both *federal* and *Charter* grounds, a court should "decide the case on the ground that seems strongest to the court".[90] Nevertheless, a court may decide the case on the *Charter* ground even though the federalist issue would be the more fundamental defect.[91] Section 52 of the *Constitution Act, 1982* provides that "any law that is inconsistent with the provisions of the Constitution is …. of no force or effect".[92] According to Canada's constitution, therefore, a court's declaration of invalidity under either the *federalism* or *Charter* ground suffices to decide the matter in favour of the plaintiff.

i) Division of Powers in Canada

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[88] *Constitution Act*, *1982*, above note 3. On the issue of a law's validity, see Peter W Hogg, *Constitutional Law*, above note 9**,** at 15-3. In *Secession Reference*, the SCC identified four principles upon which the Canadian Constitutional is founded: (1) constitutionalism and the rule of law, (2) democracy (3) the protection of minorities and (4) federalism. *Reference Re Secession of Quebec,* [1998] 2 SCR 217 [*Secession Reference*]. See also *Reference re Assisted Human Reproductions Act*, 2010 SCC 61, [2010] 3 SCR 457, at para 182 [*AHRA Reference*].
[89] *Constitutional Law***,** above note 9, at 15-4.
[90] *Ibid*., at 15-4.
[91] *Ibid*., at 15-4.
[92] *Constitution Act*, *1982*, above note 3.

The division of powers in Canada between Parliament and the provincial legislatures is set out in the *Constitution Act, 1867*.[93] Under the principle of *federalism*, the powers in a federation between both levels of government are said to be coordinate and not subordinate.[94] Criminal law matters fall within Parliament's jurisdiction under s. 91(27) and health matters fall within provincial jurisdiction as a result of various subheadings, namely, ss. 92(7) (hospitals), (13) (property and civil rights) and (16) (matters of a merely local or private nature). Some areas can be shared concurrently by both levels of government including the matter of physician-assistance in dying.[95] In *Carter*, the Court responded in the negative to the question whether the federal prohibition of physician-assisted dying "impair[ed] the core of the provincial jurisdiction".[96] Relying on earlier authority, the Court declared that aspects of physician-assisted dying may be validly legislated "by both levels of government, depending on the circumstances and the focus of the legislation".[97] However, in *Carter*, the question posed was whether an *absolute prohibition* against physician-assisted dying infringed the claimants' *Charter* rights under sections 7 and 15(1). The question in this section is whether the subject matter of Bill C-14, Parliament's *second law*, falls under this legislative body's criminal law power. Is it still within Parliament's criminal law power to legislate on the subject matter of medical assistance in dying as addressed in Bill C-14 or does the matter impair the core of the provincial jurisdiction?

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[93] *Constitution Act, 1867*, above note 11.
[94] *AHRA Reference*, above note 88, at para 182.
[95] *Carter*, above note 1, at para 53.
[96] *Ibid.* at para 53.
[97] *Ibid.* at para 53. See *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 3 SCR 199 [*RJR-MacDonald*] and *Schneider v The Queen*, [1982] 2 SCR 112 [*Schneider*].

A parallel argument is raised with respect to Quebec's law[98] to determine whether its subject matter falls under provincial jurisdiction or does it somehow impair the core of Parliament's criminal law power under the *Constitution Act, 1867*? The two laws are similar because they both address *medical assistance in dying*. But they are also similar in that they both require that this medical care be made available only to those who are *nearing death*. The federal law refers to a *reasonably foreseeable natural death* while the provincial law refers to *end-of-life*. The two notions appear to be synonymous, if not, replicative of one another. Given that they originate from different levels of government, which legislative body has jurisdiction to enact on the subject matter and, more specifically, on the narrow issue of a *reasonably foreseeable natural death* or *end of life* in the context to medical assistance in dying – Parliament or a provincial legislature? Depending on which level of government has competence to legislate on the matter, the other body's legislation would appear to be *ultra vires*. If both have competence to enact with respect to the matter, then this would bring into play the principle of *paramountcy*, whereby the federal law should prevail over the provincial law to the extent of the conflict. The examination of these questions requires an inquiry into whether the law in each case applies to a subject matter that is beyond the jurisdiction of the enacting legislative body. The cases examined next apply one or more of the various doctrines usually invoked in a *federalism* constitutional analysis problem – *interjurisdictional immunity, pith and*

[98] *Act Respecting End-of-Life Care*, above note 13. Article 26 is reproduced in note 207, below.

substance and *paramountcy*.[99] Among the three doctrines, the one most commonly used is the search for a statute's *pith and substance*.

The process of searching for a statute's "pith and substance" involves finding the law's *purpose* and *effects*.[100] This requires determining what is the *main thrust* of the law (the *main thrust* stage) and then identifying the head of power under which the matter falls (the *classification* stage). Finding the purpose or "pith and substance" of a law requires asking what is the dominant, most important or "in relation to, but affecting" characteristic of the law.[101] However, to reach the conclusion that a law is *intra vires*, the *main thrust* of the legislation must fall within a head of power assigned to the adopting legislative body.

The *ancillary powers* doctrine may apply, but only after a *pith and substance* analysis has been performed. The doctrine states that "legislative provisions which, in pith and substance, fall outside the jurisdiction of the government that enacted them, may be upheld on the basis of their connection to a valid legislative scheme".[102] A *pith and substance* analysis may target the whole statute or some of its provisions.

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[99] In *Constitutional Law*, Professor Peter Hogg maintains that the doctrine of *interjurisdictional immunity* does not have a precise definition. It is the second of the following definitions, by which he illustrates the three ways a law could be challenged on the ground of its possible application to a matter outside the jurisdiction of the enacting legislative body: First, by the law's *validity* to determine whether its matter (pith and substance) falls outside the enacting body's jurisdiction. The result is that the law is invalid. Second, *interjurisdictional immunity* concerns the law's applicability whereby it is argued that the law is valid in most of its applications, but should not apply to the matter that is outside its jurisdiction. The technique used to limit the application of the statute to the extent of the matter that is beyond the enacting body's jurisdiction is called *reading down*. The result is that the law remains valid, but the matter outside of the legislative body's competence is inapplicable. In *Canadian Western Bank*, the Court limited the application of *interjurisdictional immunity* doctrine to legislation that affects the "basic, minimum and unassailable" core of each head of legislative power stipulated in sections 91 and 92 of the *Constitution Act, 1867*. *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 [*Canadian Western Bank*]. Third, by rendering the law *inoperative* through the doctrine of *paramountcy*. This doctrine states that where there is a conflict between federal and provincial laws or where a provincial law frustrates the purpose of a federal law, the federal law will prevail to the extent of the conflict. It applies only where both a federal law and a provincial law exist and is available only to render a *provincial* law inoperative. *Constitutional Law*, above note 9, at 15-28.

[100] *Reference Re Securities Act,* [2011] 3 SCR 837 [*Securities Reference*], at para 63. It should be noted that this decision was also signed by "The Court", as was the decision in *Carter*.

[101] *Constitutional Law*, above note 9, at 15-14, 15-28.

[102] *AHRA Reference*, above note 88, at para 126.

The analytical approach used to apply the *ancillary powers* doctrine was established in *General Motors of Canada v City National Leasing*[103] in which the Court articulated five factors to determine the extent of the *overflow* into the other level of government's jurisdiction.[104] They are succinctly summarized in the following passage by LeBel and Deschamps JJ. in *AHRA Reference*:

> [T]he first step is to identify the pith and substance (purpose and effects) of the impugned provisions. If the pith and substance falls within the jurisdiction of the other level of government, the extent of the overflow must be assessed. It must then be determined whether the provisions that overflow from the jurisdiction of the government that enacted them form part of an otherwise valid statute. Finally, the impugned provisions must be considered in the context of the entire statute in order to determine whether they are sufficiently integrated with the other provisions of the otherwise valid statute.[105]

Identifying the pith and substance as precisely as possible is also necessary to avoid any connection with the core power of the other level of government and the possible "erosion of the scope of provincial powers as a result of the federal paramountcy doctrine".[106] The need for precision is especially critical where the scope of the power is not clearly defined as is the case with the provincial power of health.

Although the *interjurisdictional immunity* doctrine has often been used as a tool to determine whether a law of an enacting legislative body has encroached on a

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[103] *General Motors of Canada v City National Leasing*, [1989] 1 SCR 641 [*General Motors*].
[104] *AHRA Reference*, above note 88, at para 188. The Court pointed out that the term *overflow* is preferred to the term *encroachment* in regards to impugned provisions of a statute. The terminology is used in conjunction with the *ancillary powers* doctrine when one or more provisions of a statute are challenged. This clarification was made in *Canadian Western Bank*. See above note 99.
[105] *AHRA Reference*, above note 88, at para 189.
[106] *Ibid.*, at para 190.

core power of the other level of government, recent Court decisions show that the tendency is to restrict its application. In *AHRA Reference*, Justices Lebel and Deschamps, writing for four Justices on a reference from the Quebec Court of Appeal, warned against the "asymmetrical" effect this doctrine could have on courts' decisions to uphold legislation due to possible incursion by the other level of government.[107] Similarly, in *Canada v PHS Community Services Society*, the Supreme Court declared that the use of this doctrine should be limited to "principle and precedent" and avoided as the first recourse in a *division of powers* dispute.[108] Writing for a unanimous Court in that case, Chief Justice McLachlin stated that the doctrine has never been applied to a broad and amorphous area of jurisdiction such as *health care*, the matter at issue in that case.[109] Hence, recourse should be had to some other basis such as an exclusive legislative power before resorting to it. The modern trend in overlapping areas is to "strike a balance between the federal and provincial governments, through the application of *pith and substance* analysis and a restrained application of federal paramountcy".[110] The basis for this reasoning appears to be an increased reliance on concepts like "double aspect" or the emergent practice of "cooperative federalism" whereby courts should permit "interlocking" legislation from both levels of government and avoid blocking laws enacted for the furtherance of the *public interest*.[111] However, as will be seen in the subsequent case of *Securities Reference*, examined below, the principle of

[107] *Ibid.*, at para 183.
[108] *Canada v PHS Community Services Society*, [2011] 3 SCR 134 [*PHS*], at para 61. In her Reasons, McLachlin C.J. also confirmed that the doctrine is reciprocal in that it is not confined to federal powers. *PHS*, at para 65.
[109] *Ibid.*, at para 60.
[110] *Ibid.*, at para 65.
[111] *Ibid.*, at 63, 70. The Chief Justice also reasoned that applying the doctrine where federal criminal law power could not legislate in protected core areas such as health risks creating a "legal vacuum" where neither level of government would enact.

cooperative federalism has also been criticized.[112] In *Securities Reference*, the Court declared that this principle cannot override the *division of powers* or upset the constitutional balance provided in the *Constitution Act, 1867*. As will be seen, *federalism* respects the diversity and autonomy of the provinces and the distribution of powers given to the most suited government for a power that was democratically created under this constitutional document.

Federal criminal power touching on health is well-established in Canada. In *PHS*, the issue before the Court was whether the federal *Controlled Drugs and Substances Act*[113] applied to a safe injection clinic created by a provincial health authority. Drug users could use the clinic's premises and resources for their drug use and for counselling. The clinic's activities rendered the staff to fall possibly within the statute's purview governing "possession". To continue its operations, the clinic was required to obtain an exemption from prosecution from the federal Minister of Health. The clinic sought the exemption on the basis of *interjurisdictional immunity*, arguing that the clinic is shielded from the legislation's application because treatment decisions made in health facilities lie at the core of health care, a provincial power. However, speaking for a unanimous Court, McLachlin C.J. dismissed this argument as well as the claimants' remaining arguments directed at disallowing the federal criminal statute's application to the provincial health care facility. The Chief Justice reasoned that a valid federal criminal law may have incidental impacts on provincial matters, in the case at bar, on the delivery of health care. She stated that the delivery of health care services does not constitute a protected core of provincial power over

[112] *Securities Reference*, above note 100.
[113] S.C. 1996, c. 19.

health under sections 92(7), (13) and (16) of the *Constitution Act, 1867*.[114] The Chief Justice stated that *interjurisdictional immunity* is premised on the idea that there is a "basic, minimum and unassailable content" for the powers to which a legislative body is entitled to have protected from the other.[115] According to the Court, provincial power over health care is so "broad and extensive" that a core of this power cannot be easily identified. In *Carter*, the Court also reasoned that *health* is an area of concurrent jurisdiction, and not a core provincial power, and concluded that the *interjurisdictional immunity* doctrine did not apply in that case.[116] Nevertheless, in *PHS*, the Court held that the clinic was entitled to obtain a Ministerial exemption because the federal Minister's refusal to extend the exemption constituted a violation of section 7 *Charter* rights of individuals, who attended the facility.

To find a law's "pith and substance", a court will search beyond the "direct legal effects" of the law to evaluate its social or economic purposes. Varying results will be reached depending on what a court determines the law's social or economic purposes really are.[117] In *Securities Reference*,[118] released three months after the

[114] *PHS,* above note 108, at para 66.
[115] *Ibid*., at para 58.
[116] *Carter*, above note 1, at paras 51-3.
[117] In *Alberta Bank Taxation Reference*, the Privy Council concluded that the "pith and substance" of an Alberta law that levied a special tax solely on banks was "to regulate or destroy the banks". *A.-G. Alta v A.-G. Canada*, [1939] AC 117 [*Bank Taxation*]. A different result was reached in the earlier decision of *Lambe,* in which the Privy Council upheld a provincial law imposing a tax on banks. As the dominant feature of the law in that case was said to be *raising revenue*, the subject matter of the law was said to be *taxation*, and not *banking*. *Bank of Toronto v Lambe,* (1887) 12 App. Cas. 575 [*Lambe*]. According to Professor Hogg, the distinction arises out of the use of the expression "in relation to" appearing in sections 91 and 92 of the *Constitution Act, 1867*. See *Constitutional Law*, above note 9, at 15-8. The Court reached a similar conclusion, albeit for different reasons, in the two cases of *Quebec v Lacombe* and *Quebec v Canadian Owners and Pilots Association*. In *Lacombe*, the Court held that the "pith and substance" of a municipal zoning by-law that prohibited the "use of a lake as an aerodrome for float planes" was in relation to *aeronautics*, thereby falling within federal jurisdiction. The municipal by-law was therefore adjudged invalid because it encroached on a federal power. *Quebec v Lacombe,* [2010] 2 SCR 453 [*Lacombe*]. In *Pilots Association*, the Court rejected the claim that the location of aerodromes was incidental to an otherwise valid provincial land use law, in this case, pertaining to agricultural zoning. Basing its decision on the *interjurisdictional immunity doctrine*, the Court held that this matter was part of Parliament's core power over aeronautics, and a provincial law (municipal by-law) could not impair that core. *Quebec v Canadian Owners and Pilots Association,* [2010] 2 SCR 536 [*Pilots Association*].

Court's decision in *PHS*, the issue before the Court was whether Parliament could enact a national comprehensive securities legislation whereby the trade of securities would be governed by a single scheme throughout Canada. Securities regulation was normally seen as falling within provincial power under the headings of *property and civil rights* and *matters of a merely local or private nature* pursuant to section 92(13) and 92(16) of the *Constitution Act, 1867*.[119] However, the Government of Canada's position in that case was that the whole of the proposed Act could be justified as part of Parliament's valid exercise of its *trade and commerce* power pursuant to section 91(2) of the *Constitution Act, 1867.* The securities industry, it argued, has "undergone significant transformation in recent decades, evolving from local markets to markets that are increasingly national, indeed international".[120] It contended that the securities industry has evolved so much that it is now necessary to make the day-to-day regulation of *all aspects* of securities trading a matter of national concern falling under a different head of power – Parliament's *trade and commerce* power. The legislation identified several underlying objectives such as investor protection, the fostering of fair, effective and competitive capital markets, and the contribution to the integrity and stability of Canada's financial system.[121] Moreover, it did not unilaterally impose a unified system of securities regulation, but rather provided for an opting-in mechanism for each province.

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[118] *Securities Reference*, above note 100.
[119] *Constitution Act*, 1867, above note 11. Four provinces (Alberta, Quebec, Manitoba and New Brunswick) argued the position that the activity fell within provincial powers of property and civil rights and matters of a merely local or private nature.
[120] *Securities Reference*, above note 100, at para 33.
[121] *Ibid.,* at para 29.

In *Securities Reference,* the Court invoked the principles of *federalism* seen in *Secession Reference*[122] to affirm that the dominant tide of *cooperative federalism* espoused in *PHS* and other recent Court decisions could not override the division of powers found in sections 91 and 92 of the *Constitution Act, 1867*. The constitutional boundaries and balance provided in this constitutional document must be respected and not give way to an emergent tide, as revealed from the following passage:

> While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers…. In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode constitutional balance inherent in the Canadian federal state.[123]

The Court in *Securities Reference* stated that the concept of *federalism* in Canada recognizes the 1) diversity and autonomy of provincial governments in permitting their societies to evolve as they see fit, and 2) the democratic process by which the legislative powers under the *Constitution Act, 1867* were distributed to the government considered to be most suitable to achieve societal objectives having regard to that diversity.[124] This is the *subsidiarity* feature inherent in Canada's federalist structure whereby "legislative action if to be taken by the government that is closest to the citizen and is thus considered to be in the best position to respond to

[122] *Secession Reference*, above note 88.
[123] *Securities Reference*, above note 100, at paras 61-2.
[124] *Ibid.*, at paras 72-3.

the citizen's concerns".[125] The Court warned that an "overly expansive interpretation" of a power, in that case, the federal trade and commerce power under section 91(2), could lead to subsuming other federal heads of power and potentially displacing provincial powers over local matters and property and civil rights as a result of the *paramountcy* doctrine.[126] Hence, all powers are necessarily circumscribed.

In *Securities Reference*, the Court admonished that the federal government had not adduced evidence showing that the proposed regulatory framework addressed the transformation in the securities industry that it claimed had taken place and transcended local and provincial interests. Instead, it presented a record that showed that "the day-to-day regulation of securities within the provinces, which represented the main thrust of the Act, remained essentially a matter of property and civil rights within the provinces and therefore subject to provincial power".[127] Although aspects of the statute addressing the management of systemic risk and national data collection, which the Act itself declared to be its *raison d'être*, were considered important, they were deemed insufficient to justify a complete takeover of the provincial power in securities regulation. Notwithstanding these matters of national concern, the Court concluded that the legislation reached down into *all* aspects of the day-to-day activities of the securities industry such as contracts and property matters, public protection, and professional competence and conduct of those employed in the industry.[128] Moreover, the Court confirmed that it is not the choice of best policy option that should be the decisive factor to vest the legislative body with the power to

[125] *AHRA Reference*, above note 88**,** at para 183.
[126] *Securities Reference*, above note 100, at para 72.
[127] *Ibid.*, at para 116. [Emphasis added].
[128] *Ibid.*, at para 122.

enact legislation in a situation. Rather, it should be the body to which the head of power was assigned under the constitution's division of powers scheme.[129]

In *AHRA Reference*, a decision released prior to the one in *Securities Reference*, the issue was whether Parliament could validly legislate on all aspects of medically assisted human reproduction through the exercise of its criminal law power under section 91(27) of the *Constitution Act, 1867*.[130] The case was a reference by the Attorney General of Canada from a Quebec Court of Appeal decision, in which it declared that the *AHR* Act's purpose was to cover all aspects of assisted reproduction relating to both medical practice and research and the management of hospitals involved.[131] According to the Court of Appeal, the *pith and substance* of the impugned provisions lay beyond Parliament's criminal law power because the legislative intent was not only to prohibit wrongful acts, but also to assure that beneficial aspects of assisted reproduction were regulated. The Supreme Court divided on the issue with a 4-4-1 result and allowed the appeal in part only.

Writing for four Justices, McLachlin C.J. reasoned that the comprehensive federal law fell under Parliament's criminal law power. She stated that the "dominant thrust of the Act is prohibitory, and the aspects that concern the provision of health services do not rise to the level of pith and substance".[132] The Chief Justice viewed the *AHR* Act as a series of prohibitions and subsidiary provisions dealing with enforcement, penalties, organization, information management, and grant of licenses to various participants in assisted human reproduction, all of which were needed for

[129] *Ibid*., at para 90.
[130] *AHRA Reference*, above note 88, at para 180. *Assisted Human Reproductions Act*, S.C. 2004, c. 2 [*AHR* Act].
[131] 2008 QCCA 1167, [2008] 298 DLR (4th) 712.
[132] *AHRA Reference*, above note 88, at para 24.

administration purposes. She applied the *ancillary powers* doctrine to establish that the *nature* of the impugned provisions was related to Parliament's criminal law power and the *seriousness* of their incursion into provincial jurisdiction was minor. She also concluded that the impugned provisions were *rationally and functionally* connected to an otherwise valid scheme.[133] She would have upheld the legislation in full.

