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Shocking news
Assisted dying means euthanasia and assisted suicide
Ethical, medical and legal perspectives in tension at committee hearing

Sean Murphy, Administrator
Protection of Conscience Project

Wayne Kondro protests against the use of the words "euthanasia" and "physician-assisted suicide" during parliamentary hearings conducted by the Special Joint Committee on Physician Assisted Dying. He refers to the proceedings as "shock TV."[1]

He perhaps has a point. The name of the committee does not indicate that the hearings are actually about euthanasia and physician-assisted suicide, so someone watching the proceedings for the first time, might be shocked.

The post-*Carter* medico-legal lexicon

However, the discussions will not shock those who have been following the news. Assisted suicide and euthanasia were spelled out in the notice of claim that launched the case four years go.[2] During oral argument before the Supreme Court of Canada, Joseph Arvay, counsel for the appellants, affirmed that his clients were seeking legalization of both physician assisted suicide and euthanasia by physicians.[3] The *Carter* ruling centres on sections of the *Criminal Code* concerning consent to the infliction of death (Section 14), assisted suicide (Section 241(b)), and homicide (Section 222).[4]

Department of Justice lawyers told the committee that they would have to consider "an exemption for conduct that is otherwise criminal, namely, the crimes of aiding suicide and murder, which correspond to the two different types of physician-assisted dying."[5] Leo Russomanno, representing the Criminal Lawyers' Association, agreed with Committee member M.P. Murray Rankin that "the charge in the worst case of [physician] misconduct would be either unlawfully assisting a suicide, or homicide, murder,"later adding, "Physician-assisted suicide, if it runs afoul of the exception in *Carter*, is in every conceivable way that I can think of, murder."[6]

Mr. Justice Moldaver of the Supreme Court of Canada was particularly candid. During the hearing into the application by the federal government for an extension of the original one year time limit set by the Court, he suggested that "when Parliament authorizes someone to kill somebody, they might want judicial approval first.," adding, "They might want to put in measures that ensure so far as possible that we are not killing people who really ought not to be killed."[7]

Thus, shocking as it might be to Mr. Kondro, terms like euthanasia, assisted

suicide, homicide, and killing go with the territory the Special Joint Committee is required to explore. Moreover, these terms must be used by physicians and health care providers who, for reasons of conscience or religion, do not want to kill patients or help them commit suicide. While they need not use them at all times and in all circumstances, they cannot properly articulate the basis for their objections without them. Thus, courtesy the *Carter* ruling, the words euthanasia, suicide, homicide, and killing have become a permanent part of the Canadian medico-legal lexicon.

Of course, nothing prevents the Special Joint Committee from adding trigger warnings to its website and to its proceedings in order to avoid shocking people like Mr. Kondro.

Editors, on the other hand, cannot be expected to post trigger warnings when columnists who don't understand what they are talking about offer ill-mannered polemics instead of thoughtful commentary. The best they can do - as *iPolitics* does - is add a disclaimer that the views and opinions expressed by columnists don't necessarily reflect those of the publication.

Carter criterion of "irremediability"

Hence, *iPolitics* cannot be held responsible for Mr. Kondro's misrepresentation of the remarks of Canadian Psychiatric Association president Dr. Dr. Sonu Gaind. Mr. Kondro effectively accused Dr. Gaind of trying to boost business and maximize profits at the expense of patients by claiming that psychiatrists can cure any kind of mental illness.[8]

In fact, Dr. Gaind explained, with great care and precision, that it would be difficult to definitively classify any mental illness as "irremediable," since some kind of remedial therapy is normally available even in the most severe cases. Committee Chair Robert Oliphant was puzzled by his explanation. Reflecting on his testimony, M.P. Murray Rankin wondered if there could ever be a mental illness that would meet the *Carter* criteria of irremediality.

Dr. Gaind said, "I can't make a definitive statement that nothing ever could [be irremediable]. I don't believe that anyone could say that, but I share your difficulty in thinking of many that would, if any, but I think it's not possible to say that nothing ever could."[9]

What concerned Mr. Rankin was that a patient must have an "irremediable" medical condition in order to qualify for euthanasia or assisted suicide under the criteria set by the Supreme Court of Canada in *Carter*. However, Dr. Gaind's explanation indicated that someone with mental illness might never quality. Both were puzzled, because it seemed that, by insisting upon irremediability, the Supreme Court had set a standard that could never be met in real life.

The conundrum arose because Dr. Gaind was talking about the *medical* meaning of "irremediable," but, in *Carter*, the Supreme Court had given it a very different *legal* meaning. Professor Jocelyn Downie explained this the next day. She told the Committee that the Court had defined "irremediable" to mean the condition "cannot be remediated or alleviated by any means *acceptable to the patient*."

