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SPECIAL ISSUE
ON
CARTER V CANADA (AG)

Editor's Note

*Benny Chan**

The Supreme Court of Canada's rendering of its decision in *Carter v Canada (AG)* on 6 February 2015 will long be remembered as a watershed moment in Canadian legal history. In one fell swoop, all nine members of the Supreme Court of Canada declared the *Criminal Code* prohibitions on assisted dying to be in contravention of Section 7 of the *Canadian Charter of Rights and Freedoms*, and found that these contraventions could not be justified under Section 1. The Supreme Court gave the government one year, later extended by four months, to amend the *Criminal Code* to allow for assisted dying in limited circumstances. Following a series of advisory panels and parliamentary hearings, the government's proposed legislation on medical assistance in dying (Bill C-14), which specifies the conditions under which an individual can legally access assisted dying, received royal assent on 17 June 2016. The Supreme Court's decision in *Carter* remains to this day the only instance where the decriminalization of assisted dying was brought about by a judicial ruling rather than by an act of legislation. Now that the dust has settled on the specifics of Canada's new assisted-dying regime, the time is opportune to return to the Supreme Court's reasoning in *Carter* and to examine the nuances, possibilities, and tensions that lie within this extraordinary decision. The four articles in this special issue of the *McGill Journal of Law and Health* seek to do just that.

The practice of extending assisted dying to minors is controversial, even for jurisdictions that have allowed it such as Belgium. Critics of assisted dying have long brandished the possibility of a "slippery slope" as an argument against legalizing the practice. One instantiation of the argument evokes the concern that if we allow adults access to assisted dying, there would be nothing to stop us from allowing the same access to children. The Supreme Court, perhaps sensitive to concerns of such slippage, ruled that the unconstitutionality of the impugned provision applies only to adults. The Court was silent, however, on who exactly constitutes an "adult." Despite calls against legislating a strict age limit in response to the *Carter* decision, Parliament decided to limit access to adults over the age of 18.

As Constance MacIntosh argues in her contribution to our special issue, there remains unresolved *Charter* issues with regard to Parliament's imposed age limit. The Court ruled in the seminal case of *AC v Manitoba* that mature minors under the age of 18 had the right to refuse receiving – or request the withdrawal of – life-sustaining treatment pursuant to Section 7. MacIntosh notes that both *Carter* and *AC* "involved fact situations where the requested decision was expected to result in the death of the requestor." Furthermore, both cases required the Court to assess

* Editor-in-Chief, *McGill Journal of Law and Health*, Vol. 10.

whether the potential presence of vulnerability might undermine autonomous decision making. Despite parallels in the issues addressed and reasoning employed by the Court in these two judgments, Parliament imposed an absolute age restriction with regard to assisted dying that the Court refused to impose in *AC* with regard to the refusal and withdrawal of life-sustaining treatment. With this being the current state of the law, MacIntosh concludes that Parliament's complete exclusion of mature minors from accessing assisted dying will run afoul of Section 7. If the Belgian experience is any indication of things to come, it is only a matter of time before courts are forced to address requests for assisted dying by minors. In this sense, MacIntosh's analysis of the legal issues may prove to be prescient.

One noteworthy aspect of the Supreme Court's decision in *Carter* is the amount of the social science evidence involved. All parties to the dispute acknowledged that the constitutionality of the criminal prohibitions on assisted dying hinged in large part on the empirical question of whether there can be adequate safeguards to protect vulnerable people from abuse. There have long been concerns of whether judges have the requisite competence to settle such factually complex questions, especially when the stakes are so high. Tackling this concern head-on, Jodi Lazare's contribution to the special issue consists in a detailed examination of Justice Lynn Smith's treatment of the social science evidence in her trial decision. Lazare foregrounds her analysis against a discussion of the dangers that flow from saddling judges with large volumes of complex and conflicting evidence. The risk here is that judges will admit too much potentially unreliable expert testimony and/or misinterpret valid evidence. As appellate judges are tethered to findings of fact at the trial level, any mishandling of expert evidence by the trial judge may cause irreparable damage.

Despite these concerns, judges are not completely hopeless when it comes to social science evidence. Indeed, Lazare argues that Justice Smith's trial decision in *Carter* offers a master class in how to avoid the tendencies that so many judges fall prey to when faced with such evidence. Justice Smith was adept at identifying and mitigating the risks of unreliable expert testimonies. She was able to see through impressive-sounding credentials, assess the validity of different social science methodologies, detect expert bias, and assign proper weight to expert testimony. While Lazare's article will likely not be the last word on Justice Smith's handling of the social science evidence in *Carter*, it succeeds in challenging a commonly-held view of judges as hopelessly inept interpreters of social science evidence.

One glaring way in which the Supreme Court decision deviated from the trial decision is the absence of a Section 15 equality analysis. The Supreme Court, having found that the impugned prohibitions violated Section 7, ruled that it was unnecessary to undertake a Section 15 analysis. Maneesha Deckha, in her contribution to the special issue, laments this as a missed opportunity. Justice Smith's application of the substantive equality model deserves attention for the way in which it "exhibits a respect for the agency of those in vulnerable positions because of their physical health" and for its analysis of the "diverse perspectives within the disability community." Deckha's article thus draws our attention to the egalitarian

dimensions inherent in the debate on assisted dying, dimensions not necessarily captured in a Section 7 analysis that focuses by design on a particular individual's right to life, liberty, and security of the person. Indeed, one of the great virtues of Justice Smith's Section 15 analysis from a substantive equality standpoint is its acknowledgement of the pre-existing disadvantage, vulnerability, stereotyping, and prejudice that individuals with disabilities face in Canadian society.

Deckha's contribution goes a step further by exploring the limits of applying a substantive equality model to the question of assisted dying. For one, the substantive equality model fails to address intersecting grounds of discrimination. Furthermore, Deckha critiques Justice Smith's remedy of allowing assisted dying under stringent conditions on the basis that such a remedy participates in the fields of biopower and biopolitics. And by not granting access to those who are incompetent on the basis of medical criteria, Justice Smith's remedy draws an unjustifiable distinction between mental and physical disabilities. Deckha further reproaches Justice Smith for uncritically endorsing the "medicalization" of assisted dying without engaging with scholarly literature that challenges this paradigm. Her thought-provoking article will push readers to reflect more deeply on the role of equality and disability models in judicial discourse.

The Supreme Court's endorsement of Justice Smith's ruling that she was not bound by the Supreme Court decision in *Rodriguez v British Columbia (AG)* (a 1993 decision that upheld the *Criminal Code* prohibitions on assisted dying) is a particularly contentious part of the *Carter* decision. Dwight Newman, writing shortly after the Supreme Court's decision in *Carter* was released, criticized the Court for its unprincipled abandonment of the established rule against anticipatory overruling. If lower courts are free to disregard the rulings of higher courts, what hope is there for the pursuit of certainty in the law? In her contribution to the special issue, Debra Parkes provides a forceful and nuanced response to Newman's critique. She takes the reader on a *tour d'horizon* of recent cases to drive home the point that *Carter* was hardly the first Supreme Court decision to take a more flexible approach to *stare decisis*. A close reading of these cases – especially Justice Rothstein's rulings – reveals that *stare decisis* is "simply one of the 'working' ingredients of judicial decision making."

What we see in the cases leading up to and following *Carter* is a more explicit emphasis on the importance of correctness over certainty. Indeed, how judges apply *stare decisis* is often conditioned by the subject matter of the case and the judges' own views of whether the application of precedent will lead to a just result. Parkes welcomes this development, noting that this increasing willingness on the part of courts to revisit early decisions in order to get things "right" is consistent with the rate of social change in the *Charter* era. Furthermore, any fear that this new approach will open up the floodgates to lower court judges "underruling" decisions of higher courts should be tempered by how deeply entrenched the doctrine of precedent is in Canadian common law culture. As Parkes shows in the final part of her article, lower court judges have repeatedly refused requests by counsel to revisit precedent in decisions following *Carter*. The evidence so far suggests that the Can-

adian judicial approach to precedent continues to "be characterized by considerable constraint while allowing a degree of discretion to respond to changing legal norms or social contexts." Parkes' rich and nuanced discussion might bring some measure of comfort to those worried about *Carter*'s impact on the future of a venerable common law doctrine.

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This special issue owes its realization to the dedication and support of many people. First of all, I would like to express my sincere gratitude to Professor Jocelyn Downie of the Schulich School of Law at Dalhousie. Professor Downie approached the *McGill Journal of Law and Health* shortly after the *Carter* decision was handed down with the idea of publishing articles coming out of a workshop she was organizing. I am grateful to her for having entrusted us with this important project and offering her support throughout the process. My gratitude extends to the editors of Volume 10 and Volume 11 for the countless hours they spent editing each article. I never cease to be impressed by the care and attention that *McGill Journal of Law and Health* editors dedicate to their work. Deserving of special recognition are: Executive Editors for Volume 10, Agatha Wong and Josh Crowe; Editor-in-Chief for Volume 11, Kendra Levasseur; and Executive Editors for Volume 11, Zachary Shefman and Camille Marceau. Their leadership and professionalism will always be an inspiration to me. Finally, I would like to thank Professor Alana Klein for her support throughout my tenure as Editor-in-Chief.

Regardless of one's moral position on assisted dying, there is little denying that the Supreme Court's ruling in *Carter* signifies, as it were, a crossing of the Rubicon. The decision has become the starting point for any discussion of legal regulations on assisted dying in Canada. As such, *Carter* will likely remain an object of praise, condemnation, and fascination for years to come. The decision's unanswered questions and unresolved tensions will continue to generate vigorous debate among jurists. It is my sincere hope that our special issue succeeds in making a contribution to this debate.

Bonne lecture!