On the other hand, LeBel and Deschamps JJ., writing for four Justices as well, drew on the substantive distinctions between the *prohibited* and the *controlled* activities made in the Act. They concluded that the prohibited activities fell within Parliament's criminal law powers. However, the controlled activities such as the management of hospitals (clinics, laboratories or other institutions), which were the subject of the impugned provisions, involved the relationships between physicians and their patients, the regulation of the medical profession and rules of ethics, the consent to treatment - they concerned the "regulation of assisted human reproduction as a health service".[134] Thus, these activities fell under the various provincial heads of power relating to hospitals, property and civil rights and matters of a local nature (*sections 92(7), (13), (16) Constitution Act, 1867*). According to the Justices, the *ancillary powers* doctrine did not apply. They would have dismissed Canada's appeal.

Cromwell J, the ninth Justice, who expressed his disagreement with both McLachlin C.J.'s and LeBel and Deschamps JJ.s' Reasons for Judgment, concluded that Parliament exceeded its criminal law power by seeking to "regulate all aspects of

[133] *Ibid.*, at paras 126-156.
[134] *Ibid.*, at para 260.

research and clinical practice in relation to assisted human reproduction".[135] In his opinion, the essence of the *AHR* Act's impugned provisions permitted minute regulation of research and clinical practice and went beyond the prohibition of negative practices or the regulation of assisted human reproduction as a health service.[136] His opinion differed from the other Justices in terms of both the *nature* and *seriousness* of the federal incursion into provincial powers of some of the impugned provisions. He would classify the *matter* of the impugned provisions, viewed as a whole, as attaching to three areas of provincial competence – the establishment and management of hospitals, property and civil rights in the province and matters of a merely local or private nature in the province.[137] He agreed with Justices LeBel and Deschamps' comments that the federal government's recourse to its criminal law powers cannot be based solely on concerns for consistency or efficiency so as to have a national standard.[138] The appeal was allowed in part only.

Although the nine Justices in *AHRA Reference* disagreed on how they reached their respective conclusions, all agreed that the principle of *pith and substance* should apply. Moreover, Cromwell J agreed with Lebel and Deschamps JJ when he stated that the *matter* of the impugned provisions cannot be viewed as a valid exercise of criminal law under the Court's current jurisprudence. In other words, he would circumscribe the scope of Parliament's criminal law power at a different point than his fellow colleagues would.

[135] *Ibid.*, at para 283.
[136] *Ibid.*, at para 285.
[137] *Ibid.*, at para 287.
[138] *Ibid.*, at paras 287, 244.

In *PHS*, the Court affirmed that, where both levels of government have acted with respect to a *matter*, it is important to "strike a balance between the federal and provincial governments, through the application of pith and substance analysis and a restrained application of federal paramountcy".[139] The principle of *federalism* has it that a power may not be used to eviscerate another and a balance is reached when both Parliament and a provincial legislature are allowed "to act effectively within their respective spheres".[140] Accordingly, the analysis that follows with respect to Bill C-14 applies these principles about Canada's *division of powers*. Particularly, it seeks to apply the Court's current understanding as to how far a legislative body's power – for the purposes of this paper, Parliament's criminal law power – should extend. I argue that, as all legislative powers are circumscribed, even though some of them are not clearly defined, a legislative body cannot exceed its powers.

ii) Pith and Substance of Bill C-14 (The *Main Thrust* Stage)

In order to fall under the criminal law head of power, a law must meet three criteria. It must have (1) a prohibition, (2) a penalty, and (3) a criminal law purpose.[141] In *Margarine Reference*, the Privy Council approved the opinion of Supreme Court Justice Rand, who said that a criminal prohibition must serve "a public purpose which can support it as being in relation to the criminal law".[142] The prohibition and the associated penalty collectively are characterized as the *formal* component while the

[139] *PHS*, above note 108, at para 65.
[140] *Securities Reference*, above note 100, at para 7.
[141] *Can. Federation of Agriculture v A. G. Que*. [1951] A.C. 179 (Privy Council) [*Margarine Reference*]. In pith and substance, the law was considered to have an economic objective and not a criminal law purpose. In *AHRA Reference*, the actual expressions used were (1) suppress an evil, (2) establish a prohibition, (3) accompany that prohibition with a penalty. *AHRA Reference*, above note 88, at para 233. The suppression of an evil is identified as the criminal law purpose. See also *Reference Re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783 [*Firearms Reference*].
[142] *Margarine Reference*, [1949] SCR 1 (SCC).

criminal law purpose or, stated otherwise, "the real or apprehended evil, and the concomitant protection of legitimate societal interests" is characterized as the *substantive* component.[143] Both components are necessary. In *AHRA Reference*, the Court declared that "the formal component….supports a finding that a regulatory scheme, even one that takes the form of exemptions from a prohibitory scheme, falls within the field of criminal law.[144] In the next section, I address the issue whether Bill C-14 contains both the formal and substantive components to satisfy the criminal law requirements.

1) The Purpose of the Legislation

Identifying the purpose of an Act or some of its impugned provisions requires an examination of the *context* within which the legislation was enacted. The Court's holding in *Securities Reference* provides that the purpose may be discerned through *intrinsic* and *extrinsic* evidence.[145] Intrinsic evidence consists of purpose clauses supposedly found in the preamble and the general structure of the statute, while extrinsic evidence includes sources such as "Hansard or other accounts of the legislative process".[146] In *Rizzo*, the Court held that it is permitted to access committee reports, parliamentary hearings and the Bill's readings reflecting the various stages of the legislative process to find the purpose of what a "specific legislative provision was intended to achieve".[147]

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[143] *AHRA Reference*, above note 88, at para 234.
[144] *Ibid.,* at para 234.
[145] *Securities Reference*, above note 100, at paras 63-4.
[146] *Ibid.*, at para 64.
[147] *Rizzo & Rizzo Shoes (Re*, [1998] 1 SCR 27, at para 31, 154 DLR (4th) 193 [*Rizzo*] The Court stated that "the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by the Court".

The question at this stage is 'What does the law do and why?' The inquiry into Bill C-14's purpose is analogous to the one that the Court performed in *AHRA Reference*. In that case, the argument was whether the dominant purpose of the *AHR* Act was to prohibit improper practices associated with assisted reproduction such as undermining morality, preventing public health evils and threatening the security of the individuals, as the Attorney General of Canada had asserted. Alternatively, was the statute's dominant purpose to regulate health, a matter generally reserved for the provinces, as the Attorney General of Quebec maintained? What could be gleaned from the case was that although some of the heads of power in Canada's constitution are not clearly defined, the courts have a role in determining what the limits of those powers are. For this purpose, it is necessary to review the legislation and apply the constitutional doctrines seen above.

Bill C-14's lengthy preamble identifies essentially two objectives. First, the legislation provides an exemption to the crimes of counselling, abetting and aiding a person to end his/her life by suicide in recognition of "the autonomy of persons who have a grievous and irremediable medical condition that causes them enduring and intolerable suffering and who wish medical assistance in dying".[148] Following this statement, Parliament refers to another objective that it identifies collectively as *robust safeguards*. They essentially provide the framework within which the administration of MAiD is to operate. Given their identification as *robust safeguards*, one can assume that their intent was to protect the *vulnerable* – those who need protection from being induced to end their lives in moments of weakness. There is

[148] Bill C-14, above note 2, Preamble.

also a concern aimed at preventing errors and abuse in the provision of MAiD and avoiding the encouragement of negative perceptions as to the quality of life of persons who are elderly, ill or disabled. This is followed by a general statement that *suicide* is considered a significant public health issue. In a separate paragraph, the preamble then zeroes in on the criterion of a *reasonably foreseeable natural death* to state that it "strikes the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on the one hand, and the interests of vulnerable persons in need of protection and those of society, on the other". No explanation is offered as to why this legislative choice "strikes the most appropriate balance", only that it does. Parliament also expresses a concern that the families of those availing themselves of MAiD should not have to face adverse legal consequences regarding loss of benefits.

Two other concerns are noteworthy. They relate to 1) Parliament's desire to have a consistent approach regarding the delivery of MAiD in Canada, and 2) Parliament's recognition of the provinces' jurisdiction over certain matters such as the delivery of MAiD and the regulation of health care professionals, as well as insurance contracts, and its commitment to work with provinces, territories and civil society to facilitate access to palliative and end-of-life care, care for individuals with Alzheimer's, dementia and others, and end-of-life care for indigenous patients.[149] Although mentioned in the preamble, none of the statute's provisions addresses the issue of palliative care or end-of-life care directly for individuals in civil society, individuals with some form of mental illness, and indigenous patients. In my opinion,

[149] Bill C-14, above note 2, Preamble.

this would appear to be the intent behind a *reasonably foreseeable natural death* found in paragraph 241.2(2)(d) – to ensure that MAiD is made available only to those who are at the end of life or in palliative care. A significant portion of Bill C-14 appears to be directed to issues of professional conduct, social policy regarding suicide, pension benefits and insurance contracts.

The preamble is vague about how the federal government intends to address the public health issue of suicide. A reading of the preamble clearly suggests that Parliament considers there are individuals, who may tend towards suicide and therefore need "protection". What is unclear is whether an individual who can meet all of the MAID criteria, including a *reasonably foreseeable natural death*, but undergoing a moment of weakness falls within the ambit of this legislative *protection*? Is a medical practitioner, who diagnoses a patient with all of the eligibility criteria, including a *reasonably foreseeable natural death*, but also observes that the patient is undergoing a *moment of weakness*, legally bound to proceed with the administration of MAiD on this patient? Is the practitioner ethically bound to administer MAiD in these circumstances? What if there is a conflict between the practitioner's rules of professional conduct and the MAiD legislation?

The prohibitions under Bill C-14 follow the preamble. As seen earlier, Parliament saw fit to re-enact a similar, but not identical, prohibition that the Court examined in *Carter*.[150] By virtue of subsection 241(1), the Bill still makes it an indictable offence to counsel or abet (paragraph 241(1)(a)) or aid (paragraph 241(1)(b)) another person to die by suicide. Moreover, the Bill also re-enacts section

[150] See above note 86 for full texts of sections 14 and 241(1)(a) and (b) of Bill C-14.

14 of the *Criminal Code*, which states that the consent of a person to inflict death on her/him is not a defence available to the person assisting with the death. The person *assisting* is criminally responsible notwithstanding the consent. The exemptions allowing a practitioner, or any other person assisting, to administer MAiD under the Act apply to *aiding* a person to die by suicide (paragraph 241(1)(b)) only. Thus far, Bill C-14 appears to be prohibitory. Given the impact of this prohibition, one wonders why it was not considered sufficient protection against compelling Parliament to include the *reasonably foreseeable natural death* as a criterion for MAID? In my opinion, it could provide sufficient protection for individuals who might be perceived as vulnerable or at risk of being induced to commit suicide in a moment of weakness. It is still a criminal offence to aid a person to commit suicide.

Following this prohibition, Bill C-14 provides for exemptions under the *medical assistance in dying* regime. The exemptions are found in Part VIII of the *Criminal Code* titled *Offences Against the Person and Reputation*. Subsection 227(1) and related provisions concern exemptions relating to homicide while subsection 241(2) and related provisions concern exemptions relating to suicide. They essentially provide that no medical or nurse practitioner, or anyone assisting either one of these two practitioners, can be held criminally responsible for culpable homicide or the offence of aiding a person to die by suicide if they are acting in the administration of MAiD.[151] Among those exempted are the pharmacist who dispenses a substance (and any person aiding) for self-administration. The notion of *reasonableness* also appears in these exemptions to state that a medical or nurse practitioner, or a person

[151] Bill C-14, above note 2. Subsections 227(1) and (2), 241(2) to (5), 245(2).

aiding such practitioner, who acts under the *reasonable but mistaken belief* about any fact to provide MAiD is exempted from being charged with culpable homicide or counselling suicide under the *Criminal Code*.[152] Hence, the same legislation uses the notion of *reasonableness* for two different purposes – as part of the patient's medical assessment and as part of a practitioner or aid's belief.

The actual MAiD framework begins with section 241.1, which contains various definitions and modalities on how a practitioner may provide MAiD – by administering a substance or by prescribing a substance to a person for self-administration. Subsection 241.2(1) provides for the eligibility criteria, including the key requirement that the patient's request be an informed one, and subsection 241.2(2) defines what is meant by a *grievous and irremediable medical condition*.[153] Paragraph 241.2(2)(a) defines a *medical condition* as a serious and incurable illness, disease or disability. This provision is followed by paragraph 241.2(2)(b) to the effect that the person's medical condition must have reached the point of "advanced state of irreversible decline in capability". This language suggests that the person's capability must be so impaired that it is impossible for that condition to reverse itself. Paragraph 241.2(2)(c) states that the medical condition must cause suffering (physical or psychological) that is intolerable to the individual and "cannot be relieved under conditions that they

[152] *Ibid*., subsections 227(1) and (3) and 241(3) and (6).

[153] Subsection 241.2(1) of Bill C-14 can be summarized as follows: To receive MAiD, a person must a) be eligible to receive health care funded by a provincial or territorial government; b) be at least eighteen years of age and have the capacity to make his/her own health decisions; c) have a grievous and irremediable medical condition; d) give a voluntary request for the assistance, which request was not made under external pressure; e) give an informed consent after being informed of the means available to relieve his/her suffering, including palliative care. Subsection 241.2(2) reads: A person has a grievous and irremediable medical condition only if they meet all of the following criteria: (a) they have a serious and incurable illness, disease or disability; (b) they are in an advanced state of irreversible decline in capability; (c) that state of illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and (d) their *natural death has become reasonably foreseeable*, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining. [Emphasis added]

consider acceptable". How intolerable the suffering must feel and for how long it must be endured are unclear, but the two elements appear to be subjective to the individual. Nevertheless, observing that these criteria are met is part of the medical assessment, which would seem to fall within a medical or nurse practitioner's professional competence.

The conditions set out in paragraphs 241.2(2)(a) to 241.2(2)(c) set a high threshold for eligibility for MAiD. It is likely that any individual finding himself/herself in the severe debilitating circumstances described in these paragraphs could also satisfy the *Carter* criteria. Arguably, in themselves, they could constitute a properly-administered regulatory regime for the administration of physician-assisted death.[154] I would argue that these conditions have the effect of "decriminalizing" physician-assisted death in Canada. To this point, one may persuasively argue that the purpose of the legislation is to provide an exemption, or *decriminalize*, the offences of aiding a person to commit suicide within the context of medical assistance in dying. However, paragraph 241.2(2)(d) of *Bill C-14* contains language not found anywhere in *Carter*.

To meet the definition of a grievous and irremediable medical condition, a person's natural death must be *reasonably foreseeable*. Anyone finding himself/herself in the severe debilitating circumstances described in paragraphs 241.2(2)(a) to (c), but unable to meet the requirement of paragraph 241.2(2)(d), will not have access to MAiD. Such an individual, perhaps rendered immobilized and totally dependent on others as a result of the severe state of his/her disability will be

[154] *Carter*, above note 1, para 3.

reduced to the same two cruel choices that Ms. Taylor and Ms. Carter had invoked in their case.[155] Either the person continues to suffer until she dies a *natural death* or attempts to take her own life by violent or other means after deciding to bring an end to her suffering. For a person suffering a life-long medical condition, this is not likely to happen. It seems that Parliament either missed the Court's observation in *Carter* about "suffer[ing] until she dies of natural causes" or simply disregarded it. This is a statement about human suffering, not death. An individual, who is enduring intolerable suffering, will likely know when the right time to die has arrived. If they are able to do so, they will act on their wish to die with dignity at a time and in a manner of their own choice, rather than by cruel means.[156]

In Bill C-14, following the provision of a *grievous and irremediable medical condition* found in subsection 241.2(2), one finds the "robust safeguards" and the consequences for failing to comply with them. Among them are (i) the practitioner's opinion whether the patient meets the eligibility criteria under the Act, (ii) a patient's ability to sign a MAiD request, (iii) the competence (quality) of a person who may act as independent witness, including whether this person knows or believes herself/himself to be a beneficiary in the patient's Will or is an owner/operator of the health care facility where the medical care is provided, (iv) the independence between the practitioner administering the MAiD care and the one providing a second opinion (v) the reasonable knowledge, care and skill required to provide MAiD, (vi) the need to communicate the purpose of the substance prescribed to the pharmacist,

[155] *Ibid.,* at para 1.

[156] In *Rodriguez*, Sopinka J. (for the majority) stated in his Reasons: "That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law….and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn." *Rodriguez*, above note 8, at 588.

(vii) the assurance that a patient was given an opportunity to withdraw the request at any time, (viii) the availability of a *reliable means* for that patient to understand and communicate, in the event that the patient has difficulty communicating, (ix) the practitioner's reasonable knowledge, care and skill required to administer MAiD, and (x) the requirement that the Minister of Health make regulations regarding the collection of information of MAiD requests and inscriptions on death certificates, as needed (the "*impugned provisions*"). The failure to comply with these safeguards carries with it penalties punishable by indictment or summary conviction. The failures relate to the practitioner's knowledge of non-compliance to the safeguards, forgery, destruction of documents relating to MAiD requests and the filing requirements under the Act. The statute ends with amendments as well to the *Pension Act* and to the *Corrections and Conditional Release Act*.

As stated earlier, identifying the purpose of an Act or some of its impugned provisions may also be performed through examination of extrinsic evidence – Hansard or other accounts of the legislative process. In a document titled, *Legislative Background,* published concurrently with the coming into force of the legislation, the Department of Justice [DOJ] states that the legal effect of Bill C-14 is "to de-criminalize medical assistance in dying and leave further regulation of the practice to the provinces and territories should they so choose".[157] The document repeats the statement found in the Bill's preamble about how Parliament considers that a *reasonably foreseeable natural death* "strikes the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on the one hand,

[157] Government of Canada, represented by the Minister of Justice and Attorney General of Canada. *Legislative Background: Medical Assistance in Dying (Bill C-14, as Assented to on June 17, 2016)*, at 6. [*Legislative Background*] Any reproduction or references made in this paper to *Legislative Background*, which is an official work of the Government of Canada, has been done without any affiliation or endorsement of the Government of Canada.

and the interests of vulnerable persons in need of protection and those of society, on the other".[158] The document alludes to how the *Carter* Court ruled that the prohibition examined in the case was "not arbitrary because it "clearly helps achieve" the legislative objective of protecting vulnerable persons from being induced to die by suicide at a moment of weakness".[159] It also provides, in the DOJ's own words, a "contextual interpretation" of *Carter* and characterizes the Court's jurisprudence prior to *Carter* as its recognition that "Parliament is better placed than courts" to determine the proper balance between competing interests and conflicting social science evidence in matters of complex social policy.[160] The DOJ states: "Provided that Parliament's response falls within a range of reasonable alternatives, deference will be given".[161] In regards to Parliament's superior competence to balance the various interests among stakeholders, on multiple occasions in the *Legislative Background*, the DOJ states that "deference," and even a "high degree of deference would be owed" to the solution that Parliament ultimately proposes.[162] It argues that the "choices made by Parliament in a complex regulatory regime" would and even *will* garner such deference "provided that Parliament's response falls within a range of reasonable alternatives."[163] When read in isolation, the DOJ pursues, the Court's declaration in *Carter* describes a broad right, because it "does not expressly limit the right to dying individuals, but when read in its entirety the judgment points to "a more limited right and more limited understanding of the meaning of "grievous and

[158] *Ibid*., at 6.
[159] *Ibid*., at 4.
[160] *Ibid*., Annex E, at 32.
[161] *Ibid*., at 32.
[162] *Ibid*. at 5, 32. [On page 5 of *Legislative Background*, the term used is "owed"; on page 32, the term used is "given"].
[163] *Ibid*. at 32, 33.

irremediable medical condition"".[164] While I agree with the statement that the effect of *Carter* is not limited to individuals who are dying, it is the DOJ's subsequent commentary that is troubling and, arguably, inaccurate.

The DOJ contends that the right the Court described in *Carter* is limited to the factual circumstances of Ms. Gloria Taylor, the principal plaintiff, who "suffered from the fatal disease of ALS."[165] The government department maintains that the Court's declaration in *Carter* is responding "to the factual circumstances in this case" and quotes several passages from the judgment to suggest that "the Court limits its holding to "*Ms. Taylor and people like her*".[166] Moreover, it asserts that in *Carter* "medical assistance in dying is compared to forms of "end-of-life" care that are only available to dying individuals" and "concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making".[167] To make such assertions is to miss the essence of *Carter*. The DOJ's attempt to make the case that Parliament's legislative framework for MAiD in Bill C-14 is broader than the parameters set out in *Carter* for physician-assisted dying reflects a misunderstanding of *Carter*. In my opinion, the legislation is narrower than *Carter* in terms of eligibility to this medical care.