"Therefore," she said, "while you may say that a certain condition is treatable, *it can be irremediable if the treatment is unacceptable to the patient*."[10]

This could well mean that physicians may be unable to provide a written medical opinion to the

effect that a condition is irremediable. The most that they may be able to provide with respect to the criterion of irremediability is a diagnosis of the medical condition and the various treatments available to cure or ameliorate it. A patient who preferred euthanasia or assisted suicide would be free to reject the treatments, which would have the effect of making the condition *legally* irremediable, even if not medically so.

All interesting and important points missed by Mr. Kondro in his haste to trash Dr. Gaind.

Physician reluctance to kill: vice or virtue?

Equally unenlightening is Mr. Kondro's sneering characterization of objecting physicians as hypocritical narcissists because they don't want to kill patients. The accusation appears to be based upon his belief that killing a patient by lethal injection is no different than "common medical practices" like withdrawing life support, and, further, that no contrary view is worthy of serious consideration. Mr. Justice Moldaver, one of the Supreme Court of Canada judges who wrote the *Carter* decision, does not agree:

> Here we are saying that a doctor can actually take an active part in injecting someone, for example, and killing them. . . I see a difference between that and saying, "Okay, we're going to stop the life support, and let the patient die the, the natural death."[11]

Nor does Joseph Arvay agree that physician reluctance to kill is a vice. On the contrary, Mr. Arvay, counsel for the successful plaintiffs/appellants in *Carter*, lauded it as an outstanding virtue. "All doctors," he said, "believe it is their professional and ethical duty to do no harm."

> Which means, in almost every case, that they will want to help their patients live, not die. It is for the very reason that we advocate only physician assisted dying and not any kind of assisted dying because we know physicians will be reluctant gatekeepers, and only agree to it as a last resort.[12]

To paraphrase Mr. Kondro, he is "playing fast and loose" with both facts and logic, and the odds are very much against his readers even understanding the issues if they rely upon his commentary. In view of this, it is, perhaps, all for the best that he entirely ignored a particularly interesting exchange between Senator Serge Joyal and Dr. Gaind, this time about the assessment of patient capacity (the *Carter* criteria of "competence") in relation to the concept of irremediability.[13]

Carter criterion of "competence" (capacity)

Dr. Gaind told the Committee that some forms of mental illness can cause cognitive distortions that impair judgement. He pointed out that this is relevant to the Court's concern that patients should not be induced to take their lives at a time of weakness.

Cognitve distortions, he said, can undermine the patient's autonomy and decision-making process, acting effectively like coercion or duress from external sources. Thus, unlike purely biophysical illnesses, the symptoms of mental illness can produce both suffering and incapacity.

Senator Joyal was concerned that a psychiatrist might find that a patient lacked capacity to ask for euthanasia or assisted suicide because cognitive distortions were impairing the patient's judgement about the outlook for his illness.

Dr. Gaind explained that mental illness can cause a patient to be literally unable to see that he has a future (including the possibility of remediation). He questioned how such an inability could be reconciled with capacity/competence. It is part of the psychiatrist's role, he said, to determine whether or not such "cognitive distortions" are impairing a patient's decision-making capacity. That did not mean, he added, that a treatment would be imposed, because there is a difference between imposing a treatment and concluding that a patient lacks the capacity to obtain a treatment.

Senator Joyal protested that, in such a case, the psychiatrist would be preventing the patient from accessing assisted suicide or euthanasia. The psychiatrist would, he said, be substituting his own objective judgement that the condition is remediable for the subjective judgement of the patient that it is not. Dr. Gaind agreed that would be the case if the patient lacked capacity: that is, if the patient's contrary judgement was the product of cognitive distortion caused by the illness.

The answer that did not satisfy Senator Joyal. His primary concern seemed to be to put an end to the suffering of the patient, even if the patient were motivated by cognitive distortions contributing to the suffering and impairing decision-making capacity. He appeared to view a finding of incapacity in such circumstances as an unwarranted interference by a psychiatrist in patient autonomy.

Following Senator Joyal's line of questioning, one is left with the impression that he might argue that the criterion of capacity/competence should be dispensed with in the case of mental illness, or that the definition of capacity should be changed so that psychiatrists cannot use adverse capacity assessments to obstruct patients seeking euthanasia or assisted suicide.

In any case, the exchange highlighted the difference between the perspective of a psychiatrist attempting to properly assess the capacity of a patient whose decision-making may be clouded by cognitive distortions, and that of a lawyer primarily interested in ensuring that the physcian's capacity assessment does not obstruct the patient in the exercise of a purported legal right.