Benny Chan

Carter, Medical Aid in Dying, and Mature Minors

*Constance MacIntosh**

The Supreme Court of Canada's decision in *Carter v Canada (AG)* decriminalized medical aid in dying in certain defined circumstances. One of those circumstances is that the person seeking assistance be an "adult." This article argues that the regulatory response to this decision must approach the idea of "adult" in terms of the actual medical-decisional capacity of any given individual, and not rely upon age as a substitute for capacity. This article surveys jurisdictions where minors are included in physician-assisted dying regimes, and identifies what little empirical evidence exists regarding requests from minors. The heart of the article considers the jurisprudence on mature minors and when they are deemed to have the right to require the withdrawal of, or refuse to receive, life-sustaining treatment, and compares the reasoning in these cases with that in *Carter*. A particular focus of this article is on how the jurisprudence approaches decisional capacity when the individual in question may be particularly

La décision de la Cour suprême du Canada dans *Carter v Canada (PG)* a décriminalisé l'aide médicale à mourir dans certaines circonstances définies. Une de ces circonstances concerne le statut d' « adulte » de la personne cherchant à obtenir cette aide. Cet article soutient que la réponse règlementaire à cette décision doit considérer l'idée du patient « adulte » sur le plan de la capacité décisionnelle de chaque individu, plutôt que de se fier à l'âge comme substitut de la capacité. Cet article étudie les juridictions où les requêtes des mineurs sont incluses dans les régimes règlementaires d'aide médicale à mourir et identifie le peu de données empiriques qui existent concernant les requêtes provenant de mineurs. Au cœur de cet article se trouve la jurisprudence sur les mineurs matures et les circonstances considérées comme étant suffisantes pour leur accorder le droit de refuser ou de cesser de recevoir les traitements de maintien de la vie. On y retrouve également une comparaison du raisonnement de ces décisions au raison-

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* Director, Dalhousie Health Law Institute, and Associate Professor of Law, Schulich School of Law. I am deeply grateful to Jocelyn Downie for holding a workshop to consider the implications of the *Carter* decision, and to my colleagues for their comments on an earlier draft of this paper, including Gillian Calder, Jodi Lazare, Joanna Erdman, Sheila Wildman, Debra Parkes, Kim Brooks, Elaine Craig, and Michelle Giroux. I am also grateful to the three anonymous peer reviewers, for their helpful comments and suggestions.

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vulnerable. It finds that a blanket exclusion of mature minors from a physician-assisted dying regime likely violates the *Canadian Charter of Rights and Freedoms*, and calls out for considered debate on these issues instead of forcing a minor and their family to bring the issues forward through litigation.

nement dans *Carter*. Dans cet article, une attention particulière est portée à l'approche de la jurisprudence concernant la détermination de la capacité décisionnelle d'un individu lorsque celui-ci peut être particulièrement vulnérable. Enfin, cet article constate qu'une exclusion généralisée des mineurs matures dans le régime règlementaire d'aide médicale à mourir est probablement contraire à la *Charte canadienne des droits et libertés* et conclut à la nécessité d'un débat de qualité sur ces problèmes au lieu de forcer un mineur et sa famille à mettre ces enjeux de l'avant au moyen de procédures judiciaires.

INTRODUCTION

The Supreme Court of Canada's decision in *Carter v Canada (AG)* (*Carter* SCC) de-criminalized physician-assisted death in certain defined circumstances.[1] The court was not asked, directly, to consider the situation of requests from mature minors. In this paper, I draw upon the leading decision concerning the rights of mature minors to refuse life-sustaining treatment as a touchstone for considering whether the reasons in *Carter* SCC are persuasive in the context of minors. In particular, I draw upon Justice Abella's reasons in the Supreme Court of Canada decision in *AC v Manitoba (Director of Child and Family Services)*.[2] In *AC*, the court had to assess what weight should be placed upon a minor's express refusal to consent to a blood transfusion, without which she was expected to die. The focus in *AC*, like that in *Carter* SCC, was determining the *Canadian Charter of Rights and Freedoms*[3] compliance of a regime that was enacted to address medical decision making in situations where the subject of the decision may be vulnerable. Both cases involved fact situations where the requested medical treatment decision was expected to result in the death of the requestor. In each case, the conclusion about *Charter* compliance turned on whether the regime had mechanisms for considering whether the individual may not, in fact, be vulnerable. After closely comparing these cases, I ultimately conclude that the blanket exclusion of mature minors from a physician-assisted dying regime likely violates Section 7 of the *Charter*.

The layout of the paper is as follows. In Part I, below, I flesh out aspects of the *Carter* SCC decision, and its use of the term "adult" as a descriptive criterion for the *Criminal Code*[4] exemptions. I also survey data on requests from minors in permissive regimes. In Part II, I canvass the recommendations, conclusions, and actions of various bodies that were struck to consider medical aid in dying in Canada, for their approaches to requests from minors. I then, in Part III, survey provincial statutory regimes and their interaction with the common law to illustrate how the capacity of minors to make medical treatment decisions is assessed and weighed for the purpose of consent to, and refusal of, treatment. Next, in Part IV, I turn to the *Carter*

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1 2015 SCC 5 at para 147, [2015] 1 SCR 331 [*Carter* SCC].

2 2009 SCC 30, [2009] 2 SCR 181 [*AC*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 RSC 1985, c C-46.

decisions at both the trial level and at the Supreme Court of Canada to consider whether some of the principles and arguments that led to the Supreme Court carving out the declaration are persuasive in the context of mature minors. Finally, in Part V, I offer a brief discussion of the legal regimes which have mechanisms for considering requests for medical aid in dying from minors and the safeguards which they have put in place.

I. The *Carter* Decision and Mature Minors

The *Carter* case specifically considered whether two provisions of the *Criminal Code* offended the *Charter*. These provisions were subsection 241(b), which makes aiding or abetting a person to commit suicide an indictable offense, and section 14, which states that consent to death does not affect criminal responsibility for causing death.[5] The court found that the *Criminal Code* provisions violated all aspects of Section 7 of the *Charter*. Section 7 provides that "[e]veryone 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."[6] The prohibition was found to deprive some persons of life, because it resulted in individuals taking their own lives prematurely, out of fear that they would be physically incapable of doing so without assistance when their situation became intolerable to them. The right to liberty was violated because the prohibition denied individuals the right to make decisions about their bodily integrity and medical care. Security of the person was also violated because the prohibition left some individuals to endure intolerable suffering. These infringements were found not to be in accordance with the principles of fundamental justice. This was because the objective of the *Criminal Code* prohibition was not to preserve life, regardless of the circumstances, but to protect vulnerable persons from being induced, at a moment of weakness, to commit suicide. However, the prohibition impacted not only this identified group, but also the rights of those who were not in fact vulnerable.

The conclusion that the prohibition was not saved by Section 1[7] similarly turned on the prohibition's blanket character. In particular, the prohibi-

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5 *Ibid*.

6 *Charter, supra* note 3.

7 *Ibid*, s 1. Section 1 imposes limits on *Charter* rights. In particular, it states that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and

tion was not proportionate to the law's objective because a blanket prohibition was not necessary to protect the vulnerable. This conclusion turned on evidence that physicians are able to assess vulnerability and already do so when assessing decisional capacity and informed consent in the context of medical decision making. It also turned on evidence regarding how other countries have developed physician-assisted dying regimes with safeguards for protecting vulnerable persons.

The court declared the *Criminal Code* provisions of no force and effect:

> to the extent that they prohibit physician-assisted death for a competent 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) that causes enduring suffering that is intolerable to the individual in the circumstances.[8]

This declaration reads down *Criminal Code* offences that would otherwise be triggered by physician-assisted death. The declaration's requirement that the requesting person be an adult creates challenges. The term "adult" is not defined in *Carter* SCC. In some legislation regarding medical-decisional capacity, the term "adult" is defined to align with the age of majority and is further defined as creating a presumption of capacity.[9] However, persons under the age of majority, or minors, may also have decisional capacity. In some provinces, the presumption of capacity is legislatively granted to

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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." In determining whether a rights-infringing law is saved by this limitation, courts apply a test which was identified in *R v Oakes*, [1986] 1 SCR 103. The court will first ask whether the law's goal has a "pressing and substantial" objective. If so, the court then conducts a proportionality analysis, which assesses whether the law's limitation on a *Charter* right is rationally connected to its purpose, whether the law minimally impairs the right in question, and whether there is proportionality between the benefits of the limit and its deleterious effects.

8 *Carter* SCC, *supra* note 1 at para 147.

9 See e.g. *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 181. Section 1 defines "adult" as "anyone who has reached 19 years of age," and section 3 states that anyone who is an adult is presumed to be capable of "giving, refusing or revoking consent to health care" (*ibid,* s 3(1)(a)).

minors aged 16 and 17.[10] In most provincial regimes, factors relating to a minor's actual decisional capacity play a significant role in determining the weight to be assigned to their wishes for medical treatment including refusal of life-sustaining care, and the concept of a "mature minor" [11] is used. Regulatory reform in response to *Carter* SCC does not reflect these regimes. Instead, it imports an age limit, 18, as a threshold criteria for eligibility.[12] As a result, a physician would not be criminally liable for granting a request from a mature minor to withdraw life-saving treatment but would potentially face a murder charge and sentence of life in prison if a physician agreed to grant such a youth a request to administer a lethal medication[13] in a context where the other elements of the declaration are present. On its face, this seems to be an incongruous and arbitrary outcome that requires closer scrutiny.

There is no evidence to suggest that the court was asked to consider requests from mature minors, or the consistency of the prohibitions with the rights of mature minors. Rather, from reviewing the trial decision, it seems the legal questions revolved around how the *Criminal Code* prohibitions were inconsistent with the *Charter* rights of the particular plaintiffs – none of whom were minors. The evidence and arguments concerning regimes that permit physician-assisted death, and how those regimes address coercion, comprehension, and capacity, similarly did not consider how such regimes approach requests from minors.[14] It is appropriate that the court did not extend its declaration beyond the legal questions that were expressly argued and the evidentiary record before it. However, given that all Canadian jurisdictions recognize mature minors as having full or qualified rights to make medical treatment decisions, including withdrawal of life-sustaining treatment, it is disappointing that the court did not flag the need for policy-makers to engage with the question of how these rights will have to be reconciled with the *Carter* SCC declaration.

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10 See *Medical Consent of Minors Act*, SNB 1976, c M-6.1, s 2; *The Health Care Directives Act*, SM 1992, c 33, CCSM c H27, s 4(2)(a) [*Directives*, Manitoba].

11 The concept of a "mature minor" is explained in Part IV, below.

12 *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* SC 2016, c 3, amending *supra* note 4, s 241.2(1)(b).

13 *Criminal Code*, *supra* note 4, ss 229, 231, 235. For a concise discussion of terminology related to assisted death, see *Carter v Canada (AG)*, 2012 BCSC 886 at paras 36–43, 218 ACWS (3d) 824 [*Carter* BCSC].

14 *Carter* BCSC, *supra* note 13.

There is scant empirical evidence on minors' requests for physician-assisted death in general,[15] let alone in Canada. One of the few studies on minors' requests for physician-assisted dying that included Canadian data took place in 1997. It involved sending confidential surveys to all members of the American Society of Clinical Oncologists located in Canada, the US, and the UK. A total of 228 pediatric oncologists (or 55% of the pediatric oncologist membership at the time) took part in the survey.[16] Unfortunately the responses are not reported by country, but rather are merged in the survey's findings. According to the survey, 20.1% of pediatric oncologists reported receiving between 1 to 10 requests for physician-assisted suicide during the course of their careers. Moreover, 26.1% reported receiving requests for euthanasia.[17] The survey revealed that in some instances pediatric oncologists complied with these requests: 4.2% reported having provided a prescription to enable assisted death on 1 to 10 occasions, and 8.6% reported having performed euthanasia for between one to five patients.[18] Though this data set is small, and old, it would seem to suggest that Canadian physicians likely already receive and may grant such requests – despite the granting of these requests being unlawful. Regardless of the limits of what one can conclude from this study, it is simply naïve to assume that minors will not make such requests now that the *Criminal Code* has been amended to permit requests for medical aid in dying from adults.