The *Carter* criteria described above are clear.[168] However, although *Legislative Background* is arguing that Bill C-14 provides for a broader right, it is apparently using language to justify the opposite, as seen in the following passage:

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[164] *Ibid*. at 31.
[165] *Ibid*., at 31. [Emphasis added]
[166] *Ibid*., at 31. [Emphasis in original]
[167] *Ibid*., at 31.
[168] The *Carter* criteria, above note 47.

> The medical condition that is causing the intolerable suffering does not need to be the cause of the reasonably foreseeable death either. In other words, eligibility is not limited to those who are dying from a fatal disease. Eligibility needs to be assessed on a case-by-case basis, with flexibility to reflect the uniqueness of each person's circumstances, but with limits that require a natural death to be foreseeable in a period of time that is not too remote. It should be noted that people with a mental illness or physical disability are not excluded from the regime, but will only be able to access medical assistance in dying if they meet all of the eligibility criteria.[169]

This passage merits a few remarks. First, if eligibility is not limited to those who are dying from a fatal disease, but the person must die within a *reasonably foreseeable* time frame, then who is the person to whom the statement is referring, if not an elderly person? Yet, this is one of the groups identified in the Bill's preamble against whom negative perceptions are to be avoided. The only conclusion one can possibly draw is that the legislation is directed to those *who are dying* or *perceived to be dying*. Second, how can one make the statement that a person with mental illness is "not excluded from the regime" and may access MAiD if they meet all of the criteria when this person cannot meet the competence requirement to make the request? A similar question applies to the person with physical disability. How is this person able to access MAiD if she/he is unable to meet the *reasonably foreseeable* criterion? These individuals cannot have access to MAiD. To add to the confusion, the passage appears to be in conflict with the Minister's own words when she said at the time of tabling the legislation that the law is intended for those who are "on a trajectory

[169] *Legislative Background*, above note 157, at 11. [Emphasis added]

towards death" and "[o]ur approach in no way denies the suffering experienced by persons who would not be eligible".[170] The contradictions are apparent.

The *Legislative Background* also refers to five reports based on Canadian consultations, among them the *Report of the Special Joint Committee on Physician-Assisted Dying*, the report of the *External Panel on Options for a Legislative Response to Carter v Canada*, and the *Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying*.[171] One of the five reports quoted, the summary report of the Canadian Medical Association, *A Canadian Approach to Assisted Dying*, is undated, but refers to dates of meetings held and surveys taken as late as July 2015, after the Carter decision was released but before Bill C-14's enactment.[172] In preparation of its *Draft Principles-based Recommendations for a Canadian Approach to Medical Aid in Dying* to be presented at its General Council meeting in August 2015, the CMA surveyed its members and held an online dialogue, which showed a high level of engagement. The *CMA Report, 2015* states that "results of recent polls show that CMA members are evenly divided on the issue of legalizing assisted dying, and a significant minority of respondents to these polls say they will participate in offering this service to their patients".[173] In a letter to the *Federal External Panel* dated October 19, 2015, the CMA expressed a deep concern that a "patchwork of differing and potentially conflicting approaches" could emerge across Canada to justify the establishment of a national legislative and regulatory strategy in response to *Carter*. The association annexed the CMA's *Principles-based Recommendations*

[170] See the Minister's direct remarks at notes 189 to 192, below.
[171] *Legislative Background*, above note 157, at 5.
[172] Canadian Medical Association. *A Canadian Approach to Assisted dying: CMA Member Dialogue: Summary Report* [*CMA Report, 2015*]. Any reproduction or references made in this paper to *Canadian Medical Association or CMA* has been done without any affiliation or endorsement of the organization.
[173] *CMA Report*, 2015, previous note, at 7.

for a Canadian Approach to Assisted Dying[174] that it wished to present to the External Panel. The CMA Recommendations included the Foundational Principles upon which the recommendations are based. Some of these are Respect for Patient Autonomy, Respect for Physician Values, Consent and Capacity, Clarity ("no grey areas"), and Protection of Patients (addressing issues of vulnerability and potential coercion). The document states that the CMA has reviewed *Carter* and "other jurisdictions' experiences" and offers numerous recommendations divided into five sections, namely, 1) Patient eligibility for access to assisted dying, 2) Patient eligibility for assessment in decision-making in assisted dying, 3) Role of the physician, 4) Responsibilities of consulting physician, and 5) Moral opposition to assisted dying.

The *CMA Recommendations* begin the first section with the statement that the patient must be a competent adult who meets the *Carter* criteria. This section also addresses the issues of *informed decision*, voluntariness and capacity. For instance, *informed decision* encompasses the topic of "certainty of death" after ingesting lethal medication; capacity includes the physician's obligation to detect signs of "potential vulnerability of the patient in these circumstances" and "exploring priorities, values and fears of the patient" and other treatment options; voluntariness includes the physician's assurance that the patient is not being unduly influenced or coerced by "family members, health care providers or others". The second section of the *CMA Recommendations* establishes a medical protocol consisting of three stages, including the number and nature of patient requests, waiting periods, further assessment of patient capacity and independence between the two – administering

[174] Canadian Medical Association, CMA's *Principles-based Recommendations for a Canadian Approach to Assisted Dying* [*CMA Recommendations*].

and consulting – physicians. It is interesting that the *CMA Recommendations* refer to the number of requests a patient may make depending on the patient's expected prognosis "(i.e. terminal vs non-terminal illness)".[175] It seems the CMA was disposed to have its members provide MAiD to patients regardless of whether or not they were *terminally ill*. The third section of the CMA Recommendations, Role of the physician, states that the physician must be *trained* to provide this kind of care and must comply with all documentary and reporting requirements. The fourth section, Responsibilities of the consulting physician, requires the second physician to conduct his/her own medical assessment and document it. The fifth section, Moral opposition to assisted dying, addresses issues of moral opposition by the health care facility and the conscientious objection by the physician. None of the CMA's recommendations uses the expression "reasonably foreseeable natural death".

Another report to which *Legislative Background* refers is the one issued by the Special Joint Committee on Physician-Assisted Dying, which was required "to review the report of the *External Panel on Options for a Legislative Response to Carter v Canada*,.....to consult with Canadians, experts and stakeholders, and make recommendations on the framework of a federal response on physician-assisted dying that respects the Constitution…[and] the *Charter of Rights and Freedoms* and

[175] The CMA Policy adopted in May 2017 after Bill C-14's enactment does not use language such as *terminal vs non-terminal illness* in reference to MAiD. Instead, it refers to what MAiD encompasses and does not encompass. Under the policy, MAiD encompasses the assessment of a patient for eligibility for assistance in dying, deliberation with the patient, accompaniment of the patient through the process of deciding and, if so chosen by the patient, the provision of assistance in dying, which refers to: a) The administering by a medical practitioner or nurse of a substance to a person, at their request, that causes their death; or b) The prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their death. According to the Policy, MAiD does not encompass Palliative care and Continuous palliative sedation therapy. The policy is available at: https://www.cma.ca/Assets/assets-library/document/en/advocacy/EOL/cma_policy_medical_assistance_in_dying_pd17-03-e.pdf#search=Medical%20assistance%20in%20dying.

the priorities of Canadians".[176] The committee consisted of members representing the Senate and the House of Commons, and issued its final report in February 2016. The report states that *Special Joint Committee* held sixteen hearings, heard testimony from sixty-one witnesses, and received over one hundred submissions.[177] It was to consult broadly and "review models used or developed in other countries."[178]

Among the *Special Joint Committee*'s twenty-one recommendations, none adverted to the notion of a "reasonably foreseeable natural death". However, two of the recommendations are noteworthy. The first is that MAiD be made available to "individuals with terminal and non-terminal grievous and irremediable medical conditions that cause enduring suffering that is intolerable to the individual in the circumstance of his or her condition,"[179] and the second is that capacity of a person requesting MAiD "to provide informed consent should be assessed using existing medical practices, emphasizing the need to pay particular attention to vulnerabilities in end-of-life circumstances."[180]

The first recommendation respects the parameters in *Carter* integrally. The second recommendation proposes the use of *existing medical practices* to assess informed consent and detect vulnerabilities in *end-of-life* situations. It is based on testimony from several expert witnesses, all of whom explained their understanding of *vulnerability* and their approach as to how it could be managed. For example,

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[176] Canada. House of Commons. Special Joint Committee on Physician-Assisted Dying, *Medical-Assistance in Dying: A Patient-Centered Approach.* Ottawa: Speaker of the House of Commons, 2016 [*Special Committee Report*], at 2. Any reproduction or references made in this paper to *Special Committee Report*, which is an official work of the Government of Canada, has been done without any affiliation or endorsement of the Government of Canada.
[177] *Ibid.,* at 2.
[178] *Ibid*., at 2. The report refers to the following government journals to reflect the motions passed in the House of Commons and the Senate: House of Commons, *Journals*, No 7, 42nd Parliament, 1st Session, 11 December 2015, at 50; Senate, *Journals*, No. 6, 42nd Parliament, 1st Session, 11 December 2015, at 56.
[179] *Ibid*., at 13, Recommendation 2. [Emphasis added]
[180] *Ibid*., at 13, Recommendation 5.

constitutional law expert and member of the *External Panel on Options for a Legislative Response to Carter v Canada*,[181] Me Benoît Pelletier, testified that *vulnerability* is a complex and subtle state in which any person can find herself "when personal autonomy, status, wealth, and well-being are compromised in any significant way."[182] He suggested that, although a *vulnerable* state does not disqualify a person from seeking MAiD, it does put the person at risk of being induced.[183]

Jennifer Gibson of the *Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying*,[184] whose work it was to complement the work of the federal government, stated that properly-trained health care professionals should take *vulnerability* into account when making assessments, but in itself should not act as a barrier to access MAiD.[185] The main recommendations of the *Expert Advisory Group* provided for (i) the development of strategies to have government collaboration, including the creation of a pan-Canadian commission, (ii) the study of palliative and *end-of-life* care, (iii) an amendment to the *Criminal Code* allowing MAiD to fall under the direction of a physician or nurse practitioner, (iv) the provision that eligibility for MAiD is to be based on competence and not age, and (v) a preference against the requirement for a mandatory period between the time of a request and

[181] Established by the Ministers of Justice and Health, the initial mandate of the *External Panel on Options for a Legislative Response to Carter v Canada* [*External Panel*] was to consult with medical authorities, interveners in *Carter* and Canadians as well as propose options for a legislative response. Under the newly-elected Canadian Government, the mandate was extended by one month to December 15, 2015 and no longer included proposing legislative options. Any reproduction or references made in this paper to *External Panel* or its report, which is an official work of the Government of Canada, has been done without any affiliation or endorsement of the Government of Canada.

[182] *Special Committee Report*, above, note 176. Evidence of Benoît Pelletier, January 26, 2016, at 16.

[183] *Ibid*. at 16.

[184] The *Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying* was created in August 2015 by the provinces and territories except for Quebec and British Columbia. [*Expert Advisory Group*]. Any reproduction or references made in this paper to *Expert Advisory Group* has been done without any affiliation or endorsement of this group or government authority to which it may be affiliated.

[185] *Ibid*. *Special Committee Report*, above, note 176. Evidence of Jennifer Gibson, at 16.

the administration of MAiD.[186] None of the recommendations suggested a "reasonably foreseeable natural death".

Perhaps, the most revealing testimony was that of Me Joanne Klineberg, senior counsel at the DOJ, which authored the *Legislative Background*, when she adverted that only medical practitioners should assume the responsibility to detect evidence of mental competence and vulnerability. In referring to the Court's reasons in *Carter*, she stated:

> It was because the [C]ourt had expressed confidence that Canadian physicians can assess both mental competence and the vulnerability of a person at the individual level that it felt the absolute prohibition was unconstitutional and you could provide physician-assisted dying to those who wanted it while protecting the vulnerable.[187]

In Bill C-14, the medical or nurse practitioner plays a central role in the administration of MAiD. However, in my opinion, Parliament chose to limit that role by imposing the legislative requirement of a *reasonably foreseeable natural death*. The underlying premise is that it is "better placed than courts" to devise policy on how to protect the vulnerable and the weak who are at risk of being induced. Parliament appears to have understood that a "properly administered regulatory regime" means that the best way to protect certain individuals is by denying them access to MAiD through a legislative constraint simply because they are not expected to die within the prescribed time frame. Underpinning the policy is the perception that these individuals are *vulnerable* – individuals who must be protected from being induced to

[186] *Ibid*., at 9.
[187] *Ibid*. Evidence of Joanne Klineberg, at 16.

end their lives in moments of weakness. Since they are *not dying*, the best way to avoid errors and abuse concerning them is by imposing a general legislative restriction – the one found in paragraph 241.2(2)(d). As will be seen from the remarks of the Minister of Justice below, this was a deliberate policy choice made by the government.

In her remarks before the House of Commons when tabling the legislation, Minister of Justice, Jody Wilson-Raybould, stated that the "bill that is before the House today is the culmination of all these efforts."[188] The efforts to which she was referring were the reports of the *Special Joint Commission*, the federal *External Panel* and the provincial *Expert Advisory Group*. She announced that, under the Bill, MAiD would be provided to patients "who are suffering intolerably from a serious medical condition, and whose death is reasonably foreseeable given all of their medical circumstances, can have a peaceful death and not be forced to endure a slow and painful suffering."[189] The Minister clarified the expression "reasonably foreseeable natural death" with the following passage:

> To be clear the bill does not require that people be dying from a fatal illness or disease or be terminally ill. Rather, it uses more flexible wording; namely, that "their natural death has become reasonably foreseeable, taking into account all of their medical circumstances". This language was deliberately chosen to ensure that people that are on a trajectory toward death in a wide range of circumstances can choose a peaceful death instead of having to endure a long or painful one.

[188] *HOC Debates*, April 16, 2016, above note 86.
[189] *Ibid*.

> As the Supreme Court of Canada noted, Gloria Taylor was dying from a terminal illness and would be eligible. So too would Kay Carter, who was 89 and according to the [C]ourt suffered from spinal stenosis, which itself does not cause death but can become life-threatening in conjunction with other circumstances such as age and frailty.[190]

In this passage, the Minister is articulating the government's position that only those individuals, who are suffering intolerably from a grievous and irremediable medical condition and expected to die ("*on a trajectory toward death*") within a *reasonably foreseeable* future, are eligible for MAiD. The cause of their death need not be their medical condition. However, they must be dying somehow. With these words, the Minister is sending the message that entitlement to MAiD under Canada's legislation is dependent on terminality of illness or age (i.e., the elderly). This is the meaning of a *reasonably foreseeable natural death*. The Minister maintains that these people "can choose a peaceful death instead of having to endure a long or painful one". Moreover, it is the government's position that the legislation is intended to be "more flexible" than the standards set out in *Carter*. However, in the following passage, the Minister appears to be suggesting the opposite:

> Our approach <u>in no way denies the suffering experienced by persons who would not be eligible</u>. In partnership with the provinces and territories, <u>we will do what we can</u> to improve the quality of health services and other supports that are needed to enable such individuals to live a better quality of life.[191]

[190] *Ibid.*
[191] *Ibid.* [Emphasis added]

The Minister's words are very revealing. The government concedes that it does not "deny" the suffering of those individuals who would be eligible for MAiD, but for their death not approaching a *reasonably foreseeable* future. However, the government justifies this position by stating that the fate of these individuals will be left to doing "what we can to improve the quality of health services….to enable [them] to live a better quality of life". Exactly what the plan is in partnership with the provinces and territories is not made clear, but there appears to be a promise extended. These words illustrate that the government is consciously and intentionally causing certain individuals to suffer because it (the government) deems this group of individuals to be *vulnerable* and it is *better placed* than courts and medical professionals to manage their fate. This position is contrary to the essence of *Carter*, and, as I argue below in sections (b) and (c) of this Part, contrary to sections 7 and 15(1) of the Charter. Perhaps, the most revealing of the Minister's remarks at the time of tabling the legislation are the following:

> We have listened to those who say that permitting medical assistance in dying as a response to suffering in life, as opposed to suffering in the dying process, will put already vulnerable individuals at greater risk. We recognize that medical assistance in dying will in many respects fundamentally change our medical culture and our society. It is appropriate in this context to focus our attention on facilitating personal autonomy in the dying process where the risks to the vulnerable are manageable.[192]

The reason for including the *reasonably foreseeable natural death* criterion in the legislation is explicitly stated in this passage. Parliament has apparently listened

[192] *Ibid*. [Emphasis added]

to “those who say” that individuals who are suffering in life (as opposed to those suffering in the dying process) are *vulnerable* and would be at greater risk, from the government’s perspective, to be coerced or manipulated into seeking MAiD. In the government’s view, these individuals should not be entitled to this medical care. The Minister does not say who the interveners are that influenced this decision, but she does refer to the *Canadian Medical Association* in her address.

From the foregoing analysis, certain observations may be gleaned. Using general, if not vague, language, Parliament claims that the notion of *reasonably foreseeable natural death* “strikes the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on the one hand, and the interests of vulnerable persons in need of protection and those of society, on the other”. Parliament claims there is a need to prevent errors and abuse in the provision of MAiD to those who are vulnerable. *Suicide* is described as a public health concern, but no individual or group of individuals is identified to support this concern. The preamble does not specify by what policy the federal government intends to address this social issue. The Minister’s words indicate that Parliament is aware that there are individuals who will suffer because they cannot meet the criterion of a *reasonably foreseeable natural death*. Parliament has implemented a social policy as a means to *protect* certain individuals to the detriment of other individuals found within the same group of persons with disabilities. Parliament also makes a commitment to work with provinces, territories and civil society to facilitate access to palliative and end-of-life care for individuals, individuals with some form of mental illness, and indigenous patients. In my opinion, although mentioned in the preamble, but not stated directly in

the legislative provisions, the intent behind paragraph 241.2(2)(d) is to ensure that MAiD is made available only to those individuals who are at the end-of-life or in palliative care.

Numerous other provisions identified as *robust safeguards* address the relationship between the medical practitioner and the MAiD patient thereby causing an *overflow* into the area of health. For example, the legislation seeks to regulate professional conduct, pension benefits and insurance contracts. In the next section, I examine what is the effect of Bill C-14's *impugned provisions*.

2) The Effect of the Legislation

The tension between the values discussed above in Part III (*The Evolution of Values and The Impact on Rights*) could be seen in both the preamble and the body of Bill C-14. The protection of individuals, who are suicidal for any number of reasons figures prominently among the concerns identified above. Parliament seeks to avoid errors and abuse in the administration of MAiD and protect vulnerable persons, who could be induced to end their lives in moments of weakness. While it is in society's interest to prevent the incidence of suicide among individuals who feel the need to end their lives for non-medical related reasons, I would argue that this is not a valid exercise of Parliament's criminal law power. However, to prevent errors and abuse, Parliament considered that the best way to accomplish this objective is by imposing a policy that an individual must be nearing a *reasonably foreseeable natural death*. Individuals who have a grievous and irremediable medical condition, which does not include a reasonably foreseeable natural death, will be unable to end their lives with medical assistance in dying, and might be unable to end their lives on their own if

their disability prevents them to do so. This was the very issue examined in *Carter*. They will be forced to continue to live in severe debilitating medical circumstances. How the legal requirement of paragraph 241.2(2)(d) "protects" them from a life of intolerable suffering remains an unanswered question.

Also, Parliament considers that there are certain individuals like the elderly, ill and disabled whose quality of life could be negatively perceived and that such negative perception could impact "the inherent and equal value" that they have like all other persons. Given the reference to the "elderly", what impact should the age of a MAiD patient approaching 80 years of age have on the professional's decision to administer MAiD to her? Is the patient more or less "vulnerable" than a patient who is 30 years of age? In *A.B.*, the Ontario Superior Court of Justice decided that the death of an almost 80-year old woman suffering from osteoarthritis, which she had battled since her forties and caused her uninterrupted and excruciating pain had become *reasonably foreseeable*.[193] In this case, a physician, who had initially accepted this patient's MAiD request subsequently changed his mind, because a predecessor physician did not consider the patient's death to be *reasonably foreseeable*. The wavering physician feared that he would be charged with murder under Canada's *Criminal Code*. Perell J. reasoned that the patient did meet the requirement of paragraph 241.2(2)(d). The physician who had agreed to provide the medical assistance in dying changed his mind because one of the physicians consulted did not conclude that A.B.'s death was reasonably foreseeable and even though a subsequent physician diagnosed A.B. that she met this requirement. Hence,

[193] *A.B. v. Canada (Attorney General*, 2017 ONSC 3759, [2017] OJ No. 3140 [*A.B.*] [Decision released on June 19, 2017]

according to the court, the problem was the physician's perception of what the expression "reasonably foreseeable natural death" means, and not the legislation.