Notes

1. Kondro W. "Playing fast and loose with logic at the assisted death hearings." *iPolitics*, 2 February, 2016 (http://ipolitics.ca/2016/02/02/playing-fast-and-loose-with-logic-at-the-assisted-death-hearings/) Accessed 2016-02-03.

2. In the Supreme Court of British Columbia, *Notice of Civil Claim between Lee Carter, Hollis Johnson, Dr. William Shoichet and the British Columbia Civil Liberties Association (Plaintiffs) and the Attorney General of Canada (Defendant)* dated 26 April, 2011, Part 1, para. 6, 7 (http://www.consciencelaws.org/archive/documents/carter/2011-04-26-noticeofclaim01.pdf) (Hereinafter "*Original Notice of Claim*")

3. Supreme Court of Canada, 35591, Lee Carter, et al. v. Attorney General of Canada, et al (British Columbia) (Civil) (By Leave) Webcast of the Hearing on 2014-10-15: Joseph Arvay, Oral Submission, 88:03 | 491:20 to 90:07 | 491:20 (http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35591&urlen=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1938/201410150500wv150en,001&urlfr=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1940/201410150500wv150en,

001&date=2014-10-15) Accessed 2016-02-08.

4. *Carter v. Canada* (Attorney General), 2015 SCC 5, para. 19. (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do) Accessed 2015-06-27.

5. Special Joint Committee on Physician Assisted Dying, Meeting No. 2 (18 January, 2016): Evidence. (http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8069838) Accessed 2016-02-04

6. Special Joint Committee on Physician Assisted Dying, Meeting No. 10 (2 February, 2016): Webcast: 19:52:38 to 19:53:51 (http://parlvu.parl.gc.ca/XRender/en/PowerBrowser/PowerBrowserV2/20160202/-1/24406?useragent=Mozilla/5.0 (Windows NT 6.1; WOW64; Trident/7.0; SLCC2; .NET CLR 2.0.50727; .NET CLR 3.5.30729; .NET CLR 3.0.30729; Media Center PC 6.0; .NET4.0C; .NET4.0E; InfoPath.3; GWX:DOWNLOADED; rv:11.0) like Gecko) Accessed 2016-02-08.

7. Supreme Court of Canada, 35591, *Lee Carter, et al. v. Attorney General of Canada, et al* (British Columbia) (Civil) (By Leave). Webcast of the Hearing on 2016-01-11, 171:30 | 205:09 to 171:55 | 205:09 (http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35591&urlen=http%3a%2f%2fwww4.insinc.com%2fibc%2fmp%2fmd%2fopen_protected%2fc%2f486%2f1938%2f201601110500wv150en%2c001&urlfr=http%3a%2f%2fwww4.insinc.com%2fibc%2fmp%2fmd%2fopen_protected%2fc%2f486%2f1940%2f201601110500wv150en%2c001&date=2016-01-11) Accessed 2016-02-08.

8. "Dr. Dr. Sonu Gaind. . . essentially argued that a psychiatrist could cure anyone . . . Even terminal patients near death would benefit from a psychiatrist's involvement . . .Translation? Ka-ching, ka-ching. Gaind did concede, though, that it is vaguely 'possible' that there is such a thing as an irremediable disease."

9. Special Joint Committee on Physician Assisted Dying, Meeting No. 6 (27 January, 2016): Evidence. (http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8075735) Accessed 2016-02-07

10. Special Joint Committee on Physician Assisted Dying, Meeting No. 7 (28 January, 2016): Evidence. (http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8077830) Accessed 2016-02-06

11. Supreme Court of Canada, Webcast of the Hearing on 2016-01-11, 35591, *Lee Carter, et al. v. Attorney General of Canada, et al* (British Columbia) (Civil) (By Leave). 169:10 | 205:09 to 100:33 | 205:09

12. Supreme Court of Canada, Webcast of the Hearing on 2014-10-15, 35591, *Lee Carter, et al. v. Attorney General of Canada, et al* (British Columbia) (Civil) (By Leave). Joseph Arvay, Oral Submission, 81:32/491:20 - 82:12/491:20 (http://www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=35591&urlen=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1938/201410150500wv150en,001&urlfr=http://www4.insinc.com/ibc/mp/md/open_protected/c/486/1940/201410150500wv150en,001&date=2014-10-15) Accessed 2016-02-08.

13. Special Joint Committee on Physician Assisted Dying, Meeting No. 6 (27 January, 2016): Evidence. (http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8075735) Accessed 2016-02-07

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