While the number of requests from minors is extremely small even in jurisdictions where minors are included in physician-assisted dying regimes,[19] the numbers do not undermine the importance of fulsomely con-

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15 Bernard Dan, Christine Fonteyne & Stéphan Clément de Cléty, "Self-Requested Euthanasia for Children in Belgium" (2014) 383:9918 Lancet 671 at 671. The authors note that there is little reliable data that has been collected on requests from minors.

16 Joanne Hilden et al, "Attitudes and Practices among Pediatric Oncologists Regarding End-of-Life Care: Results of the 1998 American Society of Clinical Oncology Survey" (2001) 19:1 J Clin Oncol 205 at 205.

17 *Ibid* at 208. The authors of the report caution that those pediatric oncologists who indicated they had performed euthanasia were also almost all willing to use high-dose opioids to control pain, and may have "believed that adequate pain control in those cases was the equivalent of euthanasia" (*ibid* at 210).

18 *Ibid* at 208.

19 A study on pediatric end-of-life decisions in the Netherlands inquired into 129 reported deaths of children between the ages of 1 and 17, over a four-month

sidering whether the *Carter* SCC exemptions ought to be, or legally must be, extended to mature minors before we are faced with the foreseeable situation of a mature minor seeking certainty on the issue. To wait and force a minor to put themselves forward and live out this test case role, in a situation where the minor otherwise meets the onerous *Carter* SCC criteria of living with a grievous and irremediable medical condition that causes intolerable and enduring suffering, is cruel. This paper is intended to contribute to this foreseeable conversation.

II. Reports on Medically Assisted Death and Children, and Legislative Responses

There have been three national reports in Canada on physician-assisted death and several reports submitted to or commissioned by the Québec government. The first national report was prepared by the Special Senate Committee on Euthanasia and Assisted Suicide, which submitted its report to Parliament in 1995. Their mandate was "to examine and report on the legal, social, and ethical issues relating to euthanasia and assisted suicide" so as to support Parliament engaging in a "full and open national debate" on these matters.[20] Despite the breadth of this mandate, the report was utterly silent on the situation of minors. Given that the Committee recommended that even for competent adults assisted suicide and euthanasia should remain prohibited, it is likely that they thought it unnecessary to engage with the more complex issue of mature minors.

Fifteen years later, in 2010, the public policy questions were revisited by an Expert Panel of the Royal Society of Canada. This Panel discussed the situation of mature minors in the debate on assisted suicide and euthanasia.

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period. The study revealed that 0.7% of the deaths followed a request made by a minor to the physician to administer drugs to hasten death. Astrid Vrakking et al, "Medical End-of-Life Decisions for Children in the Netherlands" (2005) 159:9 Arch Pediatr Adolesc Med 802 at 804 [Vrakking et al, "Medical End-of-Life Decisions"]. Belgian pediatricians predicted that the number of requests from minors would be quite small. See Linda Pressly, "Belgium Divided on Euthanasia for Children", *BBC News* (9 January 2014), online: BBC <www.bbc.com/news/magazine-25651758>.

20 Parliament of Canada, The Special Senate Committee on Euthanasia and Assisted Suicide, *Of Life and Death – Final Report* (June 1995), online: Parliament of Canada < www.parl.gc.ca/content/sen/committee/351/euth/rep/lad-e.htm>.

The Panel referred to a number of legal sources as relevant for determining the legal situation of mature minors, including "the common law mature minor rule, the courts' overall jurisdiction to protect the vulnerable, provincial/territorial child and family services legislation, provincial/territorial consent legislation, and the *Canadian Charter of Rights and Freedoms*"[21] as well as the jurisprudence interpreting these various instruments and doctrines. The Panel observed that given the unclear interaction between the above instruments and doctrines, as well as controversy surrounding the instruments/doctrines themselves, the law on mature minors remains an area of confusion.[22] Regardless, the Panel ultimately reached a straight-forward recommendation – that the law on mature minors for making medical treatment decisions should apply to decisions about assisted suicide and euthanasia. However, they also noted that this solution required provincial and territorial governments to clarify mature minor consent law for end-of-life decision making through their consent and child protection legislation.[23]

Provinces and territories never acted on either recommendation. As will be discussed below, we continue to have a patchwork of legislation for assessing and giving weight to the decisional capacity of mature minors generally, although there are some commonalities. As well, no provincial or territorial government appears to have considered whether or with what modifications the law on mature minors applies (or should apply) to assisted death, with the exception of Québec. As the only province to enact physician-assisted death legislation, Québec declined to authorize physician-assisted death for mature minors.[24] This decision ran contrary to the explicit recommendations of Québec's *Commission des droits de la personne et des droits de la jeunesse*. The Commission found both that the absolute exclu-

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21 The Royal Society of Canada Expert Panel, *End-of-Life Decision-Making in Canada* (Ottawa: November 2011) at 32 [footnotes omitted].

22 *Ibid*.

23 *Ibid* at 92.

24 An expert panel provided a review for Québec and surveyed the law on minors. While it identified the right of children over 14 with capacity to make medical treatment decisions, it did not make a recommendation about whether to extend the regime to minors. Québec, Comité de juristes experts, *Mettre en oeuvre les recommandations de la Commission spéciale de l'Assemblée nationale sur la question de mourir dans la dignité : rapport du comité de juristes experts* (January 2013), online: Ministère de la Santé et des Services sociaux <www.msss.gouv.qc.ca/documentation/salle-de-presse/medias/rapport_comite_juristes_experts.pdf>.

sion of minors from the regime violated their rights, and that this rights violation could not likely be justified. The Commission wrote:

> Les balises qui rendent inaccessible l'aide médicale à mourir aux personnes mineures risquent de porter atteinte à leurs libertés et droits fondamentaux en l'occurrence le droit à la vie, le droit à l'intégrité, le droit à la sûreté, le droit à la liberté de sa personne, la liberté de conscience, le droit à la sauvegarde de sa dignité et le droit au respect de sa vie privée. La Commission doute que ces atteintes puissent être sauvegardées en vertu de l'article 9.1 de la Charte. Des règles plus en phase avec les règles actuelles de consentement aux soins pour les personnes mineures, mais qui tiennent compte de caractère spécifique et irréversible de l'aide médicale à mourir, seraient mieux à même de satisfaire au critère de l'atteinte minimale. La Commission invite donc le législateur à ouvrir la possibilité de recourir à l'aide médicale à mourir aux personnes mineures, moyennant le développement de mécanismes de consentement appropriés.[25]

The Commission's recommendation, that the legislative regime for physician-assisted death be extended to minors, and that the regime identify appropriate mechanisms to determine how requests from mature minors are considered, were not acted upon by Québec.

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[25] Québec, Commission des droits de la personne et des droits de la jeunesse, *Mémoire à la Commission de la santé et des services sociaux de l'Assemblée nationale* : Project de Loi No 52, Loi concernant les soins de fin de vie (September 2013) at 22, online: <www.cdpdj.qc.ca/publications/memoire_PL52_soins-fin-de-vie.pdf> [Mémoire, Projet de loi No 52]. An unofficial translation of this passage, provided by Brenna Noble, is:

> The rules that render medical aid in dying unattainable to minors may jeopardize their fundamental rights and freedoms in this case the right to life, the right to integrity, the right to security, the right to liberty, one's freedom of conscience, the right to the safeguard of one's dignity, and the right to privacy. The Commission doubts that such attacks can be saved under section 9.1 of the *Charter*. Rules more in line with the current rules of consent to care for minors, but that take the specific and irreversible nature of medical aid in dying into account, would be better able to satisfy the minimal impairment test. The Commission therefore invites the legislature to open the possibility of permitting medical aid in dying to minors, through the development of appropriate mechanisms to consent.

Mature minors were also mentioned in proposed charging guidelines for exercising prosecutorial discretion in situations of physician-assisted death in Canada. This detailed set of guidelines was put forward by two scholars, who published it shortly after the trial judge in *Carter* struck down the *Criminal Code* prohibitions but suspended the declaration for one year.[26] These guidelines are highly detailed and nuanced. In general, they recommend not prosecuting where the request is an expression of autonomous choice and public confidence would not be eroded by a failure to prosecute. The authors describe their guidelines as intended to apply to "competent adults and minors alike,"[27] while noting that decisional capacity for minors is determined with regard to their individual level of maturity.[28]

Most recently, the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying issued its Final Report on November 30, 2015.[29] This Advisory Group's members were appointed by eleven provinces and territories, consulted nationally, and were mandated to give non-binding advice to participating provinces and territories regarding implementation of the *Carter* SCC decision. The group considered the meaning of the reference to "adult" in *Carter* SCC. They ultimately recommended that the regulatory framework for physician-assisted dying in Canada avoid using an age limit and effectively interpreted the reference to "adult" in *Carter* SCC as meaning having competence.[30] This recommendation was in part a response to requests for a consistent national approach to eligibility, and to recognize that age is an arbitrary factor, which does not create a safeguard against risk and vulnerability. Instead, the Advisory Group posited that a decision about eligibility should turn on "the context of each request to determine whether the person has the information needed, is not under coercion or undue pressure, and is competent to make such a decision."[31]

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26 Jocelyn Downie & Ben White, "Prosecutorial Discretion in Assisted Dying in Canada: A Proposal for Charging Guidelines" (2012) 6:2 McGill JL & Health 113.

27 *Ibid* at 134.

28 *Ibid* at 143.

29 Online: Ontario Ministry of Health and Long-Term Care <www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf>.

30 *Ibid* at 34.

31 *Ibid*.

A federal panel was also struck to advise on implementing *Carter* SCC. That panel did not make any recommendations. Rather, its deliverable was a summary of findings based on public consultations regarding issues raised by the *Carter* decision. The panel received comments from private individuals regarding minors, which reflected mixed support for including minors within a physician-assisted dying regime. Comments from medical ethicists, a College of Physicians and Surgeons, and legal scholars, on the other hand, were consistent in rejecting age as a criterion for access and in supporting a capacity-based approach, sometimes in conjunction with a mandatory consultation with parents or legal guardians.[32]

The next Part explains the law on minors and medical decision making. It illustrates that provinces, like the Provincial-Territorial Expert Advisory Group, have largely recognized that older youth may have competency and capacity to make life-and-death medical treatment decisions.