A.B. illustrates how an individual was more likely or "better-positioned" to show she had a *reasonably foreseeable natural death* because her age was a consideration in the judge's final decision. After quoting the same passage from *Legislative Background* as the one noted above,[194] and an excerpt from the Glossary to Bill C-14, the judge said:

> There may be cases of doubt about the ambit of s. 241.2(2)(d), but AB's case of an almost 80 year old woman in an advanced state of incurable, irreversible, worsening illness with excruciating pain and no quality of life is not one of them. Nor is hers a case where she can say that the federal government has enacted legislation that does not go far enough in respecting her constitutional right to choose a medically assisted death.[195]

I would suggest this should not be the proper approach to determine whether a person should have access to MAiD. The "elderly" is one of the three groups of individuals (the ill and persons with disabilities are the other two) mentioned in the Bill's preamble against whom Parliament wishes to avoid encouraging negative perceptions. Why was *age* a consideration in *A.B.*? In their article, *Interpreting Canada's Medical Assistance in Dying Legislation*, Professors Downie and Chandler opine that Justice Perell's "…judgment makes it clear that the determination of the time window for anticipated death (the "when" interpretation) may be helpful but is not required to reach a determination that natural death "has become reasonably

[194] See above note 169.
[195] *A.B.*, above note 193, at 87. In *A.B.,* the court was unwilling to simply grant immunity from criminal liability to the physician, who refused to provide MAiD due to a fear of prosecution for murder.

foreseeable"".[196] I would argue that *age* played an important part in *A.B.* in determining the proximity of the patient's death. How does the legislation assist an elderly person if she finds herself in the same circumstances as the ones in *A.B.* and in fact she is being induced into ending her life during a moment of weakness? Would she receive the law's protection? Would the government's response be that it is up to the medical or nurse practitioner whose ethical and legal obligation it is to evaluate this issue to ensure that no inducement is occurring? Clearly, the language in Bill C-14 caused the medical practitioner in *A.B.* to act prudently, and, perhaps, err on the side of caution. He refused a MAiD request even though he was convinced that the claimant in *A.B.* had met all the requirements. He was not at ease with administering MAiD to A.B. because another physician did not consider the patient's death to be *reasonably foreseeable* and even though a subsequent physician diagnosed A.B. with meeting this requirement. According to Professors Downie and Chandler, the interpretation challenges regarding this provision in the legislation are significant. They state that: "Two persons in the same circumstances may be treated differently (one allowed access [to MAiD] and one denied it) simply because their providers or their counsel interpret the legislation differently".[197] The authors propose two interpretations for the expression *reasonably foreseeable natural death*, either one of which is sufficient to meet the definition. First, it could be characterized as a *temporal proximity*, that is, there is a nearness of natural death and no need "to predict the length of time the patient has remaining".[198] Second, it could also be

[196] Jocelyn Downie & Jennifer A Chandler, *Interpreting Canada's Medical Assistance in Dying Legislation,* IRPP Report March 2018, at 11. [Downie, *Canada's MAiD*]
[197] Downie, *Canada's MAiD*, previous note, at 6.
[198] *Ibid.*, at 6.

characterized as a predictable cause of natural death to determine reasonable foreseeability.

For some persons with severe disabilities, the threshold of paragraph 241.2(2)(d) cannot be met and, therefore, they will not have access to MAiD even though they can meet the other requirements of paragraphs 241.2(2)(a) to (c). For example, how would patients affected by cerebral palsy or *poliomyelitis*, whose prognosis for life remains unknown, fare under the *reasonable foreseeability* criterion? Indeed, certain grievous and irremediable medical conditions that cause intolerable suffering to a person will result in death occurring in a future considered remote. Therefore, if by *reasonably foreseeable* natural death is meant "not too remote", then the threshold of paragraph 241.2(2)(d) will not be met. For example, how would patients suffering from cerebral palsy or from *poliomyelitis* fare under the *reasonable foreseeability* criterion? The case of *Truchon et Gladu* is a test of the criteria of *reasonably foreseeable* death used in Bill C-14 and *end-of-life* used in Quebec's *Act Respecting End-of-Life Care*.[199] Both claimants, Jean Truchon, who suffers from cerebral palsy and Nicole Gladu from *poliomyelitis*, argue that these requirements violate their constitutional rights to die with dignity under section 7 and their right to equality under section 15(1) of the *Charter*.

In *Truchon and Gladu*, claimant, Jean Truchon, alleges that he has been suffering from spastic cerebral palsy since birth. At the time he filed his claim in June 2017, Mr. Truchon was 49 years of age. Throughout his life, his cognitive functions have remained intact. Until 2011, he was able to use his left arm – his only

[199] *Jean Truchon and Nicole Gladu v Procureur général du Canada (Canada)* and *Procureur général du Québec (Quebec)* [Quebec Superior Court, district of Montreal, file number: 500-17-099119-177 [*Truchon et Gladu*]. *An Act Respecting End-of-Life Care*, above note 13.

functioning member – to operate his wheelchair, a device that he has had since childhood. Until then, he was able to lead an autonomous life, including play wheelchair hockey. Towards the end of 2011, Mr. Truchon began to experience a loss of sensitivity, or paresthesia, in his left arm resulting in the total loss of this member's use. In or about March 2012, two physicians issued separate medical reports regarding Mr. Truchon's condition: the first stated that the patient was beginning to suffer from *spasmodic torticollis*, a neurological condition causing an involuntary contraction of neck and shoulder muscles; and the second indicated that he was also suffering from a severe case of *spinal stenosis*.[200] In his claim, Mr. Truchon alleges that, at this time, he began to reflect on his life. Specifically, he felt that he could not live a life of total dependence on others and considered several ways to end his life such as committing suicide at home, including starving himself to death, strolling through a park where he would try to purchase a lethal dose of heroin, and further imagined himself rolling his wheelchair in front of an oncoming vehicle. Mr. Truchon alleges that his degenerative disease, for which there is no treatment or hope of improvement, is causing him to feel like a prisoner in his own body.[201] Yet, both of Mr. Truchon's medical practitioners refused his MAiD request on the basis that his medical condition did not meet Bill C-14's *reasonably foreseeable death* requirement or Quebec's end-of-life requirement.[202] Hence, the irony here is that this individual would qualify for MAiD under *Carter's* authority, but does not

[200] It may be recalled that the facts in *Carter* showed that Kay Carter also suffered from this medical condition. However, by the time the British Columbia Supreme Court heard the matter, Ms. Carter had travelled to Switzerland for physician-assistance in dying. *Carter*, above note 1, at para 17.
[201] *Truchon et Gladu*, above note 199, Paragraphs 51 and 52 of the Demande introductive d'instance en jugement déclaratoire [*Statement of Claim*].
[202] *Act Respecting End-of-Life Care*, above note 13, article 26 (See note 213, below). In his claim, Mr. Truchon challenges the constitutionality of the criteria found in both the federal and Quebec provincial statutes, respectively.

qualify for MAiD under either the federal legislation enacted in response to *Carter* or the Quebec legislation.

In the same case, Nicole Gladu, a 71 year-old university-educated woman, alleges that at the age of four, she contracted a severe case of *poliomyelitis*, which rendered her comatose for four months. The diagnosis at the time suggested that she suffered from a serious case of thoracic scoliosis resulting in her having a curved spinal column and only a partial lung functioning. At the age of 10, she underwent corrective surgery in her spine, but the surgery was only partially successful. In 1992, a physician diagnosed Ms. Gladu with post-poliomyelitis degenerative muscular syndrome. According to this medical report, the physician states that the patient's neurological condition is symptomatic of progressive neuromuscular weakness suffered by victims of paralyzing poliomyelitis. A second physician confirmed the diagnosis of post-poliomyelitis syndrome, but added that this patient also suffered from a severe case of restrictive pulmonary disease attributable to thoracic scoliosis, the spinal curvature mentioned above. This condition has left her with a lung capacity of just 34% when seated.[203]

In March 2017, a neurologist confirmed the earlier diagnosis of neuromuscular degeneration consistent with post-poliomyelitis syndrome and further stated that this disease will continue to progress. Nevertheless, this physician concluded that even though Ms. Gladu is suffering from a grievous and irremediable medical condition, for

[203] Ms. Gladu asserts in her pleadings that she has come to hate her body as one could hate another person. She dreams of *casser le fil* ("cutting the cord": author's translation) whenever life no longer provides with her any satisfaction. On September 7, 2010, Ms. Gladu filed a brief before the Special Committee of Quebec's National Assembly on the question of dying with dignity. In it, she states : «La dignité, j'en suis convaincue, passe par le respect de l'autodétermination d'une personne.» [I am convinced that a one's dignity begins with respect for a person's self-determination: author's translation] *Truchon et Gladu*, above note 199, Paragraph 104.

which there is no treatment, her death is not *reasonably foreseeable,* in the short term.[204] In a separate evaluation, a psychologist observed that Ms. Gladu did not suffer from depression, but presented symptoms of a person who is suffering intolerable psychological pain due to the increasing loss of her autonomy and total dependence on others. In spite of these diagnoses, both physicians concluded that Ms. Gladu meets all of the requirements for medical assistance in dying, except for the *reasonably foreseeable death* found in paragraph 241.2(2)(d) of the *Criminal Code*. As in Mr. Truchon's claim, Ms. Gladu's two physicians also concluded that she did not meet Quebec's *end-of-life* requirement. It should be noted that the first medical practitioner perceived the expression *reasonably foreseeable* to mean *short term*. By the time she filed her claim in June 2017, Ms. Gladu had lost a significant level of her motor skills and strength. As of the time of filing, she continued to experience permanent discomfort and pain in her back and right hip area, and has lost the use of her upper left side. Moreover, she suffers from anxiety caused by living in an adaptive environment and depending totally on others.

Clearly, by seeking to protect those individuals who might be induced to end their lives in moments of weakness, Parliament has restricted access for other individuals who genuinely need MAiD. By virtue of this legal requirement, Parliament has lumped together persons with severe disabilities, who might be induced to end their lives in moments of weakness, *and* persons who show no signs of coercion, undue influence or ambivalence. The former would not be entitled to MAiD while the latter would. This is the effect of paragraph 241.2(2)(d). I maintain throughout this

[204] In Ms. Gladu's claim, one could read the physician's opinion: "son décès n'est pas raisonnablement prévisible, à court terme" [Emphasis added]. *Truchon et Gladu*, above note 199, Paragraph 107. The claim is currently before the Quebec Superior Court.

paper that *Carter* stands for the proposition that it is the grievous and irremediable medical condition causing enduring intolerable suffering, and not a *reasonably foreseeable* death, nor imminent death, nor even a terminal or fatal illness, that entitles a person to physician-assisted death. Under *Carter*, *death* need not be anywhere near for a person to be entitled to physician-assisted death. As seen earlier, the evidence before the Court in *Carter* showed that both Ms. Taylor and Ms. Carter had been reduced to the same two cruel choices – either she continues to suffer until she dies a *natural* death or she attempts to take her own life prematurely, often by violent means, if she can find a way. The essence of *Carter* is about human suffering, and not death, which Parliament seems to have overlooked.

The only proper way to determine whether a person is vulnerable or traversing a moment of weakness is by making *vulnerability*, and not the proximity of a person's natural death, the focus of the medical assessment. It is not by establishing one's proximity to his/her natural death that a diagnosis regarding *vulnerability* can be accurately made. Depending on whether this is perceived to be a medical or a legal question – I would argue the former – either the medical professional or the court should be left to conduct this assessment on a case-by-case basis. A person's autonomy and physical integrity are too important to be swept by a social policy that bears an uncertain dimension. What is at issue here is whether the patient is *vulnerable* so as to vitiate the *informed consent* that a medical practitioner is ethically bound to evaluate. Clearly, this is an issue concerning health and falls under provincial jurisdiction.

Moreover, I argue the position that it is the grievous and irremediable medical condition that entitles a person to MAiD, even though the Court in *Carter* uses terms such as "fatal" neurodegenerative disease and "advanced-stage" cancer in several instances in the Reasons for Judgment.[205] To say otherwise is to misunderstand *Carter*. On the other hand, Bill C-14's proposition seems to be that a person is entitled to MAiD only if death occurs, *no matter what the cause*, within a time frame identified as a *reasonably foreseeable* future, either by natural causes or as a result of the grievous and irremediable medical condition. Bill C-14, therefore, is a narrowing of the *Carter* holding.

The prohibitions in sections 14 and 241(1) against consent and against assisting a person with his/her death by suicide give the statute a prohibitory character. However, the Bill extends beyond the prohibition of assisting another person to die by suicide and into the area of medical assistance in dying. The *impugned provisions* described earlier represent an *overflow* into the area of health care normally occupied by the provinces. These impact the minute practice of medicine and the regulation and management of the medical care involved in the provision of MAiD. The nature and the seriousness of the federal incursion into provincial powers is deep. In my opinion, to argue that the Act addresses a medical protocol, which is *incidental* to its dominant purpose – to prohibit the conduct of assisting another person to die by suicide – is to assert a flawed argument. Although Parliament may employ both a *penal* and *regulatory* form to enact criminal legislation, Bill C-14 is legislation where, because some of the provincial heads of power in

[205] *Carter*, above note 1, at paras 11 and 14, respectively. [Quotes added].

question are not clearly defined, the courts have a role in determining the extent of the *overflow* of Parliament's criminal law power into those powers.

iii) Identifying the Head of Power of the Matter (The *Classification* Stage)

To reach the conclusion that a law is *intra vires*, the *main thrust* of the legislation must fall within a head of power assigned to the adopting legislative body. On the issue of *policy*, the Court in *Securities Reference* confirmed that it is not which legislative body that offers the best policy option that should be vested with the power to enact with respect to the matter in question, but to which body the power was assigned under the constitution's division of powers scheme. As seen above, in order to fall under the criminal law head of power, a law must meet three criteria. It must have (1) a prohibition, (2) a penalty, and (3) a criminal law purpose.[206] Although morality, ethics and security may play an important role in defining the scope of criminal law power, there must also be "a real evil and a reasonable apprehension of harm" failing which the scope of this power would be "unlimited and uncontrollable".[207] Even where public health is invoked as a basis to uphold a criminal law, courts show less deference if the risk to health – usually done through empirical studies – is not shown.[208]

Several of Bill C-14's provisions could be the subject of a court challenge. This would mean first and foremost, paragraph 241.2(2)(d), which is the provision articulating that a person's natural death must be *reasonably foreseeable* in order to meet the definition of a *grievous and irremediable medical condition*. I would argue

[206] *Constitutional Law*, above note 9, at 18-4 and 18-5. *Margarine Reference*, above note 141 [Privy Council]. *AHRA Reference*, above notes 88 and 141, at para 233. See also *Firearms Reference*, above note 141.
[207] *AHRA Reference*, above note 88, at para 234, 240.
[208] *Ibid.*, at para 241.

that the provisions identified above as *impugned provisions* could also be the subject of a court challenge based on the *division of powers* analysis seen above. The safeguards identified as (i) the professional relationship between the practitioner and the patient (ii) a patient's ability to sign a MAiD request and given an *informed consent* (iii) the capacity of a person who may act as independent witness (iv) the independence between the administering practitioner and the consulting practitioner providing a second opinion, (v) the reasonable knowledge, care and skill required to provide MAiD (vi) the need to communicate to the pharmacist the purpose of the substance prescribed (vii) the assurance that a patient was given an opportunity to withdraw the request at any time (viii) the availability of a *reliable means* for a MAiD patient to understand and communicate (ix) the practitioner's reasonable knowledge, care and skill required to administer MAiD, and (x) the requirement that the Minister of Health make regulations regarding the collection of information of MAiD requests for the purpose of establishing a national information collection scheme seeking to regulate all aspects of this form of medical care, including inscriptions on death certificates, as needed. The failure to comply with the safeguards carries with it penalties punishable by indictment or summary conviction separate and apart from the penalties associated with the counselling, abetting or aiding provisions. The penalties attaching to the *impugned provisions* give them a prohibitory character. The failures relate to the practitioner's knowledge of any compliance irregularities, forgery, destruction of documents relating to a MAiD request and the filing requirements under the Act.

Viewed as a whole, the legislation seems criminal in character. However, the *impugned provisions* of the law seek to regulate all aspects of medical practice in relation to medical assistance in dying. They could be classified as attaching to two areas of provincial competence – the management of health care, specifically, the provision of medical care in dying, in hospitals and health care facilities and the practice of medicine, specifically, in relation to the issues of *informed decision*, capacity, independence of the witnesses and the consulting physician, and detecting coercion and undue influence for vulnerability. These matters fall within the provincial powers of property and civil rights and merely local or private nature. Under section 241(1) of Bill C-14, counselling and abetting a person to die by suicide remain criminal offences under any circumstances, and aiding a person to die by suicide is permitted only within the context of the administration of MAiD. Therefore, the *evil* – to protect vulnerable people who might be induced to die by suicide in a moment of weakness – that Parliament is attempting to address is adequately covered by sections 14 and 241(1). Clearly, the third criterion – a criminal law purpose – is lacking in order for the law to fall under the criminal law head of power. Moreover, as previously stated, the federal government's recourse to its criminal law powers cannot be based solely on concerns to establish national standards for consistency or efficiency.[209] The main thrust of the *impugned provisions* in Bill C-14 remains essentially the provision of health care, specifically, medical assistance in dying.

To be consistent with the Court's jurisprudence, the principle of *subsidiarity* requiring that the legislative body that is closest to the citizens should be competent

[209] *AHRA Reference*, above note 88, at paras 287, 244.

to legislate with respect to the significant public health issue identified in the preamble as *suicide*. This would mean the provincial legislatures. Also, the Court in *Securities Reference* made clear that it is not which legislative body that offers the best policy option that should be vested with the power to enact with respect to the matter in question, but to which body the power was assigned under the constitution's division of powers scheme. In my opinion, Bill C-14 represents Parliament's "thinly-disguised attempt to regulate"[210] a particular area of health care – medical assistance in dying – which it has decided to limit to those who are *dying anyway*, and not to members of the larger group of individuals, who are suffering intolerably as a result of a grievous and irremediable medical condition. In my opinion, the impugned provisions of the MAiD protocol can be challenged on the *federalism* ground.

iv) Quebec's *La Loi concernant les soins de fin de vie* (An *Act Respecting End-of-Life Care*)

Following lengthy consultations since 2009 before its *Select Committee on Dying with Dignity,* on December 10, 2015, Quebec passed into law *An Act Respecting End-of-Life Care*.[211] Because criminal law is a core power falling under federal jurisdiction, the Quebec legislature could not enact legislation whereby a person may assist another with his/her death by suicide even in the context of medical assistance. However, the area of medical assistance in dying is an area of concurrent jurisdiction in which both Parliament and the provinces may validly

[210] *Securities Reference*, above note 100, at para 34.
[211] *Act Respecting End-of-Life Care,* above note 13.

legislate under the Canadian Constitution's division of powers scheme.[212] The Quebec legislature was able to achieve its objective of permitting medical assistance in death in the province by associating this practice with *palliative* or *end-of-life* care.[213] Framed this way, the practice could be identified as the delivery of health care service thereby falling within the province's protected core power over health.[214] The Quebec legislature exercised prudence in its formulation of the permissive framework since the *Criminal Code* provisions (sections 241(1)(a) and(b) and 14) at the time of its sanction on June 10, 2014 prohibited any form of assistance to die regardless of the assisted person's state of health. The definition of *medical aid in dying* found in subsection 3(6) of the Act refers to care consisting of medication or substance administered by a physician to a person, who is at end-of-life for the purpose of relieving this person's suffering.[215] The notion of "end of life" is not defined anywhere in the Act.

Where the legislation fails, however, is in its inconsistency with the *Carter* holding. It may be recalled from the discussion of the *Carter* decision in Part III above that the Court in that case declared that the prohibition against assisted suicide in the *Criminal Code* is void insofar as it deprived a competent adult person of physician-

[212] *Carter*, above note 1, at para 53. Under the *Constitution Act, 1867*, criminal law matters fall within Parliament's jurisdiction under s. 91(27) and health matters fall within provincial jurisdiction under ss. 92(7), (13) and (16). *Constitution Act, 1867,* above note 11.

[213] *Act Respecting End-of-Life Care,* above note 13. Article 26 of the statute reads: Only a patient who meets all of the following criteria may obtain medical aid in dying: (1) be an insured person within the meaning of the Health Insurance Act (chapter A-29); (2) be of full age and capable of giving consent to care; (3) be at the end of life; (4) suffer from a serious and incurable illness; (5) be in an advanced state of irreversible decline in capability; and (6) experience constant and unbearable physical or psychological suffering which cannot be relieved in a manner the patient deems tolerable. The patient must request medical aid in dying themselves, in a free and informed manner, by means of the form prescribed by the Minister. The form must be dated and signed by the patient. The form must be signed in the presence of and countersigned by a health or social services professional; if the professional is not the attending physician, the signed form is to be given by the professional to the attending physician. [Emphasis added].