III. Minors and Capacity to Make Medical Treatment Decisions

The law treats adults differently than minors in many instances. One of the areas of law where their rights differ is the law surrounding consent to medical interventions, where without informed consent an intervention may constitute an assault.[33] Adults are presumed to possess decisional capacity to consent to medical treatment. As a result of this presumption, concerns about their consent are more likely to turn on questions such as whether the adult was sufficiently informed for the consent to be valid.[34] This presumption about decisional capacity does not – in most cases – hold for minors.[35]

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[32] Canada, External Panel on Options for a Legislative Response to *Carter v Canada*, *Consultations on Physician-Assisted Dying: Summary of Results and Key Findings – Final Report* (15 December 2015) at 54–55, online: Department of Justice <www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/pad.pdf>.

[33] *Reibl v Hughes*, [1980] 2 SCR 880, 114 DLR 3(d) 1.

[34] See e.g. Patricia Peppin, "Informed Consent" in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds, *Canadian Health Law and Policy*, 4th ed (Markham: LexisNexis Canada, 2011) 153 at 153–54 [Downie, Caulfield & Flood, 4th ed].

[35] For a comprehensive discussion of medical decision making in the context of minors, including the rights and roles of parents and the thresholds for state intervention, see Joan M Gilmour, "Legal Considerations in Paediatric Patient and Family-Centred Healthcare" in Randi Zlotnik Shaul, ed, *Paediatric Pa-*

In practice, the question of capacity and consent to medical treatment for minors usually only becomes relevant where there is some sort of dispute about treatment. For example, a minor may wish to have a treatment, such as an abortion, against the wishes of their parents and so the parents claim the physician may not lawfully proceed on the basis of the minor's consent alone.[36] Alternately, physicians may disagree with the treatment decisions of the minor and/or the minor's family, and so inform child welfare authorities, who in turn make a decision whether or not to seek a court order granting authorization to impose treatment.[37] The new legislation presents a variation on this situation. Indeed, it forces us to contemplate a situation where, for example, there is a consensus between the mature minor, their family, and their physician that physician-assisted death is an appropriate treatment decision.[38] However, pursuant to the medical assistance in dying legislation, it would be unlawful to grant this treatment choice until the day the minor reaches the age of 18.

Why 18? The reasoning behind this age bar being set at 18 is not clear. It may be influenced by the fact that the age of majority, when a person ceases

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tient and Family-Centred Care: Ethical and Legal Issues (New York: Springer, 2014) 115 at 115–21.

[36] An early case in this area considered whether a 16-year-old could consent to an abortion, against the wishes of her parents. See *C (JS) v Wren*, 76 AR 115, [1986] 35 DLR (4th) 419 (ABCA).

[37] Many cases in this area have concerned treatment decisions regarding children who are Jehovah's Witnesses. In these cases, the parents and child rejected physician advice to undergo a blood transfusion, despite such a decision rendering recovery unlikely. See e.g. *AC*, *supra* note 2; *B(SJ) v British Columbia (Director of Child, Family and Community Service)*, 2005 BCSC 573, [2005] BCJ No 836; *Alberta (Director of Child Welfare) v BH*, 2002 ABPC 39, [2002] AJ No 356 [*BH*]; *U(C) (Next Friend Of) v McGonigle*, 2000 ABQB 626, [2000] AJ No 1067; *Re Kennett Estate v Manitoba (AG)*, [1998] MJ No 131, 78 ACWS (3d) 1114 (MBQB); *Walker (Litigation Guardian of) v Region 2 Hospital Corp* (1994), 150 NBR (2d) 366, 116 DLR (4th) 477 (NBCA) [*Walker*].

[38] Obviously, other permutations are possible, including one where only the mature minor seeks assisted death, and the family and health care team disagree, or one where the dispute is between the parents and the child. See e.g. *BH*, *supra* note 37, where the parent had consented to a blood transfusion that would likely save the life of the minor, but the 16-year-old Jehovah's Witness minor refused. The scenario described in the body of the paper is the one which would most likely lead to this issue being litigated.

being a legal minor, is 18 in six Canadian provinces,[39] although it is 19 in four provinces and the three territories.[40] That being said, the age of majority plays a shifting role vis-à-vis the right of minors to consent to other forms of medical treatment. Importantly, being a minor – or being below the age of majority – is not an absolute bar to a person being recognized as having a right to determine their own medical treatments. Both statutory law and the common law provide guidance on whether a child can provide consent or, in the alternative, whether their parent or guardian presumptively retains this authority.[41] In some instances statutory law codifies the common law. In other instances, it compliments or overrides it.[42] As a result, the law on consent varies across the country.

The common law recognizes that while minors are not presumed to have decisional capacity, this presumption can be rebutted. The common law approaches the issue on an individualized basis that focuses on the minor's level of maturity.[43] Joan Gilmour summarizes the common law as follows: "For children and adolescents who have the capacity to understand information and appreciate the consequences of making specific decisions, the consensus is that they should make their own treatment decisions."[44] Legis-

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39 These provinces are Alberta, Manitoba, Ontario, Prince Edward Island, Saskatchewan, and Québec. See *Age of Majority Act*, RSA 2000, c A-6, s 1; *The Age of Majority Act*, RSM 1987, c A7, s 1; *Age of Majority and Accountability Act*, RSO 1990, c A.7, s 1; *Age of Majority Act*, RSPEI 1988, c A-8, s 1; *The Age of Majority Act*, RSS 1978, c A-6, s 2(1); art 153 CCQ.

40 This is the case in British Columbia, New Brunswick, Newfoundland, Nova Scotia, Northwest Territories, Nunavut, and Yukon. See *Age of Majority Act*, RSBC 1996, c 7, s 1(a); *Age of Majority Act*, RSNB 1973, c A-4, s 1(1); *Age of Majority Act*, SNL 1995, c A-4.2, s 2; *Age of Majority Act*, RSNS 1989, c 4, s 2(1); *Age of Majority Act*, RSNWT 1988, c A-2, s 2; *Age of Majority Act*, RSY 1986, c 2, s 1(1).

41 *B(R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, [1994] SCJ No 24.

42 For a summary of the relationship between statutory law and the common law, see Joan Gilmour, "Children, Adolescents and Health Care" in Jocelyn Downie, Timothy Caulfield & Colleen Flood, eds, *Canadian Health Law and Policy*, 2nd ed (Toronto: Butterworths, 2002) 202 at 210–21.

43 *Ibid* at 211.

44 Joan Gilmour et al, "Pediatric Use of Complementary and Alternative Medicine: Legal, Ethical, and Clinical Issues in Decision-Making" (2011) 128:S4

lation varies across the country in terms of how it interacts with the common law or otherwise approaches decisional capacity in minors. Manitoba and New Brunswick provide examples of jurisdictions where legislation has deemed an age less than majority as the age at which a child is presumptively recognized as having decisional capacity for medical treatment decisions. In these provinces, children 16 years of age and older are presumed to have capacity,[45] and thus can consent to medical treatment, including the withdrawal from or refusal of life-sustaining treatment. The *Carter* SCC declaration, with its reference to the patient being an "adult" as a threshold criterion, is strikingly at odds with these regimes if "adult" is interpreted to mean the age of majority. The new legislation is similarly inconsistent. Just as with adults who lack capacity, these laws contemplate the state or a third party having discretion to intervene if decisional capacity is in fact lacking. For example, the Manitoba legislation permits intervention if the 16- or 17-year-old minor is unable, in fact, to "understand the information that is relevant to making a decision to consent or not consent" to treatment, or is unable "to appreciate the reasonably foreseeable consequences of making a decision to consent or not consent" to the medical treatment.[46] The legislation in New Brunswick and Manitoba also addresses the role of a minor's views when the minor is under 16 years of age. In particular, where a minor is between 12 and 16, and there is a dispute over treatment, Manitoba gives the minor the opportunity to have their opinion heard in a court proceeding. The judge may also consider the preferences of a minor under the age of 12 if the minor is deemed by the judge to be able to understand

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Pediatrics S149 at S151–52. See also Joan M Gilmour, "Children, Adolescents and Health Care", *supra* note 42 at 212, where Gilmour similarly writes: "a minor who can fully understand and appreciate the nature and consequences of a proposed medical procedure can give legally valid consent to the treatment."

45 See *Medical Consent of Minors Act*, *supra* note 10, s 17(3); *Directives*, Manitoba, *supra* note 10, s 4(2)(a).

46 *The Child and Family Services Act*, SM 1985–86, CCSM c C80, ss 25(9)(a)–(b) [*Child and Family Services Act*]. Two common requirements for consent, arising under the common law but reified into legislation in many instances, are that the patient have capacity to make the treatment decision and the consent be informed. Decisional capacity is defined as being present where "an individual has sufficient ability to understand and appreciate the nature and consequences of treatment and its alternatives to be able to make a decision about whether to proceed with it or not" (Joan M Gilmour, "Death, Dying and Decision-Making about End of Life Care" in Downie, Caulfield & Flood, 4th ed, *supra* note 34, 385 at 387–89 [Gilmour, "Death, Dying and Decision-Making"]).

the proceeding and if the treatment would not be harmful to the minor.[47] New Brunswick permits any child under 16 to give consent if the minor is found "capable of understanding the nature and consequences of a medical treatment" and the treatment is in "the best interests of the minor and his continuing health."[48] Thus for both jurisdictions, minors 16 years of age and younger are already recognized as potentially having the capacity and right to consent to the withdrawal of life-sustaining treatment, although this right is limited to circumstances where the treatment enables "continuing health" or is "not harmful." On the face of it, medical aid in dying would cause the identifiable "harm" of certain death. However, one must bear in mind the larger context, and in particular the elements of the declaration, and ask whether it is conceivable that there are circumstances in which a decision-maker would find that certain death is "not harmful" if the alternative is to force the minor to experience enduring intolerable suffering. This conclusion is all the stronger in light of the legislative regime, which added the further requirement that the natural death of the requesting individual be reasonably foreseeable.[49]

The statutory regime in British Columbia, on the other hand, makes no reference to age. Unlike New Brunswick and Manitoba, it has adopted a capacity approach for all minors. Its terms for a minor's consent to be considered legally effective are twofold. First, the minor must be found to understand "the nature and consequences and the reasonably foreseeable benefits and risks of the health care." Second, the health care provider must have "made reasonable efforts to determine and [must have] concluded that the health care is in the infant's best interests."[50] Thus the mature minor's decision is not deferred to without a concurring opinion from a physician, and unlike New Brunswick, no legal presumption is made that minors 16 to 18 years of age have decisional capacity. Just as some physicians agreed with the patient litigants in *Carter* SCC that a request for a physician-assisted death ought to be granted to those individuals, it is entirely conceivable that a British Columbian physician may concur with a capable minor that physician-assisted dying is in their best interests.

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47 *Child and Family Services Act*, *supra* note 46, ss 2(2)–(3). It was the Manitoba regime that was at issue in *AC*, *supra* note 2, and so it is returned to again, below.

48 *Medical Consent of Minors Act*, *supra* note 10, s 3(1)(b).

49 *Criminal Code*, *supra* note 4, s 241.2(2)(d).

50 *Infants Act*, RSBC 1996, c 223, s 17(3)(a).

The scholarship on mature minor regimes often adopts a critical tone, taking the position that in refusal of treatment cases, capacity assessments may be artificial. Mosoff, for example, notes that where there is a dispute about capacity and the matter goes to court, a youth will be found to lack capacity if "death is likely without treatment and the treatment is likely to be successful."[51] That is, the decision about whether to respect the minor's wishes turns not on the capacity assessment, but on the alignment of the prognosis with the minor's decision. Gilmour surmises that a positive prognosis influences whether a court believes that the minor understands the consequences of refusing the treatment, and thus whether the minor has capacity.[52]

Where minors' decisions to refuse potentially life-sustaining treatment have been assessed in court and respected, the fact situations have indeed tended to be ones where the odds of a favourable outcome were low, or the child's life was unlikely to be appreciably prolonged. These poor prognoses were often accompanied by undesirable side effects associated with the treatment, including emotional distress due to religious beliefs being violated.[53] Despite this pattern, the Supreme Court of Canada concluded that – in

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[51] See Judith Mosoff, "'Why Not Tell It Like It Is?': The Example of P.H. v. Eastern Regional Integrated Health Authority, a Minor in a Life-Threatening Context" (2012) 63 UNBLJ 238 at 239. See also Gilmour, "Children, Adolescents and Health Care", *supra* note 42 at 213:

> The argument that a minor can only consent to care that would be of benefit is sometimes referred to as 'the welfare principle'. It suggests that a mature minor can only make those decisions about medical care that others would consider to be in his or her interests; as such it challenges the extent of the commitment in law to mature minors' interests in self-determination and autonomy.

[52] Gilmour, "Death, Dying and Decision-Making", *supra* note 46 at 392–93. In *AC*, *supra* note 2, Justice Abella noted a similar trend, without going so far as to suggest that unspoken factors are at play. In her survey of the jurisprudence in 2009, she noted that at that time no court in Canada or the UK had allowed a child under 16 to refuse treatment that was likely to jeopardize the child's "potential for a healthy future" (*ibid* at paras 56–57). In these cases, courts found that the decision to refuse treatment was not voluntary (e.g., due to influence from parents) or else that "the [child] was not mature enough to make the decision to die" (*ibid* at para 61).

[53] *AC*, *supra* note 2 at paras 62–63. See also *Walker*, *supra* note 37; *Re K(LD)*, (1985), 23 CRR 337 at paras 19, 27, 33, ACWS (2d) 417 (Ont Prov Ct); *Sas-*

theory – the coupling of Manitoba's legislation with the common law could result in upholding a 15-year-old's decision to not undergo a life-saving treatment despite a good prognosis.[54] While the jurisprudence may exhibit a certain capriciousness, this is no cause to avoid considering the implications of *Carter* SCC for mature minors. Any older adolescent who met the remainder of the onerous criteria set out in the *Carter* SCC declaration and the additional statutory requirement – a grievous and irremediable medical condition that causes enduring suffering that is intolerable and whose death is reasonably foreseeable – would be unlikely to be in a situation where the prognosis is favourable. As a result, some of the concerns which Mosoff and Gilmour identify would be unlikely to influence the integrity of the capacity assessment. In sum, while the tests and criteria vary, all jurisdictions recognize that minors may be sufficiently mature to consent to medical treatment including the withdrawing of life-sustaining treatment. In some instances, third party affirmation that the decision is in the minor's best interest is also required.

Recall that the *Carter* SCC declaration brings the law on physician-assisted suicide or voluntary euthanasia more in line with existing law on the determinative role of consent where a person refuses to receive, or withdraws from, life-sustaining treatment[55] – but only for someone who is a "competent adult."[56] A pivotal question, then, is whether the medical aid in dying regime enacted to implement *Carter* SCC, and in particular the regime's exclusion of mature minors, would withstand a *Charter* challenge. That is, is the reasoning in *Carter* SCC persuasive in the case of a mature minor? I turn now to comparing the *Carter* SCC decision with Justice Abella's reasons in *AC*.

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katchewan (Minister of Social Services) v P(F), [1990] 69 DLR (4th) 134, [1990] 4 WWR 748 (Sask Prov Ct).

54 *AC*, *supra* note 2.

55 For an overview of the determinative role of consent in such health care decisions, see Gilmour, "Death, Dying and Decision-Making", *supra* note 46 at 387.

56 Another continuing inconsistency is that substitute decision-makers, and advance directives, can provide full consent for the withdrawal of life-sustaining treatment from persons who, at the time when the decision to withdraw is actually made, lack capacity. See *Personal Directives Act*, SNS 2008, c 8, ss 3(b), 9, 15.

IV. APPLYING THE REASONING IN *CARTER* TO MATURE MINORS

The legal question in *Carter* SCC was framed as whether a statutory regime which has the "narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness"[57] was *Charter*-compliant. The trial judge, Justice Smith, remarked on similarities between the matters before her and the leading case on mature minors' right to not have medical treatment imposed without their consent, *AC*.[58] The discussion below will take the majority reasons written by Justice Abella in *AC*[59] as a touchstone for considering the persuasiveness of aspects of the *Carter* SCC decision in the context of mature minors. It will focus, in particular, on the analysis of the rights that are protected under Section 7 of the *Charter*.

AC involved the interaction of the common law with Manitoba's child welfare legislation. A 15-year-old Jehovah's Witness had refused to consent to blood transfusions, a decision that put her life directly at risk. The minor's family supported this decision. The Manitoba Director of Child and Family Services intervened and sought a court order under provincial legislation to authorize the life-saving treatment without the consent of the minor and/or her family. As the minor was under 16, the legislative presumption of capacity was not present. Instead, as discussed above, the minor only had the right to have her views made known to

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57 *Carter* SCC, *supra* note 1 at para 78.

58 *AC*, *supra* note 2.

59 There were three sets of reasons in *AC* (*supra* note 2). Justice Abella wrote the majority judgment, for herself and three other judges, and upheld the regime as lawful. Chief Justice McLachlin and Justice Rothstein concurred in the result. Both Justice Abella and Chief Justice McLachlin found the regime to be constitutionally sound. However, Justice Abella found that the common law continued to play a role, a conclusion which Chief Justice McLachlin rejected. Justice Abella and Chief Justice McLachlin also had different findings on elements of the *Charter* analysis. Justice Binnie wrote in dissent and found the regime violated the *Charter*. For discussion of these reasons, see Shawn HE Harmon, "Body Blow: Mature Minors and the Supreme Court of Canada's Decision in *AC v Manitoba*" (2010) 4:1 McGill JL & Health 83. The approach to autonomy which the court endorsed has also attracted considerable criticism. Alternatives, such as supported decision making, have been presented as preferable approaches. See e.g. Mona Paré, "Of Minors and the Mentally Ill: Re-Positioning Perspectives on Consent to Health Care" (2011) 29:1 Windsor YB Access Just 107.

the decision-maker.[60] The family argued that their child's refusal to consent to treatment ought to be definitive. In particular, they argued that the child's *Charter* rights to equality,[61] life, liberty, security of the person,[62] and to religious freedom[63] were violated by the legislation because they claimed it effectively created "an irrebuttable presumption of incapacity."[64]

Early in her reasons, the trial judge in *Carter v Canada (AG)* (*Carter* BCSC), Justice Smith, reflected on how the legal questions that she had to decide were similar to those that were considered in *AC* and adopted its language. She wrote:

> [In *AC* Justice Abella] framed the issue in a way that echoes the issue in the case before me (at para 30):
>
> > The question is whether the statutory regime strikes a constitutional balance between what the law has consistently seen as an individual's fundamental right to autonomous decision making in connection with his or her body and the law's equally persistent attempts to protect vulnerable children from harm.[65]

Justice Smith returned to *AC* throughout her analysis. She ultimately drew many of her conclusions, which were subsequently adopted by the Supreme Court, from *AC*, as well as from other cases that discussed the conditions under which minors could refuse life-saving treatment.[66]

As noted above, both these decisions concerned regimes enacted to address decision-making contexts where the subject of the decision may be vulnerable and where that vulnerability required considering whether or

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60 *Child and Family Services Act*, *supra* note 46, ss 2(2)–(3).

61 *Charter*, *supra* note 3, s 15.

62 *Ibid*, s 7.

63 *Ibid*, s 2(a).

64 *AC*, *supra* note 2 at para 25.

65 *Carter* BCSC, *supra* note 13 at para 962, citing *AC*, *supra* note 2 at para 30.

66 See e.g. *AC, supra* note 2, was cited in *Carter* BCSC, *supra* note 13 at paras 218, 955–56, 958–70, 1234, 1298, 1300–03, 1350.

how protections may be required. In *AC*, the relevant vulnerability is that which is presumed to be inherent to childhood and which is also presumed to gradually dissipate with the development of maturity. In *Carter* SCC, the relevant vulnerability is characterized as a "time of weakness" that a suffering person may experience. In each case, the conclusion about *Charter* compliance turned on whether the regime recognized that vulnerability may not, in fact, be present in the circumstances, or alternatively that a level of vulnerability does not necessarily undermine autonomous decisional capacity.

To look at the cases more closely, both *AC* and *Carter* SCC considered how an individual's Section 7 rights[67] were impacted upon by the regime in question. In *Carter* SCC, the Supreme Court of Canada found that the right to life was engaged because "the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear they would be incapable of doing so when they reached the point where suffering was intolerable."[68] Justice Abella did not discuss the right to life in *AC*. But the reasoning in *Carter* SCC is on its face compelling with regard to mature minors. It is entirely conceivable that a 16-year-old may choose to commit suicide "prematurely" rather than face living with a medical condition that has become intolerable to them past the moment when they still have the power to take their own life. Both decisions do discuss the right to liberty and security of the person. In *AC*, the court considered minors' interests in liberty and security of the person and found that these interests were implicated by orders imposing treatment against the wishes of a minor. The court found that such orders denied minors the ability to determine their own medical treatment, thereby depriving them of their rights as guaranteed under the *Charter*.[69]

Revisiting these *Charter* rights in *Carter* SCC, the court observed that these rights are underwritten by a concern for "individual autonomy and dignity."[70] The court affirmed that security of the person encompasses "a notion of personal autonomy involving … control over one's bodily integ-

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67 *Charter*, *supra* note 3, s 7. Section 7 protects the rights 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."