[214] *PHS,* above note 108.

[215] *Act Respecting End-of-Life Care,* above note 13, subsection 3(6).

assisted death where the person (1) clearly consents to the termination of life, and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) (3) causing enduring suffering that is intolerable to the individual in the circumstances of his/her condition (and could not be alleviated by any acceptable to him/her).[216] It seems that a person in the province of Quebec wishing to have access to medical aid in dying must comply with both the *end-of-life* requirement of the provincial legislation as well as the *reasonably foreseeable natural death* requirement under Bill C-14. They seem synonymous as both involve a *nearness* of death although the *end-of-life* requirement is more easily understood and even current language in the medical field. It also appears to be more restrictive than the provision found in the federal legislation.

v) Bill C-14 and Dialogue

As seen in Part III above, the Court in *Carter* pronounced a rule regarding physician-assisted dying. Hence, the task for the competent legislative body – here, the Parliament of Canada – is how to devise a legislative framework in responding legislation or, the *second law*, in which the right could be circumscribed. Should it be formulated in narrower, equally-narrow or broader terms? Since I argue in the *Pith and Substance* section, above, that the legislative requirements of Bill C-14 has the effect of disallowing an adult person, who can otherwise meet the *Carter* criteria, from being entitled to MAiD, then this would constitute a narrowing of the scope of the right. Parliament proceeded to enact legislation on an interpretation of the *Charter*

[216] *Carter*, above note 1, at paras 4, 127 and 147. [Emphasis added] These were identified as the *Carter* criteria, see note 47, above.

that differs from the one provided in the "prior relevant judicial decision"[217] – *Carter*. The right is defined more narrowly than the Court's interpretation in *Carter*. In the following analysis, I propose to look at some of the Court's decisions to understand address why Parliament would act on the premise of defining a fundamental right more narrowly.

According to *dialogue*, a more restrictive *second law* than the Court envisaged Parliament should enact could be the result of a legislative disagreement with how the Court interpreted the *Charter* right or freedom in its decision.[218] *Dialogue*'s authors suggest that Parliament could signal its disagreement where there is a material change in circumstances or the discovery of new evidence. In *Mills*, the Court stated that the discovery of new evidence was that Parliament had the benefit of seeing how the *O'Connor* regime was functioning for seventeen months since that decision's release. Parliament had the opportunity to assess the ongoing problem of violence against women and children and its particularly disadvantageous impact on their equal participation in society. Moreover, the *Mills* Court explained how the legislation sought to address issues frequently encountered in the criminal process, namely, reliance on "bare assertions" for the production of documents, the imposition of harsh and irrelevant burdens on complainants, and the impact that generalized assumptions of sexual assault victims and classes of records have on the search for truth. Clearly, in crafting legislation to address all of these concerns, Parliament put in place a mechanism where balancing between competing interests and an independent arbiter, a judge, were at the heart of the final determination.

[217] *Charter* Dialogue Revisited, above note 5, at 33.
[218] *Ibid.*, at 34.

A competent legislative body could show its disagreement in a variety of ways. It could use a *notwithstanding* clause found in section 33(1) of the *Charter* to override one of the *Charter*'s rights.[219] In Bill C-14, Parliament did not see fit to use a *notwithstanding* clause. A competent legislative body could also state its legislative objectives by explicit recitals in the legislation's preamble. According to the authors of dialogue, the recitals could be included with a view to providing a stronger basis for a section 1 justification in the event of a *Charter* challenge.[220] The fact that the legislative body deliberated on the issue does not necessarily facilitate a justification under section 1 of the *Charter*.[221] Dialogue's authors point out that the law must still convince a court that it could pass the *Oakes* test.[222] Hence, if Bill C-14's requirement to show a *reasonably foreseeable natural death* and Quebec's legislative requirement to be at *end-of-life* are adjudged to violate either one of sections 7 or 15(1) of the Charter, then the two criteria will still have to satisfy this test. Before examining how *dialogue* applies to Bill C-14, it is necessary to discuss the cases where the Court raised the metaphor. This will be followed by a discussion of how Parliament disagreed with the Court's interpretation of the right to physician-assisted dying in *Carter*.

Mills is one of the earliest cases to refer favourably to the notion of *dialogue*.[223] In this case, the Court, speaking through Justice McLachlin (as she then was) and Justice Iacobucci, took a deferential approach and upheld a statutory regime

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[219] *Ibid*., at 34. Section 33(1) of the *Charter* provides: Parliament or the legislature of a province may expressly declare in an Act of Parliament or the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. *Charter*, above note 3.
[220] *Ibid*., above note 3. *Charter* Dialogue Revisited, above note 5 at 21, 49-50.
[221] *Ibid.,* at 49. In *Sauvé*, discussed below, McLachlin C.J. confirmed this very point in her analysis.
[222] *R v Oakes*, [1986] 1 SCR 103 [Oakes].
[223] *R v Mills*, [1999] 3 SCR 668 [*Mills*].

concerning the disclosure of a complainant's confidential records to the accused in a sexual assault case. The Court in *Mills* deferred to Parliament's judgment by stating that *O'Connor* was "not necessarily the last word on the subject [of disclosure of third party records in sexual assault proceedings]" and "the law develops through a dialogue between courts and legislatures".[224] The Court emphasized the importance of *dialogue* to the democratic process and cited in support Justice Iacobucci's words in *Vriend*, when he stated in part: "To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other".[225]

Parliament enacted a new regime, Bill C-46,[226] approximately seventeen months after the majority in *O'Connor*[227] had established a rule on how to achieve the proper balance between the *Charter* rights of the accused and those of the complainants. As in *O'Connor*, the competing interests in *Mills* involved the accused's right to *full answer and defence* implicating section 7 and the complainant's rights to *privacy* and *confidentiality* implicating section 8.[228] According to the majority, neither right can trump the other, and the right to *equality* under subsection 15(1) of the *Charter* informs both of these rights.[229] In its analysis, the Court repeated an established principle that where protected rights between two individuals conflict, "*Charter* principles require a balance to be achieved that fully respects the

[224] *Ibid*., at para 20.
[225] *Vriend*, above note 19, at para 139.
[226] S.C. 1997, c.30, which came into force on May 12, 1997, and amended the Criminal Code,
[227] *R v O'Connor*, [1995] 4 SCR 411 [*O'Connor*].
[228] Section 7 of the *Charter*, above note 12. The right to privacy and confidentiality stems from section 8, which reads: Everyone has the right to be secure against unreasonable search or seizure.
[229] *Mills*, above note 223, at paras 17, 80 and 82. Subsection 15(1), above note 12.

importance of both sets of rights".[230] The Court also adverted to the fact that *Charter* rights are to be interpreted *contextually* to resolve conflicts between them and any hierarchical approach with respect to these rights should be avoided.[231] The conflict that Bill C-46 was seeking to resolve was balancing the competing *Charter* rights between two (or more) individuals in a criminal law context. The legislation dealt with the production of documents in a criminal proceeding, the outcome of which was "subject to careful scrutiny" by a judge. The judge would be the final arbiter of this balancing exercise.

In *Mills*, the Court observed how the competent legislative body *spoke* with the courts. In the legislation's preamble, Parliament recites several concerns about the "incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children" and the risk that compelled production of personal records would deter complainants from reporting incidents to the police or seeking necessary treatment or counselling. It is also noteworthy that Bill C-46's preamble refers to the *Canadian Charter of Rights and Freedoms* in three of its eight paragraphs. There is specific language that speaks to (i) the disadvantageous impact on the equal participation of women and children in society, (ii) the equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Charter*, (iii) ensuring the full protection of the rights guaranteed by the *Charter* for all, including those accused or victims of crimes involving sexual violence or abuse, and (iv) rights guaranteed equally to all and, in the event of a conflict, those rights are

[230] *Ibid.,* at para 61.
[231] *Ibid.,* at para 2. The Court was referring to the hierarchical approach, which it rejected in *Dagenais*, in defining competing rights. *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, at para 17 [*Dagenais*].

to be accommodated and reconciled to the greatest extent possible. The last paragraph of the preamble reads:

> AND WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny.[232]

The Court determined that the legislative regime examined in *Mills* was more restrictive than the *O'Connor* regime because both the accused's and complainant's rights were to be "considered when deciding to order production to the judge", at the first stage.[233] At this stage in *O'Connor*, the accused was required to show only that the documents sought to be produced to the judge were "likely to be relevant".[234] No balancing of rights between the accused and the complainant was to take place at the first stage.[235] Bill C-46, on the other hand, provided that the trial judge was to *take into account* a series of factors at the first stage in deciding whether to allow production to the court, including the "potential prejudice to the personal dignity and right to privacy of any person to whom the record relates".[236]

At the second stage, Bill C-46 required the accused to show not only that production to the defence was "likely relevant", but that it was "necessary in the interests of justice". Before turning the records over to the defence, during this stage

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[232] *Mills*, above note 223, preamble.
[233] *Ibid.*, at 125. See also *Charter* Dialogue Revisited, above note 5 at 21.
[234] *O'Connor*, above note 227, at 19.
[235] *Mills*, above note 223, at 124.
[236] *Ibid.*, at 127. See section 278.5(2)(e) of Bill C-46.

the judge was to re-visit the same factors and assess the same interests between the accused and the complainant examined at the first stage, but in balancing these interests, the judge was to consider also the societal interest of encouraging the reporting of sexual offences and treatment of complainants. In addition, at this stage, the trial judge must assess the effect of production of documents on the *integrity of the trial process*. By contrast, the regime set out In *O'Connor* required the judge to evaluate the competing interests of both the accused and the complainant competing interests to determine where to *strike the proper balance* between these interests. The Bill also included the concerns that Justice L'Heureux-Dubé, had expressed in dissent in *O'Connor* such as the integrity of the trial process and the social interest to facilitate the reporting of sexual crimes. Clearly, the legislative framework examined in *Mills* differed from the *O'Connor* regime in several ways.

Despite this divergence, the Court held Bill C-46 to be constitutionally valid because it accounted for the *Charter* rights of all individuals concerned – the accused, the complainant and the witnesses, if applicable – in the context of producing confidential documents for the purposes of a criminal trial. The Court in *Mills* indicated that Parliament crafted a comprehensive procedure using specific language whereby a proper balance could be struck between competing rights in a very sensitive context. In other words, the Bill was not just making *idle references* to competing rights, but actually set out a workable procedure to have them balanced, respected, and implemented. It further indicated that the law's advantages were multifold. It provided for an effective balancing mechanism, an independent arbiter (the judge) at the center of this balancing process, and the recognition of *Charter*

rights, including equality rights, among all the stakeholders. The Court succinctly described the judge's role in this legislative framework in the following passage:

> By giving judges wide discretion to consider a variety of factors and requiring them to make whatever order is necessary in the interest of justice at both stages of an application for production, Parliament has created a scheme that permits judges to preserve the complainant's privacy and equality rights to the maximum extent possible, but also to ensure that the accused has access to the documents required to make full answer and defence.[237]

Furthermore, there is no ambiguity about which legislative body has jurisdiction over the subject matter of the statute – criminal law. Under the *Canadian Constitution, 1867*,[238] Parliament is the competent legislative body vested with this power.

In *Hall*, Chief Justice McLachlin also had favourable comments regarding the *dialogue* that takes place between the courts and the legislature.[239] She described the case as an excellent example of such a *dialogue* because Parliament responded with a *second law* to a Court decision in which it held that the language of the former law was unconstitutional.[240] At issue were new grounds for which an accused may be denied bail. Under section 11(e) of the *Charter*, an accused person has the "right …. not to be denied reasonable bail without just cause". Parliament enacted new conditions for bail denial in the *second law* in response to the *Morales* decision, in which the Court had struck down a *Criminal Code* provision that included a ground

[237] *Ibid.,* at 144.
[238] *Canadian Constitution, 1867*, above, note 11.
[239] *Hall*, above note 19.
[240] *Ibid.*, at para 43.

for denying bail where it is "necessary in the public interest".[241] In *Hall*, the Court referred to its earlier decision in *Morales* in which it concluded that this ground was "vague, imprecise and authorized a "standardless sweep""[242] and, therefore, unconstitutional. Parliament replaced the provision with a new ground, which read in part "on any other just cause being shown ….. in order to maintain confidence in the administration of justice".[243] When the matter reached the Court in *Hall*, McLachlin C.J., speaking for the majority, reasoned that Parliament must set out "narrow and precise circumstances by which bail can be denied" and cannot allow a court to deny bail as it sees fit.[244] The Court considered that the phrase "on any other cause being shown" did not provide a specific enough basis for bail denial and therefore violated the presumption of innocence and section 11(e) of the *Charter*.[245] However, the Court pursued that the phrase "to maintain confidence in the administration of justice" is much narrower and more precise than the public interest ground considered in *Morales*, and, therefore, constitutional.

In dissent in *Hall*, Iacobucci J. referred to several of the Court's decisions that attracted the notion of *dialogue*, but specifically described the Court's decision in *Mills* as an illustration of the "mutual respect" that exists between the courts and the legislatures, a respect that is fundamental to the constitutional *dialogue* that occurs between them. However, he followed these praising remarks with an admonition directed to the majority, who upheld the latter part of section 515(10)(c) of the *second*

[241] *R v Morales*, [1992] 3 SCR 711 [*Morales*].
[242] *Hall*, above note 19, at para 17, referring to *Morales*, previous note.
[243] *Criminal Code*, R.S.C. 1985, c. C-46. Section 515(10(c).
[244] *Hall*, above note 19, at para 22.
[245] *Ibid*., at para 22. In *Hall*, the Court considered the various grounds for bail denial, including "to maintain confidence in the administration of justice". Ibid., at paras 15-31, 38 and 41.

law, that is, "to maintain confidence in the administration of justice". He stated that that the majority's decision in the case at bar demonstrates how dialogue can "break down" and how the Court has abdicated its role in this *dialogue*. In his opinion, although Parliament had responded with a *second law*, it had done so without due regard for the constitutional standards laid down in *Morales*.[246] In this Justice's opinion, the impugned provision had the effect of revitalizing the "public interest" ground struck down in that case. Justice Iacobucci's comments would prove to be prophetic in view of the Court's subsequent decision in *Sauvé*.[247]

In *Sauvé*, the Court took a less deferential stance with respect to the legislation it was asked to examine.[248] Like *Mills*, the case involved competing interests. Unlike *Mills*, the competing interests were not between an accused and a complainant (and, perhaps, witnesses), but between the competing "social and political philosophies" upon which the fundamental right in question could be viewed. They involved the *state*. How far can Parliament go to deny the right to vote guaranteed by section 3 of the *Charter*? At issue in this case was legislation that prohibited the right to vote in federal elections of prison inmates, who were serving a sentence of two or more years. Parliament enacted this legislative provision in response to an earlier SCC decision with the same claimant concluding that a prohibition whereby all prison inmates regardless of the length of their sentences were denied the right to vote is void.[249] Before the Supreme Court, the government

[246] *Ibid*., at para 127. See also *Charter* Dialogue Revisited, above note 5, at 22.
[247] *Sauvé,* above note 19.
[248] *Ibid.,* at para 17. *Canada Elections Act*, S.C. [1993], c. 19, section 23, replacing section 51(e) with the following provision: 51. The following persons are not qualified to vote at an election and shall not vote at an election: … (e) Every person who is imprisoned in a correctional institution serving a sentence of two years or more.
[249] *Sauvé v Canada (Attorney General),* [1993] 2 SCR 438 [*Sauvé, 1993*].

conceded that the impugned provision infringed section 3 of the *Charter*. The only issue to be adjudicated was whether the infringement of this right was justified under section 1.

The Court divided on the issue, but the majority, which included both McLachlin C.J. and Iacobucci J., held that the limitation of the fundamental right was not justified under section 1. Speaking for the majority, McLachlin C.J. stated the case was not merely about "competing social philosophies" about whom in the Canadian polity is entitled to vote. Deference may be appropriate where competing social and political policies are involved, but not where the state denies a fundamental *Charter* right. The Chief Justice indicated that protecting competing rights, as was the case in *Mills*, might be valid as a reason to justify a limitation under section 1, but a "simple majoritarian political preference for abolishing a right altogether" is unjustifiable.[250]

The majority in *Sauvé* rejected all of the government's arguments, which were directed primarily at the degree of *deference* that the courts would seemingly owe to the competent legislative body, in this case, Parliament. The government argued that prohibiting the right to vote for these prison inmates is a "matter of social and political philosophy, requiring deference" to the legislature.[251] It also asserted that the "philosophically-based or symbolic nature of the government's objectives in itself commands deference" and where a challenged prohibition of the right to vote follows a judicial rejection of an even more comprehensive prohibition, the "Court should

[250] *Sauvé*, above note 19, at para 20.
[251] *Ibid.,* at para 12.

defer to the legislature as part of a *dialogue*".[252] Moreover, before the Supreme Court, the government advanced the following as representing the legislation's objectives: first, to enhance civic responsibility and respect for the rule of law, and, second, to provide additional punishment, or "enhance the general purposes of the criminal sanction".

However, the Court considered these objectives to be vague because they left no room for debate. In addition, the Court stated that the record, including the Hansard debates, was unclear whether these were the *actual* objectives that motivated Parliament to justify the deprivation of the right to vote to the inmates in question. In fact, the Chief Justice characterized the parliamentary debates as offering "more fulmination than illumination".[253] In her own words, she stated:

> The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote – one of the most fundamental rights guaranteed by the *Charter* – and Parliament's denial of that right. Public debate on an issue does not transform into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.[254]

[252] *Ibid.*, at paras 16-7.
[253] *Ibid.*, at para 21.
[254] *Ibid.*, at paras 13, 15. [Emphasis added].

The above passage makes two things clear: (1) the state must exercise its role as legislator carefully at all times by respecting the fundamental rights guaranteed by the *Charter*, and (2) the courts must exercise their role as guardians of these *Charter* rights at all times. A competent legislative body should not expect deference for limits on fundamental rights it enacts simply because a public debate on an issue has taken place or the Court has in prior instances granted deference to it (the legislative body). Legislation, no matter what its purported design or regardless of the stage of its legislative process, is not shielded from *full judicial scrutiny*. The Chief Justice stated that Parliament cannot use lofty objectives in its laws to avoid *Charter* scrutiny.[255] According to the Court, Parliament must ensure that it passes laws that conform with the Constitution at all times regardless of the stage of their enactment. The healthy *dialogue* between the courts and the legislature should not be interpreted as a rule that "if at first you don't succeed, try, try again".[256] This statement contradicts the government statement that the Court "will" defer to Parliament provided it responds with a reasonable alternative, as seen earlier in *Legislative Background*.[257]

The Chief Justice pursued her section 1 analysis stating that it requires consideration of "valid objectives and proportionality".[258] She reasoned that while certain matters can be proven by empirical or scientific evidence, others cannot. Where philosophical, social or political questions are involved, it is sufficient that a reasonable person be convinced that the government is justified in infringing a

[255] *Ibid*., at para 16.
[256] *Ibid*., at para 17.
[257] *Legislative Background*, above note 157. See also note 162 above.
[258] *Sauvé,* above note 19, at para 16. [Emphasis in original]

Charter right to the degree that it has having regard to all the evidence adduced. McLachlin C.J. stated that what is required in these matters is "*rational, reasoned defensibility*".[259] Judicial deference in certain social policy matters may be appropriate in some cases. However, it is "when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system".[260]

The last point illustrating the extent of the legislative discord involves the members' vote leading to Bill C-14's passage. The disparity of the vote expressed by the members of the House of Commons as well as the concerns expressed by the various lobbying groups appearing during the hearings before the *Special Joint Committee*, as seen earlier, leading to the Bill's adoption, all reveal the extent of legislative disagreement.[261] During the second reading of the Bill held on May 4, 2016, the vote in the House of Commons [House] revealed that 235 members were in favour of the Bill and 75 against. The Bill was referred to the *Standing Committee on Justice and Human Rights* for consideration. After JUST's proposed amendments to the Bill, a third reading was held on May 31, 2016 and those in favour of the legislation, as drafted, were fewer. The members in the House of Commons voted 186 in favour and 137 against, thereby showing the extent of the disagreement in the House.

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[259] *Ibid*., at para 18.
[260] *Ibid*., at para 15.
[261] Canada. House of Commons. 42nd Parliament, 1st Session, Bill C-14 – An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying). Votes No. 49 and 76, respectively. Also, House of Commons. Standing Committee on Justice and human Rights [JUST]. 42nd Parliament, 1st Session.