68 *Carter* SCC, *supra* note 1 at para 57.

69 *AC*, *supra* note 2 at para 102.

70 *Carter* SCC, *supra* note 1 at para 64.

rity free from state interference"[71] and that "it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering."[72] As to liberty, they defined this interest as "the right to make fundamental personal choices free from state interference."[73] The court in *Carter* SCC analyzed the right to liberty and security of the person together, finding that the prohibition interfered with individuals' "ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people … to endure intolerable suffering, it impinges on their security of the person."[74] In its summative comments on autonomy, the *Carter* SCC court essentially found that the reasoning in *AC*, which supported mature minors having the right to refuse treatment, also determined its conclusions about the claimed right of the individual plaintiffs to choose physician-assisted death:

> In *A.C. v. Manitoba (Director of Child and Family Services)*, ... a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed 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" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person.[75]

Given *Carter* SCC's reasoning, and the findings in *AC*, it is likely that a physician-assisted death regime that completely excludes mature minors, without regard to their actual circumstances, will impair their Section 7 rights.

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71 *Ibid*, citing *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519 at 587–88, [1993] SCJ No 94.

72 *Carter* SCC, *supra* note 1 at para 64.

73 *Ibid*, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 50, [2000] 2 SCR 307, citing *R v Morgentaler*, [1988] 1 SCR 30 at 166, 44 DLR (4th) 385, Wilson J.

74 *Carter* SCC, *supra* note 1 at para 66.

75 *Ibid* at para 67.

Laws that infringe on life, liberty, or security of the person will stand if they are consistent with the principles of fundamental justice, which include the principle that a law should not being arbitrary.[76] The court in *Carter* SCC found that a total ban on assisted death was not arbitrary because there was a rational connection between the legal prohibition and its object, to protect the vulnerable from ending their lives in times of weakness.[77] If the question with regard to mature minors is framed as whether it is arbitrary to assume that a continued prohibition on assisted death will protect them, then, like the discussion in *Carter* SCC about adults, the answer must be no. However, if the question is whether it is arbitrary to assume that a mature minor can never have the capacity to make a medical treatment decision that adults have the capacity to make, then the answer must be yes. As discussed above, mature minors are defined by a finding that they have this very capacity vis-à-vis the specific decision at issue in any given instance. In *AC* the court affirmed that a regime which ignored this fact would be arbitrary:

> Given the significance we attach to bodily integrity, it would be arbitrary to assume that no one under the age of 16 has capacity to make medical treatment decisions. It is not, however, arbitrary to give them the opportunity to prove that they have sufficient maturity to do so.[78]

The finding that the legislative regime in *AC* did in fact provide an opportunity to prove capacity was pivotal for determining that although the regime violated a minor's Section 7 rights to liberty and security of the person, it was nonetheless compliant with Section 7.

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[76] The principles of fundamental justice are also offended if a law is overbroad or has consequences that are grossly disproportionate. The decision in *Carter* SCC turned on the prohibition being overbroad, and taking "away rights in a way that … goes too far by denying the rights of some individuals in a way that bears no relation to its object" (*Carter* SCC, *supra* note 1 at para 85). In particular, the prohibition was overbroad because it caught people who are not, in fact, vulnerable, but rather seeking to exercise an autonomous and informed choice. Overbreadth was not considered in *AC* (*supra* note 2) – but one would expect a similar assessment. In principle, an age restriction results in minors who are capable and can consent being treated as incapable and lacking capacity. The court in *Carter* SCC also briefly discussed the principle of gross disproportionality but did not reach a conclusion on that issue (*ibid* at paras 89–90).

[77] *Ibid* at 83–84.

[78] *AC*, *supra* note 2 at para 107.

In her analysis, Justice Abella found that the potential for vulnerability, in the form of lack of maturity, justified the state holding a power to assess life decisions for their alignment with the child's best interests:

> [T]he ineffability inherent in the concept of "maturity" … justifies the state's retaining an overarching power to determine whether allowing the child to exercise his or her autonomy in a given situation actually accords with his or her best interests.[79]

However, the protective legislative regime at issue in *AC* was nuanced by the fact that it did not create an irrebuttable presumption of incapacity. Rather, Justice Abella found it required an inquiry into maturity, with the overarching power of the state to act without the consent of the minor fading in light of growing maturity, even where the minor is refusing life-sustaining treatment. On this point, Justice Abella wrote:

> The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under [the legislation]. … If … the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected.[80]

In other words, the minor's *Charter* rights were respected because the regime did not create an absolute bar to their treatment wishes being respected. Rather, it required an assessment on the facts and recognized the possibility of finding that in individual cases a child may be found to have the decisional rights of a competent adult due to having mature decisional capacity. This set of facts also supported the court's conclusion that the regime's reliance on age did not violate Section 15 – because capacity, not age, was the true determinant of whether the child would have the right to make their own treatment decision.[81]

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79 *Ibid* at para 86.

80 *Ibid* at para 87.

81 The court in *AC*, *ibid*, considered whether the reference to age offended Section 15, the equality provisions of the *Charter*. The court found Section 15 was not offended. Although noting that the presumption as to a distinction between "promoting autonomy and protecting welfare" is presumed to collapse at age 16, in all cases weight will be allocated to a child's views in accordance with

In summarizing her reasons, Justice Abella commented that "[a] rigid statutory distinction that completely ignored the actual decision-making capabilities of children under a certain age would fail to reflect the realities of childhood and child development."[82] To place a stark red line between adults and minors with regard to physician-assisted dying would clash with the very reasons our approaches to mature minors and medical-decisional capacity are *Charter*-compliant. The court's reasons in *AC*, coupled with those in *Carter* SCC, would seem to support extending the regime which operationalizes the declaration in *Carter* SCC to mature minors, or risk being found unconstitutionally arbitrary.

In *AC* there was no *Charter* violation, and so there was no Section 1 analysis. This differs from *Carter* SCC, where because the provision in question was found to violate Section 7 rights and be inconsistent with the principles of fundamental justice because the *Criminal Code* did not provide an opportunity to rebut the presumption of vulnerability, the court had to consider whether the violation was justified by the government.[83] The Supreme Court shaped its discussion on Section 1 as an answer to the following question:

> [W]hether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.[84]

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a court's conclusions about the child's maturity and capacity. Justice Abella writes: "their ability to make treatment decisions is ultimately calibrated in accordance with maturity, not age, and no disadvantaging prejudice or stereotype based on age can be said to be engaged" (*ibid* at para 111).

82 *Ibid* at para 116.

83 As stated by the Supreme Court of Canada in *Carter* SCC, the Section 1 justification analysis centrally asks the following questions about an impugned regime: "In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*, Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103" (*supra* note 1 at para 94).

84 *Ibid* at para 103.

This is a re-phrasing of how the trial judge in *Carter* BCSC positioned the issue. She stated, more generally, that the "real question is whether a prohibition with exceptions would, in practical application, place patients at risk because of the difficulty in designing and applying the exceptions."[85] It is hard to imagine that this question would not be asked if a challenge was brought regarding mature minors. One would expect that this issue would sit at the heart of public concerns.

This portion of *Carter* SCC is particularly interesting for considering the situation of mature minors, as the Supreme Court of Canada answered this question with reference to its reasoning and findings in *AC*. In particular, *AC* was relied upon to illustrate that safeguards can be designed and implemented to protect those who ask for physician-assisted death and who are potentially vulnerable:

> As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72–78). Yet, this Court implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.[86]

In short, it was the court's confidence that physicians can assess adolescent decisional capacity in the context of life-and-death decisions that gave the court confidence that physicians can assess adult decisional capacity to consent to physician-assisted dying.[87] It follows that we should have confidence that our tests for adolescents will also capture their capacity in this context.

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85 *Carter* BCSC, *supra* note 13 at para 1235.

86 *Carter* SCC, *supra* note 1 at para 116.

87 Justice Abella wrote in *AC*, *supra* note 2 at para 78: "the factors that may affect an adolescent's ability to exercise *independent*, mature judgement in making

V. THE QUESTION OF SAFEGUARDS: PRACTICES AND EXPERIENCES IN BELGIUM AND THE NETHERLANDS

The Section 1 analysis in *Carter* SCC, which focuses on proportionality and what was necessary to protect the vulnerable, turned in part on evidence concerning how other regimes address risks and concerns about vulnerability associated with physician-assisted death. Based on this evidence, both the trial judge and the Supreme Court concluded that it was possible to limit the risks "through a carefully designed and monitored system of safeguards."[88] The Supreme Court, of course, left it to policy-makers to determine what this system would look like.

In the context of mature minors' capacity to consent, Courts and medical treatment teams have already recognized that when considering the weight to be placed on a mature minor's request "the degree of scrutiny will inevitably be most intense in cases where a treatment decision is likely to seriously endanger a child's life or health."[89] However, it may be that further and specific protocols, safeguards, or terms for evaluating requests for medical aid in dying from mature minors are appropriate. This issue should certainly be discussed and considered if provinces and the federal government include mature minors in physician-assisted dying regimes. While the Expert Panel suggested that the same regime that is used for adults should be used for minors, the Québec Commission suggested that the rules for consent for minors should be supplemented by rules that take the specific and irreversible nature of medical aid in dying into account.[90]

Both Belgium and the Netherlands, where minors are included in a physician-assisted dying regime, have chosen routes which align more closely with the Commission's suggested approach. Belgium's regime did not originally extend to minors. Its 2002 legislation, which legalized euthanasia where the patient was experiencing a "hopeless medical condition and complains of constant and unbearable physical *or mental* pain that cannot be relieved and is the result of a serious and incurable accidental or pathologic-

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maximally autonomous choices are numerous, complex, and difficult to enumerate with any precision" [emphasis in original].

88 *Carter* SCC, *supra* note 1 at para 117.

89 *AC*, *supra* note 2 at para 86.

90 Mémoire, Project de Loi No 52, *supra* note 25 at 22.

al condition,"[91] required patients to be of the age of majority in Belgium, 18, or an "emancipated minor."[92]

In 2014, Belgium amended its law to extend the exception to minors. It removed all reference to age, and instead made "the capacity for discernment" (*la capacité de discernement*) the key threshold for minors.[93] Belgium adopted this amendment, in part,[94] because age was seen "as less important than the capacity for discernment" and a recognition that this capacity "var-

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91 Raphael Cohen-Almagor, "Belgian Euthanasia Law: A Critical Analysis" (2009) 35 J Med Ethics 436 at 438 [emphasis in original].