Dialogue's authors maintain that if the second law was enacted on the basis of a legislature disagreeing on how the Court interpreted the *Charter* right or freedom in its decision, "then the second look case will have to be decided against the legislation".[262] As seen from the foregoing analysis, there is evidence to suggest the apparent disagreement between how differently Parliament and the Court view the right to physician-assisted dying in Canada. In my opinion, this disagreement extended across various committees and members of Parliament who voted on the legislation. Government sources such as *Hansard*, numerous committee reports reflecting consultations and testimony held by these committees, and the disparate votes cast during the second and third readings of the Bill in the House of Commons after amendments proposed by JUST reveal the extent of the legislative disagreement with the Court's pronouncement of the *Charter* right. These documents provide valuable insight into government policy and activities leading to the final draft of the legislation.

As seen earlier in *Legislative Background*, the government claims that the Court owes Parliament deference with respect to its proposed legislative solutions.[263] In the document, the DOJ asserts that the Court has "acknowledged in a number of cases that a law passed by Parliament may differ from a regime envisaged by the Court without necessarily being unconstitutional".[264] In support of this statement, the DOJ quotes from a passage in *Mills*, seen above, that depicts the government's position in a favourable light:

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[262] *Charter* Dialogue Revisited, above note 5, at 49.
[263] *Legislative Background*, above note 157.
[264] *Ibid.*, at 33.

> Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy.[265]

With this passage, the DOJ adverts to the fact that a *dialogue* takes place between the Court and Parliament. The DOJ pursues its argument by suggesting that in jurisprudence prior to *Carter*, the SCC has recognized Parliament's superior competence in complex regimes at balancing competing interests and weighing conflicting social science evidence. There is little doubt that in making these assertions, the DOJ is acknowledging that by adopting Bill C-14, Parliament has passed a law that differs considerably from the regime that the SCC envisaged. Because the regulatory regime is complex, Parliament expects the Court will defer to the proposed legislation. However, the Court's jurisprudence with respect to *dialogue* shows clearly that the Court will review legislation carefully before committing to *deference* to the competent legislature.

The Court in *Mills* acknowledged that Bill C-46 differed considerably from the *O'Connor* regime, but concluded that these differences were not fatal. The majority considered that the Bill provided "sufficient protection for all relevant *Charter* rights".[266] It rejected the accused's argument that because Bill C-46 diverged or was inconsistent with the one established in *O'Connor*, it was unconstitutional. A law is not unconstitutional, it reasoned, simply because it differs "from a regime envisaged

[265] *Mills*, above note 223, at para 55.
[266] *Ibid.*, at para 22.

by the Court in the absence of a statutory scheme".[267] The Court affirmed that Parliament may develop a different scheme from the one it devised at *common law* "as long as it remains constitutional".[268] The above passage signaled by the DOJ illustrates this point. However, the Court did not end its comments there. It reiterated its proposition in *Secession Reference* that "constitutionalism can facilitate democracy rather than undermine it, and that one way in which it does this is by ensuring that fundamental human rights and individual freedoms are given due regard and protection".[269] The Court pursued its reasoning by stating that Parliament remains an important ally in protecting vulnerable groups. However, Bill C-46 examined in *Mills* was considered to provide "sufficient protection for all relevant *Charter* rights".[270] Clearly, any proposed legislation must meet this standard.

The Court in *Carter* addressed what could be considered *dialogue*. After concluding that the prohibition examined in that case violated the claimants' section 7 rights, the Court performed the required section 1 analysis and explained how it should approach the analysis. The Court stated that some measure of *deference* must be accorded to the legislature when assessing the *proportionality* component of the analysis. When Parliament faces a difficult task of addressing "complex issues of social policy and competing societal values",[271] this legislative body must weigh and balance the perspectives of various stakeholders involved. Agreeing with the trial judge, the Court concluded that the prohibition at issue in that case did not merit a high degree of deference.

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[267] *Ibid*., at para 55.
[268] *Ibid*., at para 55.
[269] *Ibid*. at para 58. *Secession Reference,* above note 88.
[270] *Ibid*. at para 22.
[271] *Carter*, above note 1, at para 98.

In adopting Bill C-14, Parliament has narrowed the right to physician-assisted in dying pronounced in *Carter*. As stated earlier in the *Pith and Substance* analysis of Bill C-14, Parliament failed to address the issue of *human suffering* of some individuals in adopting the legislation. It failed to address the kind of suffering that is intolerable to an individual, who cannot meet the criterion of paragraph 241.2(2)(d). Such as individual should not be forced to continue to live in the circumstances of his/her grievous and irremediable medical condition because the proximity of his/her death is not reasonably foreseeable. In enacting this provision, Parliament sought to protect the life of those individuals who have a higher life expectancy than those whose death is "reasonably foreseeable". I would argue that the criterion is unnecessary given what the patient is seeking is relief from intolerable suffering. The provision is arbitrary. In my opinion, unlike what the preamble states, the measure does not strike the proper balance between the interests of those who need MAiD and those who need *protection*.

b) AN ARGUMENT THAT PARAGRAPH 241.2(2)(D) REQUIRING A *REASONABLY FORESEEABLE NATURAL DEATH* VIOLATES SECTION 7 OF THE *CHARTER*

In *Carter*, the Court concluded that the absolute prohibition at issue in that case deprived persons suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person guaranteed by section 7 of the *Charter* and that the infringement was not justified under section 1.[272] However, even if section 7 of the *Charter* protects an individual's basic interests of life, liberty and

[272] Carter, above note 1, at paras 70 and 123. Section 7 of the *Charter*, above note 12. Section 1 of the *Charter*, above note 3.

security of the person, a state action may infringe these interests, if it is done in accordance with the principles of fundamental justice.[273] According to Professor Stewart, the Court has adopted a "one-right" approach to this *Charter* provision in that section 7 is infringed if the state action affects at least one of the three interests of life, liberty or security of the person *and* the conduct is not done in accordance with the principles of fundamental justice.[274] Moreover, even if there is a violation of section 7 rights and the violation is ruled to be in accordance with the "internal qualifier – the requirement that the state respect the "principles of fundamental justice"" – the state action must still be justified under section 1.[275] The principles of fundamental justice that a law must not infringe are the following: 1) vagueness 2) arbitrariness; 3) overbreadth; and 4) gross disproportionality.[276] The foregoing principles relating to section 7 of the *Charter* will now be applied to Bill C-14.

i. The Section 7 Interests: *Life, Liberty and Security of the Person*

In my opinion, Bill C-14, which restricts the right of access to MAiD for an 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) (3) that causes enduring suffering that is intolerable to this person in the circumstances of his/her condition (and could not be alleviated by any means acceptable to him/her), violates this person's right to life, liberty and security of the person within the meaning of section 7 of the *Charter* in a way that does not conform to the principles of fundamental justice. As stated in Part IV, *Pith and Substance of Bill C-14*, two

[273] Hamish Stewart, *Fundamental Justice - Section 7 of the Canadian Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2012), at 5. [Stewart*, Fundamental Justice*]
[274] *Ibid*, at 62.
[275] *Ibid*., at 4,5.
[276] *Ibid*., at 127-143.

objectives can be identified with Bill C-14. The first is the objective of allowing medical assistance in dying as an exemption under Canada's prohibition against counselling, abetting and aiding another person to die by suicide. Following this statement, Parliament refers to another objective that it identifies collectively as *robust safeguards*. These essentially provide the framework within which the administration of MAiD is to operate. Given their identification as *robust safeguards*, one can assume that their intent was to protect the *vulnerable* – those who need protection from being induced to end their lives in moments of weakness.

Under Bill C-14, the interest of the right to life is engaged to the extent that it forces a person to take his/her life prematurely. This was the trial judge's reasoning in *Carter* and the Court did not interfere with this conclusion.[277] It is the effect of paragraph 241.2(2)(d) requiring a person to show a *reasonably foreseeable natural death*. To relieve one's intolerable suffering, the person will be required to find other means to end his/her life, if the person is able to do so. The person can either seek the assistance from a person outside the MAiD context or he/she can find an undignified and cruel way to do it. Also, like *Carter*, the argument as to the quality of life – "the qualitative approach to the right to life"[278] – would fail because the provision does not pose a threat of death. In fact, the opposite is true. The provision prohibits the right to die by MAiD.

Similarly, under the Bill, the interest of the right to liberty is engaged. A person's decision to die is deeply personal and involves one's personal autonomy and bodily integrity. The law in Canada recognizes a person's autonomy to make

[277] *Carter*, above note 1, para 57.
[278] *Ibid.*, para 61.

medical decisions.[279] Like a woman's decision to terminate her pregnancy, it is a decision that comes after deliberation about one's self-worthiness, relationship to others and to society.[280] It is a decision that, after profound and, perhaps, long, reflection, leads to the conclusion that life is no longer worth living because to continue to live in the person's personal circumstances is to pay a very high price. It is a decision about how a person "wish[es] to live or cease to live".[281] Paragraph 241.2(2)(d) of Bill C-14 requiring a patient to have a reasonably foreseeable natural death takes away the right to make that decision.

The right to security is also engaged under the legislation. Paragraph 241.2(2)(d) impacts a person, first, by unduly burdening the person to show that death in *reasonably foreseeable* and, second, if the person is refused, by subjecting the person to severe emotional stress. This adds to the existing burden that the person must suffer as a result of the disability. The person must continue to live against his/her will under the same challenging circumstances. This interest protects a person's physical and psychological integrity. As the Court concluded in *Carter* with respect to the prohibition in that case, paragraph 241.2(2)(d) "insofar as [it prohibits medical assistance in dying] for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering", infringes a person's right to security.

[279] *AC*, above note 45.
[280] *Morgentaler*, above note 69.
[281] *Carter*, above note 1, at 68, quoting Binnie J., in *AC*, above note 45.

ii. The Principles of Fundamental Justice: Vagueness, Arbitrariness, Overbreadth, and Gross Disproportionality

In *Bedford*, the Court considered that the principles of fundamental justice are directed at two *evils* found in the law.[282] The first *evil* encompasses the situations where there is no connection between the violations of the person's rights and the objective that the law is seeking. Both arbitrariness and overbreadth address this *evil*. The second evil is found in the gross disproportionality norm in that the law is causing the deprivation on the individual's section 7 interests in a manner that is grossly disproportionate to the law's objective.[283] There is a connection between the section 7 interest and law's purpose, but the impact on that interest is sufficiently severe that it violates this principle of fundamental justice. The Court in *Bedford* did not consider which of the two *evils* the principle of *vagueness* addresses.

- Vagueness

This principle states that a law must not be overly vague.[284] Several interpretations have been given to this requirement, but the following stand out. The law must be precise enough so as to guide human conduct with reasonable certainty.[285] This idea does not require the law to be absolutely certain, but it does require it to set boundaries and "provide the citizen with fair notice of the legal implications of her conduct".[286] Also, a law is not necessarily unconstitutional because it uses terms like "reasonableness" or "undueness".[287] Courts will usually use rules of *statutory interpretation* to give these terms content and apply them to the

[282] *Bedford*, above note 83, at para 108.
[283] *Ibid.,* at para 109.
[284] Stewart, *Fundamental Justice*, above note 273, at 127.
[285] *Ibid.*, at 127
[286] *Ibid.*, at 127
[287] *Ibid.*, at 129.

facts before of the case. However, in one of his notes, Professor Stewart warns the reader to inquire into the motivation behind the use of certain language by quoting a commentator: “A specious clarity can be more damaging than an honest open-ended vagueness”.[288] Nevertheless, based on the foregoing concepts, I would suggest that paragraph 241.2(2)(d) is not vague and, consequently, the principle of fundamental justice regarding *vagueness* is not breached.

- Arbitrariness

A law is arbitrary if its effect bears *no connection* to the object of the law.[289] In *Bedford*, the Court stated that arbitrariness asks whether there is a *direct or rational connection* between the objective of the law and the limits that it imposes on the section 7 interests.[290] There must be a direct connection between the effect the legislation has on the individual and the limit the law imposes on his/her section 7 right. A law that has the effect of limiting any of these interests in a way that has no connection to its object is arbitrary. The two objectives identified with Bill C-14 are to provide an exemption to the crime of aiding a person to die by suicide and to protect the vulnerable against ending their lives during a moment of weakness. The first objective, which seeks to exempt practitioners and others involved in the administration of MAiD, is not arbitrary. The objective of the law is directly connected to its effect of allowing patients to die by MAiD. In regards to the second objective, it would seem that paragraph 241.2(2)(d), which seeks to protect the vulnerable from dying during a moment of weakness, is not rationally connected to the effect that it

[288] *Ibid*., at 129, note 13. The author cites Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), at 63.
[289] Carter, above note 1, at para 83. *Bedford*, above note 83, at paras 98, 119.
[290] *Bedford*, above note 83, at para 111.

has on genuine MAiD patients, who will not die within a *reasonably foreseeable* future. Thus, the effect the legislation has on genuine patients wishing to end their lives through the administration of MAiD is unrelated to the objective of protecting the vulnerable wishing to end their lives in a moment of weakness. The law is therefore arbitrary.

- Overbreadth

A law must be drawn with a "degree of precision appropriate to its purposes".[291] In *Carter*, the Court expanded this principle to state that an overbroad law goes too far if it takes away rights of an individual in a way that bears no relation to the object even though it fulfills the general object of the law.[292] In *Bedford*, the Court stated that the an overbroad law is one that is "so broad in scope that it includes *some* conduct that bears no relation to its purpose".[293] Chief Justice McLachlin, writing for the Court, stated: "At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts".[294] In other words, a law is overbroad when it is rational in some cases, but "overreaches in its effect in others".[295] Both the arbitrariness and overbreadth principles ask whether there is a connection between the effect of the law and its objective. However, overbreadth should be viewed as a distinct principle of fundamental justice because it allows a court to determine whether the lack of connection has the effect of "sweeping conduct into its ambit" that

[291] Stewart, *Fundamental Justice*, above note 273, at 133.
[292] *Carter*, above note 1, at para 85.
[293] *Bedford*, above note 83, at para 112. [Emphasis in original]
[294] *Ibid.*, at para 112. [Emphasis in original]
[295] *Ibid.*, at para 113.

has no rational connection to its objective.[296] In view of the foregoing principles, I would argue that Bill C-14, specifically, paragraph 241.2(2)(d), is overbroad as it overreaches in its effect in the rights of some individuals – those who cannot show a *reasonably foreseeable natural death*. Dying within a reasonably foreseeable future is not *rationally connected* to a "considered, rational and persistent wish to end" one's life due to a grievous and irremediable medical condition.[297] There are individuals captured by the provision, who are unable to show that their natural death is *reasonably foreseeable*, but who genuinely should have access to MAiD. Consequently, the principle of *overbreadth* has been breached and the legislation, specifically, paragraph 241.2(2)(d), is in violation of section 7.

- Gross Disproportionality

This principle of fundamental justice requires that the effect of the law on the person's section 7 interests of life, liberty and security must be proportionate to the object of the law. In other words, the inquiry is whether the impact of the law on the person's section 7 rights is aligned or "out of sync" with the objective of the law. It is directed at the second evil identified above – the deprivation of a person's section 7 interests in a way that is grossly disproportionate to the law's "purposes that they cannot rationally be supported".[298] The violation of one person's interests is sufficient to engage this principle.[299] I would argue that the impact that the law, specifically, paragraph 241.2(2)(d), has on a person's section 7 rights is severe. Like the prohibition in *Carter*, the provision of Bill C-14 imposes an excessive burden on

[296] *Ibid*., at para 117.
[297] *Carter*, above note 1, at para 86.
[298] *Bedford*, above note 83, at paras 111, 120.
[299] *Ibid*., at para 122.

individuals, who are unable to show that they will die within a *reasonably foreseeable natural death*, by compelling them to continue to live in the circumstances of their medical condition. It deprives them of the right to do as they wish with their bodies given their grievous and medical condition and permits the state to impose its own view that it is *better placed* to decide what a person should do with his/her own body, in a way that has no connection with the objective contemplated by the legislature – protecting the vulnerable who might wish to die at a moment of weakness. Consequently, the law, specifically, paragraph 241.2(2)(d), infringes the principle of *gross disproportionality* and therefore violates section 7 of the *Charter*.

For the reasons outlined for all three norms – arbitrariness, overbreadth and gross disproportionality, the law violates a person's *Charter* rights under section 7.

c) AN ARGUMENT THAT PARAGRAPH 241.2(2)(D) REQUIRING A *REASONABLY FORESEEABLE NATURAL DEATH* VIOLATES SUBSECTION 15(1) OF THE *CHARTER*

As already stated, the Supreme Court decided the claim in *Carter* under section 7 and declined to deal with it under subsection 15(1). However, even though it declined to deal with the claim under that subsection, the Court reasoned that Justice Smith of the British Columbia Supreme Court was at liberty to analyze the prohibition in that case under the *Charter*'s equality provision. In detailed Reasons for Judgment, Justice Smith concluded that the prohibition examined in *Carter* violated the right to equality under subsection 15(1).[300]

[300] *Carter Trial,* above note 70. Subsection 15(1) Subsection 15(1), above note 12.

In my opinion, by requiring that *reasonably foreseeable death* be part of a MAiD patient's prognosis, Parliament has necessarily engaged the equality provision. More specifically, the issue of whether the restriction provided in paragraph 241.2(2)(d)[301] of Bill C-14 has an *adverse impact* on persons with disabilities must be addressed and resolved under the *Charter* equality provision. Unless a court decides the matter as a section 7 violation only – that paragraph 241.2(2)(d) constitutes a restriction, which deprives persons with disabilities of their life, liberty and security interests, without regard to whether the provision creates an *intragroup* distinction – the analysis will necessarily have to proceed to subsection 15(1) of the *Charter*. In my opinion, this group is similar, but not the same, as the group of persons with disabilities that was considered in *Carter* as a result of the requirement to prove a *reasonably foreseeable natural death*. In other words, a court will not be able to avoid the reality that paragraph 241.2(2)(d) creates an *intragroup* distinction – a group of persons with disabilities, who would otherwise be eligible for MAiD, but for the fact that their natural death is not *reasonably foreseeable*. The same reasoning would apply to subsection 26(3) of Quebec's *Act respecting End-of-Life Care* requiring a patient to be at end of life. As a result, my view is that subsection 15(1) is necessarily engaged.

In this section of the paper, I argue that the *effect* of Bill C-14, specifically, paragraph 241.2(2)(d), creates an *intragroup* distinction between members of a group with disabilities based on those who are diagnosed with a *reasonably foreseeable* natural death and those who are not. The restriction imposes an additional and,

[301] See above note 153, in subsection (a)(2) of Part IV, The Pith and Substance of Bill C-14 (The *Main Thrust* Stage), for the definition of a *grievous and irremediable medical condition* in Bill C-14.

therefore, unequal burden on a MAID patient, whose prognosis does not include a *reasonably foreseeable natural death*, relative to other members of the same group of persons with disabilities whose prognosis does. Absent this medical evidence, the patient with a disability, who meets all of the requirements under subsection 241.2(2) except for the one found in paragraph 241.2(2)(d), will be denied MAiD. Consequently, those who do not meet this test will be reduced to the same two cruel choices that Ms. Gloria Taylor and Ms. Kay Carter in *Carter* faced – either *continue to live* in the circumstances of their challenging medical condition until they die of natural causes or take their life, if they are able to find a way given their circumstances. I argue that this unequal burden or disadvantage is discriminatory against this particular subgroup of persons with disabilities in that the legislation, specifically, paragraph 241.2(2)(d), of Bill C-14 impacts this subgroup *adversely*. In this section of the paper, I examine what constitutes *adverse effects*[302] discrimination and how the members of this particular subgroup, or *intragroup*, have been adversely affected by paragraph 241.2(2)(d). Before doing so, however, it is necessary to examine how the Court has dealt with the notion of *equality* under section 15 of the *Charter*. What is the essence of the law of equality in Canada? What constitutes *substantive equality*? What is sufficient to create a distinction? What approach should be used in analyzing cases under subsection 15(1) and identifying discrimination? What is the interrogation for *effects-based* discrimination under subsection 15(1)?

[302] The words *adverse effects*, *effects-based* and *disparate impact* are used interchangeably throughout this paper to signify discrimination that is indirect or unintentional.

i) *Substantive Equality* in Canada

The seminal case of *Andrews v Law Society of British Columbia*[303] captured the essence of the law of equality under subsection 15(1) of the *Charter*. Writing for the majority in *Andrews*, Justice McIntyre distinguished *formal* from *substantive equality,*[304] and described the essence of equality in Canada as consisting of an "accommodation of differences [whereby] it will be frequently necessary to make distinctions".[305] This language appears to be consistent with the one found in subsection 15(1), which speaks to every individual's right to equality "without discrimination" - first expressed as a general principle and then measured in relation to certain enumerated grounds such as race, national or ethnic origin, sex, etc.[306] If the expression "without discrimination" in subsection 15(1) meant "without distinction", then the word *discrimination* would have no meaning.[307] Hence, the objective of subsection 15(1) is not just identifying a distinction, but identifying a distinction that is discriminatory.[308] McIntyre J. enunciates this principle in the following passage:

> Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal

[303] *Andrews v Law Society of British Columbia,* [1989] 1 SCR 145 [*Andrews*].
[304] In fact, McIntyre J. referred to the type of equality he was describing as *true equality*, and Iacobucci J. re-named it *substantive equality* in the subsequent case of *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*].
[305] *Andrews*, above note 303, at 169.
[306] Subsection 15(1) of the *Charter*, above note 12. Following the coming into force of the *Charter*, the courts have recognized grounds *analogous* to the ones enumerated in this subsection. See, for example, *Corbière v Canada (Minister of Indian Affairs),* [1999] 2 SCR 203, where the SCC recognized the analogous ground of *Aboriginality* residence for off-reserve band member status. [*Corbière*]
[307] *Andrews*, above note 303, at 181.
[308] *Ibid.,* at 171.

> treatment before and under the law or that the law has a differential impact on him or her in the protection of benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.[309]

Justice McIntyre reverts to his earlier decision in *O'Malley*[310] to describe discrimination in the following words:

> [D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[311]

The foregoing passage suggests that a law could affect an individual or group by design or impact. The distinction may be caused either intentionally or unintentionally. If the law has the effect of imposing burdens, obligations or disadvantages on or withholding benefits from that individual or group, regardless of the legislative intent, then the law is said to be discriminatory and in violation of subsection 15(1). This essence has come to be known as *substantive equality*. According to this doctrine, the analysis extends beyond the notion of treating everyone alike.[312] The approach is not a search for *sameness*, which is at the heart

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[309] *Ibid.,* at 182. [Emphasis added]

[310] *Ontario Human Rights Commission and O'Malley v Simpsons-Sears Ltd.,* [1985] 2 SCR 536 [*O'Malley*].

[311] *Andrews*, above note 303, at 174. [Emphasis added]

[312] In Andrews, McIntyre J. succinctly stated the idea that distinctions will be necessary in the following passage: "It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and the identical treatment may frequently produce serious inequality". *Ibid*. at 164.

of the *formal equality* doctrine. The approach for *substantive equality* under the *Charter* is "large[ly] remedial" in nature – that is, a generous, but cautious one.[313]

Charter analysis requires consideration of the breadth, scope, and purpose of a law or other form of *state action* to determine what *effect* this law or *state action* is having on an individual or group. The nature of the *Charter* protections is more fundamental than it would be under a statute like its predecessor, the *Canadian Bill of Rights*, given these protections originate from the constitution.[314] The difference is that an impugned legislation or provision is balanced against rights and freedoms guaranteed by the constitution. The scrutiny applied to legislation or other form of *government action* under the *Charter* is different from and, necessarily, more onerous than, the one applied during the era of its predecessor statute.

Subsection 15(1) of the *Charter* embodies 1) the right to equality before the law, 2) the right to equality under the law, 3) the right to equal protection of the law, and 4) the right to equal benefit of the law. The significance of this broadening in scope under the *Charter* has to do with remedying the apparent shortcomings of the *Canadian Bill of Rights*. In *Andrews*, McIntyre J. drew on some of the Court's earlier jurisprudence under the Bill of Rights to illustrate the apparent deficiencies that involved considerations of whether a law violated equality before the law, as opposed to a violation under the law.[315] The former constituted a statutory protection; the latter

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[313] *Ibid.*, at 169, 171.

[314] Canadian Bill of Rights, S.C. 1960, c. 44, R.S.C. 1970, App. III [*Bill of Rights*]. In *Andrews*, McIntyre J. stated that the *Bill of Rights* provides a proper "linguistic, philosophic and historical context" necessary in a subsection 15(1) analysis. *Andrews*, above note 303, at 171. The statute was more limited in scope in that it embodied only equality before the law and the protection of the law. The Equal Protection Clause of the Fourteenth Amendment of the U.S.A. Constitution is similarly-written as it provides that "[No state shall] deny to any person within its jurisdiction the equal protection of the laws".

[315] For example, in *Lavell*, the Court held that depriving women, but not men, of membership in Aboriginal Bands, if they married non-aboriginals, was not a violation of equality before the law, although it might be a violation under the

did not. *Charter* protections will apply equally to every individual free from discrimination. They will apply even to non-Canadians, who are permanent residents of Canada, as was the case in *Andrews*,[316] and they will apply equally to male and female persons.[317]

The Court's more recent jurisprudence has established a two-step process to identify discrimination under s. 15(1). In both *Kapp*[318] and *Withler,*[319] the Court relied on McIntyre J.'s definition of discrimination in *Andrews*, which he described in terms of *disadvantages and burdens*, to devise the proper test under subsection 15(1). The test involves asking the questions: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[320] In *Withler*, the Court stated that it is necessary to look at the full context of the claimant group to determine whether there is discrimination. The subsection 15(1) inquiry involves a substantive contextual approach and a corresponding repudiation of a formalistic "treat likes alike" approach.[321] Claimants may need to present evidence of historical or sociological

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law. The latter was not a legal protection. *Attorney General of Canada v Lavell*, [1974] SCR 1349 [*Lavell*]. In *Bliss*, a pregnant woman was denied unemployment benefits because she was pregnant. Contrary to what she argued, the Court held that there was no discrimination on the basis of sex because she belonged to a class of pregnant persons and, according to the Court, all persons were treated equally within this class. *Bliss v Attorney General of Canada*, [1979] 1 SCR 183 [*Bliss*]. In *R v Drybones*, [1970] SCR 282 [*Drybones*] In *Drybones*, the Court struck down a law making it an offence for an aboriginal person to be intoxicated off a reserve. Ritchie J. stated that the expression "equality before the law" found in section 1(b) of the *Bill of Rights* means that no individual or group is to be treated more harshly than any other under the law on account of his race. *Ibid.*, at 297.

[316] In *Andrews*, the *Charter* was found to apply to a British subject, who was a permanent resident of Canada. The Court held that requiring this person to have Canadian citizenship to gain access to a profession infringed his section 15 equality rights. McIntyre J. wrote dissenting Reasons with Lamer J.

[317] Section 28 of the *Charter* reads: Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[318] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*], at para 15.

[319] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [*Withler*].

[320] *Withler*, previous note, at para 30. See also Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under section 15 of the Charter" 2014 3 (1) Canadian Journal of Human Rights 115 [Watson Koshan, *Adverse Impact*].

[321] *Withler*, above note 319, at para 43.

disadvantage to show how the law imposes a burden or denies a benefit to them relative to others.

In *Withler*, Chief Justice McLachlin and Justice Abella, who delivered the judgment for the Court, described the two ways to establish a claim of discrimination:

> The first way that substantive inequality, or discrimination, may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). Perpetuation of a disadvantage typically occurs when the law treats a historically disadvantaged group in a way that exacerbates the situation of the group.[322]
>
> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage.[323]

The Court in *Withler* immediately followed these two statements with a precision as to how a group, who has not suffered a historical disadvantage, may also be the subject of discrimination. It pointed out that a group "may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on the members of the group".[324] In such a situation, if it is shown that the law imposes a disadvantage by stereotyping members of this group, then subsection 15(1) has been infringed, and no evidence about historic disadvantage will be necessary. Where it is asserted

[322] *Ibid.*, at para 35. [Emphasis added]
[323] *Ibid.*, at para 36. [Emphasis added]. In *Withler*, the claimants challenged the Reduction Provisions of the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36, and the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17, arguing that the reduction of the supplementary death benefit by ten percent for every year that the deceased plan member had exceeded a specified age (60 or 65 years) was discriminatory. The provisions were not found to infringe subsection 15(1) and their claim was rejected.
[324] *Ibid.*, at para 36.

that the "law is based on stereotyped views of the claimant group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances".[325]

Thus, under *Kapp* and *Withler*, the central questions in a subsection 15(1) claim are: Does the law create a distinction based on an enumerated or analogous ground? Does the law treat a historically disadvantaged group in a way that exacerbates the situation of the group? Is the disadvantage imposed based on a stereotype or prejudice that does not correspond to the actual circumstances and characteristics of the group, but results in perpetuation of prejudice and stereotyping? The investigation may require a further question: If this is a group that has not suffered a historical disadvantage, is it the subject of conduct that, if permitted to continue, would create a discriminatory impact on its members? The Justices in *Withler* concluded that there is often a link between a historic disadvantage and discrimination, and pointed to the *remedial* purpose of subsection 15(1). In *Kapp*, the Court stated that its approach to discrimination in terms of the impact the law has on the "human dignity" of an individual, even considering the four contextual factors enunciated in *Law*, proved to be inappropriate.[326] The test of *human dignity* has proven to be confusing, impractical and burdensome for equality seekers.[327] The Court admitted that the test allowed the formalism of the *mirror comparator* analysis to resurface since its decision in *Andrews*, in which McIntyre J. emphasized that a formalistic approach to substantive equality should be avoided. Moreover, the Court

[325] *Ibid*., at para 38.
[326] *Kapp*, above note 318, at para 19. *Law,* above note 304. I will not substantively address the four contextual factors cited in *Law*. Briefly, the factors are 1) pre-existing disadvantage, if any, of the claimant group; 2) degree of correspondence between the differential treatment and the claimant's group reality; 3) whether the law or program has an ameliorative purpose or effect; and 4) the nature of the interest affected.
[327] *Kapp*, above note 318, at para 22.

clarified that the four factors cited in *Law* were not meant to be interpreted as a new test, but as a way to understand substantive equality under subsection 15(1) – how to combat discrimination.[328]

The trial judge in *Carter*, Justice Smith, applied the above principles in the context of physician-assisted dying.[329] She relied on Chief Justice McLachlin's and Justice Abella's Joint Reasons in *Withler* to state what the proper analysis should be under subsection 15(1). She indicated that the analysis involves answering the question whether the impugned law violates the animating norm – *substantive equality*.[330] What must be observed is the "law's real impact on the claimants and members of the group to which they belong".[331] What is to be avoided is the search for *formal equality* whereby a "mirror" comparator group is considered necessary as part of the equality analysis. This search is detrimental to the substantive equality analysis required under subsection 15(1) as it is a "search for sameness", which is at the heart of the *formal equality* doctrine, and may fail "to capture the substantive inequality".[332]

In reaffirming the animating norm of the Court's section 15 jurisprudence to be *substantive equality*, Smith J. in *Carter* quoted the Justices McLachlin and Abella in

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[328] *Ibid.,* at para 24.

[329] *Carter Trial,* above note 70. In this part of paper, I refer extensively to Madam Justice Smith's Reasons mainly because of her thorough subsection 15(1) analysis and, as noted previously, because the Supreme Court declined to deal with the issue of physician-assisted death under this subsection, preferring instead to deal with it under section 7. In my view, Justice Smith's judgment regarding *substantive equality* provides persuasive, if not controlling, authority on the subsection 15(1) issue.

[330] *Ibid.*, at para 1022.

[331] *Ibid.*, at para 1023.

[332] *Ibid.*, at para 1023. In fact, Smith J. noted the Supreme Court's rejection in *Withler* of the mirror comparator-group approach, which requires a comparison between closely matched groups to identify discrimination. In *Andrews,* it was described as a comparison with the condition of others. Justice Smith stated that the notion of equality as a comparative concept had evolved since *Andrews* into the one the Supreme Court is currently using in the long line of cases that includes *Andrews*, above note 303, *Law*, above note 304, Kapp, above note 318, *Withler*, above note 319, at para 60. It is noteworthy that the question of whether formal equality remains viable as a doctrine is unanswered to date, according to Professor Baines. See Beverley Baines, "Equality, Comparison, Discrimination, Status" (2015) Research Paper Series, Queen's University, at 73.

Withler that "[c]are must be taken to avoid converting the inquiry into substantive equality into a formalistic and arbitrary search for the "proper" comparator group".[333] While *comparison* is an important part of the analysis, its role is to help establish a distinction at the first step of the two-part *Kapp/Withler* test to conclude whether there is *substantive inequality*. The claimant must show that "he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1)".[334] It is unnecessary "to pinpoint a particular group that precisely corresponds to the claimant group".[335] Proof of the characteristic or characteristics that is alleged to establish the discrimination is what is required. As the two Justices, McLachlin and Abella, advert in *Withler*: "Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's right to be free from discrimination."[336] To be *free from discrimination* is clearly broader – much broader – than to be *treated identically*.

Therefore, to show discrimination, a claimant must show that the law is treating her/him differently (the distinction) by imposing a burden, obligation or disadvantage, or withholding benefits or advantages based on personal characteristics, and adversely impacting her/him (the discrimination). The burdens, obligations or disadvantages imposed on an individual or group, but not on others, or the benefits or advantages withheld from an individual or group, but available to others, have the *effect* of creating a distinction. One must therefore examine the "personal characteristics" of the individual or group, and the burdens and

[333] *Carter Trial,* above note 70, at para 1022. Smith J. is quoting McLachlin C.J. and Abella J. in *Withler*, at paras 1-3.
[334] *Withler*, above note 319, at para 62.
[335] *Ibid.,* at para 63.
[336] *Ibid.,* at para 31.

disadvantages the legislation is imposing on them or the benefits the legislation is withholding from them. If the claimant succeeds in proving the distinction, the analysis moves to the second stage of the two-part test noted above to determine whether the law creates a disadvantage by perpetuating prejudice or stereotyping.

Smith J. then referred to the interrogation at the second stage: Does the measure perpetuate disadvantage or stereotype the claimant's group? If, following these observations and interrogations, one can conclude that the legislation is creating a distinction, either purposefully or adversely, based on the individual's or group's personal characteristics, and perpetuating a disadvantage or stereotyping the individual or group, then the legislation is said to be discriminatory and in violation of subsection 15(1).

In *Carter*, Smith J. also addressed the difficulty in dealing with an *effects-based* discrimination case, particularly, in the case of disability. She stated that identifying claims with effects-based discrimination under section 15(1) is "less straightforward than those based on facial distinctions".[337] *Facial distinctions* are intentional or explicit. She referred to LaForest J.'s reasons in *Eldridge* to suggest that "[a]dverse effects discrimination is especially relevant in the case of disability".[338] She also relied on the Court's judgment in *Withler* to describe the difference between direct and *adverse effects* claims:

> In some cases, identifying the distinction will be relatively straightforward, because a law will, on its face, make a distinction on the basis of an enumerated or analogous ground (direct discrimination)….<u>In other cases, establishing the distinction will be more difficult, because what is alleged is</u>

[337] *Carter Trial*, above note 70, at para 1038. See also Watson Koshan, *Adverse Impact*, above note 320, at 32.
[338] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR. 624 [*Eldridge*].

> indirect discrimination; that although the law purports to treat everyone the same, it has a disproportionately negative impact on a group or individual that can be identified by factors related to enumerated or analogous grounds.[339]

The passage is clear that a law need not make an *explicit* distinction to be discriminatory. The distinction could be indirect. In *Carter*, Smith J. noted that the *Criminal Code* prohibition in that case, section 241(b),[340] did not create a distinction based on physical disability, but prohibited anyone from assisting another person to commit suicide. The trial judge stated it "is not necessary for members of a disadvantaged group to be affected the same way to establish that the law creates a distinction based on an enumerated or analogous ground."[341] She relied on the line of cases consisting of *Law, Kapp* and *Withler*, each in its own way standing for the proposition that any approach that is susceptible of sliding the equality analysis into "formalism or confusion" is inappropriate.[342] She rejected the Government of Canada's argument in *Carter* that there is no disproportionate burden imposed on the plaintiffs where the context of the legislation is based on a legal system, which embodies a "general and centrally-important prohibition against the ending of human life".[343] This argument was in response to the plaintiffs' argument that the prohibition in that case deprived them of the right to choose suicide, just like Ms. Rodriguez had argued in her own case – that "she would be deprived of the right to choose suicide, and so to decide the conduct of her life for herself".[344] Neither the *Carter* plaintiffs nor

[339] *Carter Trial*, above note 70, at para 1038. [Emphasis in original]
[340] Section 241(b) Criminal Code, above note 44.
[341] *Carter Trial*, above note 70, at paras 1032,1074.
[342] *Ibid.,* at para 1062.
[343] *Ibid.,* at para 1061.
[344] *Ibid.,* at para 1059.

Ms. Rodriguez argued that suicide was a benefit of which they were being deprived. Smith J. relied on the Court's decisions in *Turpin* and in *Auton* to conclude that to be deprived of a *choice* constituted a disadvantage or burden imposed by law.[345] She concluded that substantive equality analysis includes claims for the "removal of burdens imposed by law where those burdens are based on characteristics (such as disability) specified in s. 15 or analogous to them.[346] She quoted Wilson J. in *Turpin*, as follows:

> The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.[347]

Smith J. concluded that, based on the facts before her, the fact that some individuals may be unable to end their lives without assistance, because of a grievous and irremediable illness, supported a distinction between physically disabled persons and able-bodied persons in society. According to the trial judge, this was sufficient to establish a distinction based on disability.[348] The prohibition against assisted suicide adversely impacted the group of persons with disabilities and was therefore discriminatory against this group.

In *Quebec v A*, the Supreme Court clarified that stereotyping and prejudice set out in *Kapp* and *Withler* are "just two of the indicia" to determine whether substantive

[345] *R v Turpin*, [1989] 1 SCR 1296 [*Turpin*]. *Auton (Guardian ad litem of v British Columbia Attorney General)*, 2004 SCC 78 [*Auton*]. *Carter Trial*, above note 69, at paras 1059, 1064.
[346] *Carter Trial*, above note 70, at para 1064.
[347] Ibid., at 1329-1330. *Turpin*, above note 345.
[348] *Carter Trial*, above note 70, at para 1076.

equality has been breached.[349] According to the Court, it is necessary to look at flexible and more contextual question as to "whether a distinction has the effect of perpetuating *arbitrary disadvantage*"[350] on the basis of an enumerated or analogous ground. Abella J. stated that the *Kapp* and *Withler* decisions did not create a new test, but reformulated the *disadvantage* analysis that McIntyre J. had described in *Andrews*. The decision in *Quebec v A* is significant because it affirmed the Court's rejection of the *dignity* test established in *Law*.[351] Consistent with its analysis in *Kapp*, the Court stated that to require the claimant to show that a law perpetuates a *view* that he/she is less worthy or less capable as a human being, or promotes *negative* attitudes towards this individual is to impose an unnecessary and "ineffable burden".[352] According to the Court, the "root" of section 15 is to understand that some groups have been historically disadvantaged and any attempt by government to perpetuate such disadvantage is a violation of substantive equality.[353]

The Court reiterated the importance of *arbitrary disadvantage* in its more recent decision of *Taypotat*.[354] In Taypotat, the Department of Indian Affairs and Northern Development authorized the Kahkewistahaw First Nation to elect its leaders under a new election code after the band demonstrated that it had received sufficient community support in a ratification vote. The code required any band member running as chief or council member to meet a grade 12 minimum requirement. The

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[349] *Quebec v A*, 2013 SCC 5, [2013] 1 SCR 61, at para 325. [*Quebec v A*] Although Abella J. dissented on the result in the case, she wrote Reasons, with which four other Justices concurred, to the effect that certain provisions in the *Civil Code of Quebec* affording legal protections to married or civil union spouses, but not to *de facto spouses*, violated the equality rights guaranteed under the *Charter* of the latter spouses. Abella J. concluded that these provisions were not saved under section 1 whereas four of the Justices found that the provisions did not violate the *Charter* and another four concluded that the provisions were saved by section 1.
[350] *Ibid.* at para 331.
[351] *Law*, above note 304.
[352] *Quebec v A*, above note 349, at para 330. [Abella J.]
[353] *Ibid.*, at para 332. [Abella J.]
[354] *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 [*Taypotat*]

Election Officer refused to certify Taypotat, who had been Chief for 27 years, in his bid to be re-elected. Writing for the Court, Abella J. emphasized that the focus of a subsection 15(1) analysis is to determine whether the impugned law creates a distinction, either facially or adversely, based on an enumerated or analogous ground and whether, having regard to the social and economic context of the claimant, the law imposes a burden or denies a benefit such that the claimant's disadvantage is perpetuated, reinforced or exacerbated. She stated that the focus of the second part of a section 15 analysis is *arbitrary disadvantage* to determine "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage".[355] This would constitute an *arbitrary disadvantage*.