92 *Ibid*. See *Loi relative à l'euthanasie*, Moniteur Belge [MB], 22 June 2012, 28515 [*Loi euthanasie*]. An unofficial version of this original legislation is available online: Dalhousie Health Law Institute <eol.law.dal.ca/wp-content/uploads/2015/06/Belgian-Euthanasia-Act.pdf>. For an unofficial translation of the legislation into English, see Dale Kidd, "The Belgian Act on Euthanasia of May 28th 2002" (2002) 9:2-3 Ethical Perspectives 182. The term "emancipated minor" is not defined in the legislation. The term was described to Raphael Cohen-Almagor as intended to refer to "boundary cases of 16-17 year-old patients" and to "an autonomous person capable of making decisions" (Cohen-Almagor, *supra* note 91 at 437). Others have asserted that the term only referred to "minors who are independent of their parents (e.g. due to marriage)" and thus "does not apply to other 'mature minors' between the ages of twelve and eighteen." See Wayne Sumner, *Assisted Death: A Study in Ethics and Law* (Oxford University Press, 2011) at 157. Given changes to the legislative regime in 2014, the question of the proper interpretation of the term has been rendered moot.

93 *Loi euthanasie*, *supra* note 92, art 3(1), as amended by *Loi modifiant la loi du 28 mai 2002 relative à l'euthanasie, en vue d'étendre l'euthanasie aux mineurs*, Moniteur Belge [MB], 22 February 2014, 21053. An unofficial English translation is available online: Dalhousie Health Law Institute <eol.law.dal.ca/wp-content/uploads/2015/06/Law-of-28-May-2002-on-Euthanasia-as-amended-by-the-Law-of-13-February-2014.pdf>.

94 Other key factors for not restricting minors' access to euthanasia in controlled circumstances include strong public and physician support: Andrew M Siegel, Dominic A Sisti & Arthur L Caplan, "Pediatric Euthanasia in Belgium: Disturbing Developments" (2014) 311:19 JAMA 1963 at 1963. A 2011 survey found that 69.4% of Belgium physicians supported extending the then current law on euthanasia to minors: Geert Pousset et al, "Attitudes and Practices of Physicians Regarding Physician-Assisted Dying in Minors" (2011) 96:10 Arch Dis Child 948 at 950.

ies widely with children."[95] This change brought their medical aid in dying laws in line with their existing consent legislation, which turns on a factual assessment of capacity.[96]

While all children with decisional capacity can consent to euthanasia, one safeguard is that their decision is not determinative as parental consent is also required. Describing the criteria of the 2014 amendment, Bernard Dan et al write:

> This bill rests on the same fundamentals as the 2002 Act on Euthanasia, including specifics of the request, responsibility of the physician, and the notions of serious and incurable disorder, hopeless situation, and unbearable suffering. Although it extends its application to children, it restricts its scope by excluding psychiatric disorders and, more importantly, by specifically addressing the issue of capacity for discernment, which should be assessed carefully by a multidisciplinary pediatric team, including a clinical psychologist. The parents must agree to the request.[97]

Thus, this regime recognizes the family as the decision-making unit. As well, the whole regime was passed in conjunction with legislation that "provided the basis for a steep increase in the means that were already available for palliative care,"[98] as one of their measures to reduce risk and address vulnerability.

Legislation authorizing physician-assisted death in the Netherlands, on the other hand, was crafted to address requests from minors from the start. The 2002 *Termination of Life on Request and Assisted Suicide (Review Pro-*

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95 Dan, Fonteyne & de Cléty, *supra* note 15 at 671 [footnotes omitted].

96 Article 12 of the *Loi relative aux droits du patient*, Moniteur Belge [MB], 26 September 2002, 43719 grants minors "'who are deemed to be capable of reasonable judgment of their needs' the right to exercise their patient rights autonomously, independently of chronological age." See Pousset, *supra* note 94 at 952.

97 Dan, Fonteyne & de Cléty, *supra* note 15 at 672.

98 Cohen-Almagor, *supra* note 91 at 437.

cedures) Act has some terms that apply whenever a physician receives a request, and additional terms that apply when the request is made by a minor.[99]

In all cases, the legislation permits physicians to agree to grant requests for assisted death in circumstance of "due care." The "due care" criteria include the patient being convinced there is no other reasonable solution for him or her, the physician being convinced that the request is voluntary and well-considered, and that the patient's suffering is lasting and unbearable. The physician must also have informed the patient about his or her options, and an independent written opinion must be obtained from another physician, where that second physician has seen the patient and agrees that the above criteria are met.[100] The granting physician must report on how the due care criteria were met, and the report is in turn evaluated by a Regional Euthanasia Review Committee. If the Committee is of the opinion that the due care criteria were not met, the file is referred to the Healthcare Inspectorate and the Public Prosecution Service, who may prosecute the physician.[101]

Additional requirements arise when the requesting individual is a minor. These requirements are calibrated by age and mirror Dutch laws on a minor's consent to medical treatment.[102] In particular, older minors who are 17 and 18 years of age can independently request assisted death, but their parents are required to be consulted about and involved in the decision-

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99 *Termination of Life on Request and Assisted Suicide (Review Procedures) Act* (entered into force April 2002), art 2.

100 André Janssen, "The New Regulation of Voluntary Euthanasia and Medically Assisted Suicide in the Netherlands" (2002) 16:2 Intl JL Pol'y & Fam 260 at 262–63. See also Government of the Netherlands, "Is Euthanasia Allowed?" (14 February 2016), online: <www.government.nl/issues/euthanasia/is-euthanasia-allowed>. For a detailed description of how the due care criteria are interpreted, see Regional Euthanasia Review Committees, "Annual Report 2011" (August 2012) at 8–26. An English translation of the Dutch law can be found at World Federation of Right to Die Societies, "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", online: <www.euthanasia.ws/documentos/Leyes/Internacional/Holanda%20Ley%202002.pdf>.

101 Government of the Netherlands, "Euthanasia, Assisted Suicide and Non-Resuscitation on Request" (14 February 2016), online: <www.government.nl/issues/euthanasia/euthanasia-assisted-suicide-and-non-resuscitation-on-request>. For a more detailed description of the process for reviewing reports, see Regional Euthanasia Review Committees, *supra* note 100 at 27–28.

102 Janssen, *supra* note 100 at 265.

making process.[103] For younger minors, the legislation is similar to that in Belgium, and while children who are 12 to 16 years of age can request assisted death, their parents must also consent to the request.[104]

The legislation also makes the physician responsible for the ultimate decision about whether to grant the request.[105] Intriguingly, a survey of pediatric physicians working in specializations where the majority of child deaths occur (oncology, hematology, intensivists and neurologists) found that while 62% had received requests for physician-assisted dying, only 24% had ever granted such a request.[106] Unfortunately the publication describing the survey results did not provide the reasons why the requests were not granted, so it is not clear, for example, whether the decision turned on a capacity assessment, medical criteria not being met, or the physician concluding that there were other reasonable options. Another study has found that, although only consultation is required by the legislation, in practice physicians are less likely to grant requests from older minors without parental consent.[107] Overall, while Dutch minors can initiate the decision-making process, it appears that their family and the whole treatment team are robust participants in such decisions. In many ways, this model is closer to a supported decision-making model, which some have argued ought to be generally adopted

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103 *Ibid*.

104 The legislation does not extend to children under 12 years of age. Vrakking et al, "Medical End-of-Life Decisions", *supra* note 19 at 803. According to recent interviews reported in the Daily Telegraph, the Dutch Paediatric Association objects to the age-based approach. The Association's ethics committee is petitioning for a commission to be struck to consider an approach under which "[e]ach child's ability to ask to die [is] evaluated on a case-by-case basis" according to Eduard Verhagen, a member of the ethics committee and professor of paediatrics at Groningen University, as cited in Justin Huggler, "Give Children under 12 the Right to Die, Say Dutch Paediatricians", *The Telegraph* (19 June 2015), online: <www.telegraph.co.uk/news/worldnews/europe/netherlands/11686716/Give-children-under-12-the-right-to-die-say-Dutch-paediatricians.html>.

105 Vrakking et al, "Medical End-of-Life Decisions", *supra* note 19 at 807. Vrakking et al explain that this is pursuant to the *Dutch Medical Treatment Act* (1995).

106 Vrakking et al, "Medical End-of-Life Decisions", *supra* note 19 at 807.

107 *Ibid* at 807, citing Astrid M Vrakking et al, "Physicians' Willingness to Grant Requests for Assistance in Dying for Children: A Study of Hypothetical Cases" (2005) 146:5 J Pediatr 611 at 611–17.

in Canada for minors. Mona Paré, for example, suggests such approaches are better at respecting the protection needs and autonomy rights of minors than our current approach to consent and capacity, because they engage the circle of care.[108]

If Canada chooses to include minors in a physician-assisted dying regime, which legally I believe we must, the regimes in Belgium and the Netherlands offer us some models to consider when assessing whether additional safeguards should be in place when requests come from minors. They also identify some issues that we must address in our conversations about minors and physician-assisted death. These include the roles for family members and treatment teams in end-of-life decisions, as well as the need to pay attention to the adequacy of palliative care. The Netherlands model is also provocative in that while a request must be made by the minor, the state continues to assert a protective role and the ultimate decision does not rest with the minor but with a physician.

Conclusion

This article has not engaged with many of the spectres that hover around discussions of medical aid in dying. It has not, for example, considered the adequacy of the funding of pediatric palliative care and the quality of hospice care for minors in Canada. Any deficiency in these factors ought not to play a role in any request for physician-assisted death in Canada. This article has also not suggested how provinces ought to go about addressing the outstanding matter of bringing clarity and consistency to the law regarding mature minors and medical decision making generally. It has instead focused on the general and consistent principles in this area, which force us to recognize that we need to grapple with how minors are to be included in Canada's medical aid in dying regime.

This article calls out for a lot of work. It calls upon the public and policy makers to engage with the fact that minors will request physician-assisted death, and to think through the best answers to such a request. At the moment, the range of responses seems to include telling a minor who is 17 years and 10 months old to make a choice between either waiting it out for two months and hoping that they do not lose capacity during that time period, or else choosing to have their feeding tube removed and starving to

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108 Paré, *supra* note 59.

death while heavily sedated. Another choice is to tell a family that they can serve as a litigation test case that will likely last far longer than the life of their child. These responses are not satisfactory, and they do a disservice to our youth.

This conversation requires engagement with what the law demands, with close attention and honesty about the impact and consequences of our decisions. The analysis above, of *Carter* SCC and *AC*, indicates that the complete exclusion of minors from a physician-assisted death regime will likely fall if challenged under Section 7. The focus of the discussion moving forward should be to identify the terms under which our legal regime is clearly *Charter*-compliant, and under which there is public confidence that protections are in place where vulnerability is present.