In *Vriend*, seen earlier, Alberta's human rights legislation, the *Individual's Rights Protection Act* (IRPA) was found to be *underinclusive* and discriminatory because it excluded a certain group of individuals on the ground of *sexual orientation*, more specifically, *LGBT* persons.[356] Therefore, according to the Court, the legislation's underinclusive effect on this group denied its members *substantive equality*. The exclusion of this group from the legislation had a disproportionate impact relative to the *included* group, heterosexuals.[357]

[355] *Ibid.,* at 20. Taypotat brought an application for judicial review before the Federal Court initially claiming that education was an analogous ground for the purposes of section 15, then, before the Supreme Court, changing his claim to argue that education has a disproportionate effect on older community members who live on a reserve. The change was apparently due to evidentiary deficiencies in Taypotat's claim before the courts.
[356] *Vriend*, above note 19, para 61. See also Watson Koshan, *Adverse Impact*, above note 320, at 18**.**
[357] Watson Koshan, *Adverse Impact*, above note 320, at 18.

Some commentators have been critical of the slow progress made towards understanding *substantive equality* in this country. For Professor MacKinnon, substantive equality can be best understood only by realizing that inequalities reflect the *social hierarchies* built in our social fabric. According to MacKinnon, Canadian courts pursued a long and winding road because they placed dignity – or more accurately, indignity, – and not hierarchy, as the *sine qua non* of the discrimination analysis.[358] She claims that the Court finally recognized this difficult road it had travelled in its 2008 *Kapp* decision.[359] To prove her point that social hierarchy should be at the centre of the *substantive equality* analysis, she identifies several hierarchies underpinning current disadvantage based on social status and worth, conjugality, race, sex, sexual orientation and species: straight over gays and lesbians, married over common law spouses, white over black, men over women, and even humans over animals.[360] MacKinnon argues that although the Court does not use the expression "hierarchy" in its decisions, it "often produces results that are consistent with a hierarchical analysis".[361]

In my opinion, the notion of *hierarchy* could be just as unsatisfactory as *dignity*, which the Court rejected in *Quebec v A*. A claimant is not expected to show that a law perpetuates a *view* that he/she is less worthy or less capable as a human

[358] Catharine A MacKinnon, "Substantive equality revisited: A reply to Sandra Fredman" (2016) 14:3 International Journal of Constitutional Law 739, at 741. [MacKinnon*, Substantive equality*].
[359] *Kapp,* above note 318. In *Kapp*, commercial fishers, who were mainly non-Aboriginal, claimed they were discriminated against on the basis of race when they were excluded from a fishery during a 24-hour period and three Aboriginal bands were granted communal fishing licences permitting their members to fish for salmon during this time. The Court held that the licence was constitutional.
[360] MacKinnon*, Substantive equality*, above note 358, at 743.
[361] Ibid., at 744. MacKinnon cites some examples of where the Court performed a "hierarchical analysis" without using this language: *R v Keegstra*, [1990] 1 SCR 852 [*Keegstra*] (hate propaganda), *R v Butler*, [1992] 1 SCR 452 [*Butler*], *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69 [*Little Sisters*] (pornography). She also refers to Abella J.'s dissent in *Quebec v A*, who found the exclusion of *de facto spouses* from family patrimony and matrimonial rights in Quebec to be discriminatory. According to MacKinnon, the Justice applied a "disadvantage analysis attentive to hierarchy,…. although that language is not used". *Ibid*, at 744. Quebec v A, above note 349.

being or promotes *negative* attitudes towards this individual. What is important to understand for the purposes of section 15 is that some groups have been historically disadvantaged and to perpetuate such disadvantage is a violation of substantive equality.[362] It would seem that the evidentiary standard of *disadvantage* and now, under the authority of *Quebec v A* and *Taypotat*, of *arbitrary disadvantage*, is much easier to satisfy than *hierarchy*. First, one must show that the legislation or other form of state action has the effect of creating a distinction. Then, it must be shown that the law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage. For example, in *Vriend*, a legislature declined to include *sexual orientation* as a ground of discrimination in its human rights legislation even after debating and voting on the issue and in spite of the policy of equality proclaimed in the law's preamble. While I will not comment on whether there will always be hierarchies, I do subscribe to the view that what the equality provision in the *Charter* seeks to accomplish is not to eliminate all distinctions, as McIntyre J. adverted in *Andrews*, but to promote the goal of a society "without discrimination".

On her part, Professor Fredman proposes a four-dimensional framework to reflect the several dimensions of *substantive equality* found in the Court's current jurisprudence. The approach consists of the following four aims and objectives: i) redress disadvantage; ii) redress stigma, stereotyping, humiliation and degradation as a result of race, sex, violence or other status-based prejudice; iii) the participative dimension: enhance social inclusion and political voice to promote or permit political

[362] *Quebec v A*, above note 349, at para 332. [Abella J.]

participation of minorities (who have traditionally been blocked) and social inclusion in community and society to attain full humanity; and iv) accommodate difference (and remove the detriment) towards the goal of achieving social structural change.[363] Fredman argues that the dimensions should be viewed together so as to buttress one another and make up for each other's weaknesses.[364] She justifies her approach as a better reflection of the "multi-facetted nature of inequality" and as a more reliable tool in helping identify discriminatory actions, practices and institutions.[365] According to Fredman, the right to equality is best understood when viewed from the perspective of values or policy, and not logic, as the concept resists capture by a single principle and too many conflicting conceptions of the right exist.[366] In fact, Fredman states that dignity and hierarchy are similar in that they both evoke the notion of rank.[367]

MacKinnon is critical of Sandra Fredman's proposal of a four-dimensional approach to elucidate *substantive equality*. She refers to Fredman's analytical framework as a list of factors that reflect traditional thinking and current developments in equality thinking. While she admits that Fredman's approach does not amount to the "typical abstraction" found in the literature, Mackinnon argues that her failure to observe that the single principle that has eluded her in her quest to describe *substantive equality* is found in the notion of *social hierarchy*.[368] Although MacKinnon offers hierarchy as an alternative, she admits that her own principle is not

[363] Sandra Fredman, "Substantive equality revisited" (2016) 14:3 International Journal of Constitutional Law 712, at 728-733. [Fredman*, Substantive equality*]
[364] Ibid.*,* at 713.
[365] *Ibid.,* at 713.
[366] *Ibid.,* at 713-4.
[367] *Ibid.*, at 725.
[368] MacKinnon*, Substantive equality*, above note 358, at 740.

an abstraction, as one would consider a principle to be a rule, but the "social content [underlying] each "pre-existing disadvantage"".[369]

Fredman's approach appears to be more persuasive. Her comprehensive framework appears to offer a workable mechanism in the search for substantive equality for those who are disadvantaged, demeaned, excluded or simply ignored. Its attractive feature is its practicality. It provides a *road map* towards the attainment of substantive equality consisting of specific points of identification such as detriment rather than difference or recognition of the individual as a social construct rather dignity attached to an individual. As Fredman herself says, her approach has a *relational format*. Because it is more practical, it seems easier to apply.

Before addressing whether Bill C-14 complies with or breaches the principle of *substantive equality*, a comment is necessary on what the Court has said with respect to subsection 15(2) of the *Charter* concerning the amelioration of conditions of disadvantaged individuals or groups.[370] In *Kapp*, the Court formulated a new test for the subsection enabling the government to show that the "remedial scheme" was designed to ameliorate the situation of disadvantaged individuals or groups.[371] Under the test, the government must show that (1) the program has an ameliorative purpose, and (2) the program is directed at a disadvantaged group found in any of the enumerated or analogous grounds.[372] The Court considered that if the government is able to show that the ameliorative program meets the criteria of subsection 15(2), the

[369] *Ibid*., at 740.
[370] Subsection 15(2) of the Charter reads: Subsection 1 does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
[371] *Kapp*, above note 318, at 33 and 41.
[372] *Ibid*., at 41

analysis under subsection 15(1) may become unnecessary.[373] Read together, the two provisions are an expression of *substantive equality* – subsection 15(1) viewed as preventing governments to act in a way that perpetuates disadvantage and subsection 15(2) viewed as enabling governments to ameliorate situations of disadvantaged groups.[374] However, the Court warned that the proper approach would be the *purpose-based* one rather than an *effect-based* approach and proposed the following question for courts to ask: "[W]here a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged?"[375] Once a claimant has shown that there is a distinction based on an enumerated or analogous ground, the government must show that the law, program or activity is ameliorative. There is no need to proceed further into the second stage of the *substantive equality* test. In response to what critics suggested governments could easily try to circumvent the discriminatory action by inserting an *object* clause in the legislation identifying its ameliorative purpose, the Court stated that courts could easily examine the legislation to determine its genuineness. In *Kapp*, the claimants unsuccessfully argued that the source of their discrimination was a government program that the Court identified as ameliorative. The federal government had adopted the Aboriginal Fisheries Strategy, which was aimed at providing the aboriginal communities with a larger role in fisheries management and increased economic benefits. Similarly, in *Cunningham*,[376] the Court held that status Indians who were excluded from membership in a Métis settlement

[373] *Ibid.*, at 37. The Court was proposing this third interpretation to subsection 15(2) to the two that Iacobucci J. had proposed in *Lovelace* – either as an interpretive aid to subsection 15(1) or as an exemption to subsection 15(1). *Lovelace v Ontario*, 2000 SCC 37, [2000] 1 SCR 950 [*Lovelace*].
[374] *Kapp*, above note 318, at 37.
[375] *Ibid.*, at 48.
[376] *Alberta v Cunningham*, 2011 SCC 37 [*Cunningham*].

pursuant to the *Metis Settlements Act*[377] did not violate subsection 15(1) of the *Charter*. The purpose of the Act was to enhance Métis identity and culture, which is an inequality associated with an ameliorative program permitted under subsection 15(2) of the *Charter*. In my opinion, the government could not successfully make a s. 15(2) argument as it is unable to show that there was a program set up and the distinction was intended to improve the conditions of a disadvantaged group.

ii. *Substantive Equality* and Bill C-14

By enacting paragraph 241.2(2)(d), Parliament has intentionally sought to protect the persons who are perceived as *vulnerable* – persons whom the legislative body considered might be persuaded to "commit suicide in a moment of weakness".[378] This is a personal characteristic that is irrelevant to certain persons with disabilities, who wish to end their lives by medical assistance in dying as a result of a grievous and irremediable medical condition. This requirement to show a reasonably foreseeable death creates a distinction and is an additional burden based on a personal characteristic. This is the effect of the MAiD legislation.

The legislative constraint bars a group of persons from accessing MAiD solely on the ground that the members of this group do not have their natural death approaching a *reasonably foreseeable* future. The legislation fails to give due consideration to the other aspects of their physical condition, the more important ones, that demonstrate the extent of their disability and their suffering. This perpetuates a disadvantage to which persons with disabilities have been subjected.

[377] *Metis Settlements Act,* RSA 2000, c. M-14.
[378] *Carter*, above note 1, at para 78.

The provision in question is prohibitive in that it excludes this subgroup of persons with disabilities, who cannot prove a reasonably foreseeable natural death. Thus, paragraph 241.2(2)(d) is *under-inclusive* regarding this particular group of individuals due to the fact that their diagnosis does not include a *reasonably foreseeable* natural death. The provision creates an *arbitrary disadvantage* and is therefore discriminatory.

d) SECTION 1 JUSTIFICATION

The onus is on the government to show that the impugned provision is justifiable under section 1. At this justificatory stage, government will likely argue that the provision is a result of a deliberate policy choice and the provision is facially neutral. In other words, it will argue that it has balanced the perspective of persons who might be at risk in a permissive regime against that of those who are not, when seeking medical assistance in dying. Under the *Oakes* test, the government must show that the law has a pressing and substantial object and the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected, (2) it is minimally impairing of the right in question, and (3) there is proportionality between the deleterious and salutary effects of the law.[379] Moreover, in her reasons for judgment, Smith J. noted that the decision in *Alberta v. Hutterian Brethren of Wilson Colony* had brought a "substantive change" to the section 1 analysis.[380] She expressed this opinion because the Court concluded in *Hutterian* that the final branch of the Oakes test – whether the deleterious effects of the law are

[379] Oakes, above note 222.
[380] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 [*Hutterian*]. *Carter Trial,* above note 70, at para. 994.

disproportionate to its benefits – did not duplicate the first stage of the test – pressing and substantial objective. She indicated that the courts' assessments at this stage are broadened to take account whether the deleterious effects of the infringement outweigh the benefits to the individual or group.[381] The Supreme Court did not disagree with this analysis.[382]

Parliament has gone too far in seeking to protect the vulnerable in the context of medical assistance in dying. In my opinion, the impugned legislation does not meet the proportionality test required under section 1 of the *Charter*. The objective of subsection 241.2(2), and, in particular, paragraph (d) requiring a reasonably foreseeable natural death, is to ensure that vulnerable persons in society will not be induced into ending their lives in a moment of weakness. The law seeks to protect vulnerable persons, who may be induced, coerced or manipulated into committing suicide at a time of weakness. While the objective of this provision is pressing and substantial, the measure is disproportionate. The disproportionality arises because it is an excessively-stringent and overly-protective safeguard, which *adversely impacts* persons who are "competent, fully-informed, non-ambivalent, and free from coercion or duress".[383]

Limiting the right of access to medical assistance in dying for certain persons with disabilities, who cannot prove their death is reasonably foreseeable, is not rationally connected to Parliament's objective to protect vulnerable persons, who might be induced into ending their lives in a moment of weakness. It has the adverse

[381] *Carter Trial,* above note 70, at para 994.
[382] The SCC did disagree with the trial judge's conclusion that the Court's s. 1 comments in *Hutterian* were necessary for her to reconsider the s. 15 equality claim. She could have reconsidered this claim because of the change in legislative facts that were before her. *Carter*, above note 1, at para. 48.
[383] *Carter Trial,* above note 70, at para 1243.

effect of compelling certain persons with disabilities, who can meet all of the legislative requirements of subsection 241.2(2), but whose natural death is not reasonably foreseeable, to continue to live against their will.

Paragraph (d) also fails to meet the proportionality test because it is not minimally impairing on certain persons with disabilities whose natural death is not reasonably foreseeable. Parliament could have successfully met the proportionality test and, consequently, achieve its legislative objective of protecting vulnerable persons by leaving this responsibility solely to the medical and nurse practitioners. # has been induced, coerced or manipulated into seeking medical assistance in dying.[384] In doing so, it would be imposing a less invasive way and a less onerous protective safeguard for the benefit of these persons with disabilities. It would seem that this part of the medical assessment – whether a person is showing signs of coercion, undue influence or ambivalence – would have been rendered much easier and more sensible if the decision were left to the medical practitioner alone. A patient can demonstrate to the acting practitioner whether he/she is acting in a moment of weakness in applying for MAiD. This professional alone should have the discretion to decide the consensual issue and not be concerned with the legal constraint of a person's "natural death". In its effort to protect those who might be perceived as acting in a moment of weakness or, more precisely, under a defective consent, Parliament acted in a way that could not satisfy the minimal impairment test under *Oakes*. In doing so, it digressed and narrowed the scope of *Carter*. Canadian Courts have recognized physicians' ability to assess adequately for *free and informed*

[384] *Carter*, above note 1, at para 118.

decision making. Such a procedure would be minimally impairing on a person with a disability, who requests MAiD, as it would meet the "stringently limited, carefully monitored system of exceptions" to which the trial judge in *Carter* referred and with which the Supreme Court agreed.[385]

Parliament's inclusion of a *reasonably foreseeable natural death* is not a neutral and rationally defensible policy choice. It does not take into account the disproportionate impact that the provision has on persons, who request MAiD.[386] Paragraph (d) discriminates against a subgroup of disabled persons on the ground of a *personal characteristic* that is unnecessary to possess in order to have access to MAiD. Persons requesting MAiD, who meet the other legislative requirements of subsection 241.2(2), will have demonstrated that "they are in an advanced state of irreversible decline in capability" and "that state of illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable".[387] In spite of this debilitating condition and intolerable pain that they must suffer, these persons will be required to live in the circumstances of their medical condition. The requirement that a person's natural death has become *reasonably foreseeable* under paragraph 241.2(2)(d) has not struck a correct balance between the legislative objective to protect the vulnerable in the context of medical assistance in dying, or, otherwise stated, persons who might be at risk in a permissive regime, and the objective to allow those who are grievously and irremediably ill and enduring intolerable suffering to have access to medical

[385] *Ibid.,* at para 29.
[386] *Carter Trial,* above note 70, at para 1089.
[387] Paragraph 241.2(2)(b) and (c), respectively, of Bill C-14. See above note 153.

assistance in dying. The latter are not vulnerable. For all of the foregoing reasons, the legislative requirement found in paragraph (d) constitutes a prohibition which is not justified under section 1 of the Charter, and an infringement of a person's right to equality under section 15(1).

V. Conclusion

VI. Currently, under both the federal and the Quebec provincial statutes, in evaluating MAiD requests, medical practitioners have the difficult task of determining whether their patients' medical conditions meet the statutory requirement of a *reasonably foreseeable natural death* or, in Quebec, the *reasonably foreseeable natural death* and *end-of-life* requirements found in both legislation. This responsibility is enormous, and practitioners' response so far has been one of caution – better to be prudent than risk being charged with wrongful death or even murder! The wavering practitioner in *A.B*. held an honest belief that his patient's death was in fact *reasonably foreseeable*. However, his belief – a subjective one – based on his professional experience and emotional make-up contradicted another physician's belief – also a subjective one – who had a different perception of what a *reasonably foreseeable* death could mean. The case illustrates the uneasiness that medical practitioners could experience with the legal expression *reasonably foreseeable* natural death. The issue of a patient's *informed consent* falls well within a medical practitioner's professional purview. The practitioner is the best person positioned to evaluate the risks involved in permitting medical-assistance in dying. Many patients, who satisfy the other statutory components, but whose

death is *indeterminable*, will submit requests only to see them rejected. Some might choose not to submit their MAiD requests and end up enduring intolerable suffering against their wishes until death ensues "naturally". Perhaps, they will consider alternative ways to die. For these patients, the law has little or no value, as they do not know when they will die "naturally". Their perception is that they would not be able to meet the *reasonably foreseeable* and, for Quebec residents, the two requirements – reasonably foreseeable and *end-of-life* – found in the federal and the provincial statutes, respectively.

With the adoption of Bill C-14 and the *Act Respecting End-of-Life Care*, the authority under *Carter* would be severely undermined and, even rendered superfluous, if the two provisions, paragraph 241.2 (2)(d) and subsection 26(3), are ultimately upheld by the courts. The provisions in effect exclude a class of people, who could validly give their consent to end their life in their very difficult medical circumstances. However, the effect of paragraph 241.2(2)(d) prohibits them from giving this consent. A patient requesting MAID must prove that she is expected to die of natural causes within a *reasonably foreseeable* future. *Carter* provides that there are vulnerable individuals in society that need protection. However, the impugned provision adversely affects individuals, who must endure intolerable physical or psychological suffering in the circumstances of their condition while living, if their MAiD requests are denied. These individuals would be compelled to die an "ugly death", the kind of death the claimants in *Carter* and *Rodriguez* sought to avoid.

The situation is untenable given that *Carter* represents the law of the land. Bill C-14 and the *Act Respecting End-of-Life Care* in Quebec are sources of ambiguity

and uncertainty in an area where clarity, reliability and suitability are critical – even imperative. It is a person's *Charter* right to die in a dignified manner at a time and place of one's choosing where this person has a medical condition as described in *Carter*. In *Carter*, neither terminal illness nor imminent death was considered necessary as part of a person's medical condition. Given the grievous and irremediable nature of a person's medical condition, neither ambiguity nor uncertainty is permitted here.

Also, a court as a guardian of *Charter* values must take into account whether a law is consistent or runs afoul of the *Charter*. However, the issue is whether the Supreme Court will re-position itself with respect to the question of medical assistance in dying. This is not an unlikely scenario given that the Court re-positioned itself on the issue from its earlier position in *Rodriguez*. Will the Supreme Court consider that a reasonably foreseeable natural death is an adequate legislative response as part of a "carefully-designed system".

Hopefully, this paper demonstrated the error of Parliament's policy judgment in crafting Bill C-14. Parliament's position on the very specific issue of a *reasonably foreseeable natural death* fails to consider the essence of *Carter*. The right to physician-assisted dying, as the Court pronounced it in *Carter*, not just unanimously, but as a single voice, is about *human suffering*. It is about the kind of suffering that is an affront to a person's human autonomy and dignity and equality. There are individuals who suffer from disabilities that are as severe as the ones described in *Carter*, but who regrettably will not have access to MAID because they fail to meet the stringent legislative constraint of Bill C-14 and, in Quebec, of *Act Respecting End-*

of-Life Care in Quebec. This policy error illustrates that Parliament is not *better placed* than the courts, or even the medical professionals, to manage the risk of those individuals who are considered as needing protection because they are undergoing a moment of weakness. With Bill C-14, Parliament has gone beyond what it needed to do, which was to *decriminalize* the offence of assisting a person to die by suicide to the extent necessary to allow medical assistance in dying.

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