Judging the Social Sciences in *Carter v Canada (AG)*

*Jodi Lazare**

This paper examines a recent example of evidence-based decision making affecting social policy at the trial court level. It offers a close reading of *Carter v Canada (AG)*, decided by the British Columbia Supreme Court, and of Justice Lynn Smith's careful scrutiny of the social science evidence when invalidating the *Criminal Code* prohibition on assistance in dying. Drawing on literature which examines the legal system's use of social science evidence and expert witnesses, this paper suggests that Justice Smith's treatment of the evidence in *Carter* provides an example of skilled judicial treatment of the extensive amounts of social science evidence typically tendered in *Charter* challenges related to controversial social issues. First, it considers the implications of the Supreme Court of Canada's revised approach to social fact-

Cet article examine un exemple récent de prise de décision fondée sur des preuves touchant la politique sociale au niveau des tribunaux de première instance. Il propose une lecture attentive de l'arrêt *Carter c Canada (PG)* de la Cour suprême de la Colombie-Britannique et de l'examen minutieux de la preuve issue des sciences sociales par la juge Lynn Smith en invalidant l'interdiction du *Code criminel* sur l'aide à mourir. En se fondant sur la littérature portant sur l'utilisation des preuves de la science sociale et des témoins experts au sein du système juridique, cet article suggère que le traitement de la preuve effectué par la juge Smith dans *Carter* offre un exemple de traitement judiciaire adroit des quantités importantes de données issues des sciences sociales, habituellement présentées lors de contestation au nom de la Charte portant sur

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finding by trial judges and the consequent need for trial judges to critically evaluate and effectively draw on the social sciences. Second, it examines certain limits to courts' institutional capacity to evaluate the work of social scientists – specifically, the general lack of judicial training in disciplines other than law – and suggests that the trial judge's approach in *Carter* is one to be emulated in future cases with similarly vast evidentiary records. Third, it looks at the role of the expert witness and at some of the dangers inherent in judicial reliance on expert testimony and highlights the ways in which Justice Smith's careful consideration of the subtle effects of adversarial bias may have affected her approach to the evidence. It suggests that while some judges might struggle with common risks and challenges associated with judicial reliance on this type of evidence in the adjudication of social policy, the trial decision in *Carter* demonstrates that these difficulties may be overcome.

des enjeux sociaux controversés. D'abord, il examine les implications de la nouvelle approche de la Cour suprême du Canada face aux données sociales recueillis par les juges de première instance et la nécessité qui en découle pour ceux-ci de les évaluer de manière critique et de tirer efficacement les conclusions nécessaires en fonction de ces sciences sociales. Deuxièmement, il examine certaines limites à la capacité institutionnelle des tribunaux d'évaluer le travail des chercheurs en sciences sociales – particulièrement, le manque général de formation juridique dans des disciplines autres que le droit – et suggère que l'approche adoptée par la juge de première instance dans *Carter* devrait être imitée lors de cas futurs présentant des dossiers de preuve aussi vastes. Troisièmement, il se penche sur le rôle du témoin expert et sur quelques dangers inhérents de la confiance accordée aux tribunaux aux témoignages d'experts et met l'accent sur la façon dont la prise en compte minutieuse des effets subtils de la partialité, par la juge Smith, peut avoir influencé son analyse de la preuve. Il suggère que, bien que certains juges pourraient avoir des difficultés avec les risques et les défis associés à la déférence judiciaire vis-à-vis de ce type de preuves, la décision *Carter* en première instance démontre que les difficultés avec des preuves issues des sciences sociales dans processus de décision des politiques sociales peuvent être surmontées.

Introduction

People often speak of evidence-based decision making in matters of public policy and legislation. Since the adoption of the *Canadian Charter of Rights and Freedoms* (*Charter*), however, sensitive policy decisions have not been limited to the legislative sphere. Nor is the use of evidence in developing policy limited to our elected representatives. In some cases, the idea of approaching questions affecting social policy based on a solid evidentiary foundation characterizes the judicial task as much as it does that of the legislature. Adjudication essentially involves deciding matters based on the best available evidence.[1]

In this paper, I examine a recent example of evidence-based adjudication affecting social policy, *Carter v Canada (AG)* (*Carter* BCSC).[2] I consider the trial judge's use of social science expert evidence in the British Columbia Supreme Court's 2012 decision in *Carter* BCSC invalidating the criminal prohibition on assisted death in Canada. That decision laid the evidentiary foundation for the Supreme Court of Canada's unanimous ruling, in 2015, that it is unconstitutional for the law to prohibit individuals "suffering intolerably as a result of a grievous and irremediable medical condition" from deciding to end their lives on their own terms.[3]

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1 This paper assumes that in adjudicating rights disputes under the *Charter*, the Canadian judiciary has the potential to effect significant change with respect to social policy. Stated otherwise, this paper accepts that *Charter* adjudication implies some sort of lawmaking role for judges. See e.g. Donald M Brown, "Practice with the *Charter*" (1989) 23:3 UBC L Rev 595 at 596, on the "enhanced 'lawmaking' role now vested in the judicial process." For further reading on the respective roles of the judiciary and the legislature with respect to policy matters see Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Luc B Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures" (2005) 3:4 NYU Intl J Cont L 617; 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; Andrew Petter, "Taking Dialogue Theory Much Too Seriously (Or Perhaps *Charter* Dialogue Isn't Such a Good Thing After All)" (2007) 45:1 Osgoode Hall LJ 147; The Honourable Chief Justice John D Richard, "Separation of Powers: The Canadian Experience" (2009) 47:4 Duq L Rev 731.

2 2012 BCSC 886, 287 CCC (3d) 1 [*Carter* BCSC].

3 *Carter v Canada (AG)*, 2015 SCC 5 at para 3, [2015] 1 SCR 331 [*Carter* SCC].

In looking at the trial decision in *Carter* BCSC, I offer a close reading of a fresh example of judicial reliance on social science evidence. Drawing on the literature examining the legal system's use of social science evidence and expert witnesses, I suggest that Justice Lynn Smith's treatment of the evidence in *Carter* BCSC provides an example of skilled judicial treatment of the extensive amounts of social science evidence typically tendered in *Charter* challenges related to controversial social issues.[4] Given the capable treatment of the evidence, I further suggest that while some judges might struggle with common risks and challenges associated with judicial reliance on social science evidence, Justice Smith's approach provides an example to be emulated by judges dealing with similar evidentiary records in the context of social policy disputes. Further, my reading of the case, combined with the relevant literature, enables me to suggest avenues of further research into ways to improve the adjudicative system's use of social science evidence, so that all judges – and, by extension, litigants – may properly benefit from the valuable insights of the social sciences.

I approach this reading of *Carter* BCSC in three parts. In Part I, I examine the role of the trial judge. I posit that the trial decision in *Carter* BCSC serves as a testing ground for the Supreme Court's new approach to social fact-finding by trial judges. In reviewing the decision, the Supreme Court refused to distinguish between adjudicative and legislative facts for the purposes of appellate review.[5] I consider the implications of this move and the consequent need for trial judges who are able to critically evaluate and use social science evidence, given the increased weight that now rests on their shoulders. In Part II, I examine certain limits to courts' institutional capacity to evaluate the work of social scientists – specifically, the general lack of judicial training in disciplines other than law – and suggest that the trial judge's approach in *Carter* BCSC is one to be emulated in future cases with similar evidentiary records. In Part III, I look at the role of the expert witness. I highlight the problem of adversarial bias – one of the principal dangers inherent in judicial reliance on expert testimony, the typical vehicle

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4 As I explain below, I use the term "skilled" as it is understood and described in the relevant literature and case law.

5 *Carter* SCC, *supra* note 3 at para 109. Adjudicative facts are the specific facts of the case at hand. Legislative facts are more general in nature and help to establish the social context of a case. Previously, appellate judges were free to review legislative factual findings in the absence of demonstrated error. As I explain below, the Supreme Court recently did away with the distinction as it applies to the standard of appellate review. See Part I, below, for more on this topic.

by which social science evidence is brought to court. Here, I highlight the ways in which Justice Smith carefully considered the potential effects of bias and suggest that where judges are less discriminating in their evaluation of expert evidence, the bias that may result from the adversarial model of adjudication has the potential to delegitimize judicial review of social policy.

In approaching this project, I read the trial decision in *Carter* BCSC against a backdrop of wide-ranging literature and case law dealing with the perils and promises of social science evidence in the courtroom, both in Canada and abroad. I examined all of Justice Smith's comments relating to the nature of the evidence before her and her treatment of it, so as to determine whether the evidentiary issues encountered resonated with the risks and challenges discussed in the literature. I sought to determine whether one experienced judge's approach to a larger than usual evidentiary record validated or contradicted the existing literature. My evaluation of the evidentiary approaches was based on the widely accepted norms identified in the relevant literature; I looked closely at each instance of the weighing of contradictory evidence, and, as I explain below, at the considerations cited for the decision to accept one witness's evidence over another's. I sought out examples of the common challenges associated with judicial use of this type of evidence and attempted to highlight potentially problematic evidence – and the judge's treatment of it – brought forward by parties on both sides of the litigation. Finally, this paper does not take a position on the many legal issues in dispute; in reading *Carter* BCSC, my focus was on the judicial reliance on and use of the evidence, and not on the substantive legal analysis.

This paper builds on the wealth of literature on the judicial use of social science evidence, and is premised on the idea that the legal system has much to gain from the social sciences, particularly with respect to rights adjudication with the potential to seriously impact social policy.[6] Its goals,

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[6] Much has been written on the rich contributions that empirical evidence from the social sciences can bring to the law. See e.g. John Monahan & Laurens Walker, "Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law" (1986) 134:3 U Pa L Rev 477; Tracey L Meares & Bernard E Harcourt, "Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure" (2000) 90:3 J Crim L & Criminology 733; Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501; Yasmin Dawood, "Democracy and Deference: The Role of Social

however, are limited. It does not weigh in on the question of undue deference to social science evidence tendered by the government,[7] although the decision in *Carter* – both at trial and at the Supreme Court – may enrich that debate. Nor does it delve into the questions related to legal education and training, which, as I suggest below, might ground further research related to the critical evaluation of empirical evidence by jurists.[8] Rather, this paper should serve primarily to highlight the judicious treatment of the evidence in *Carter* BCSC, so that others may attempt to replicate Justice Smith's capable approach. In doing so, it necessarily exposes some of the potential perils of reliance on empirical data under the current system of adjudication in Canada and identifies possible routes toward overcoming the associated challenges.

I. The New Weight of Social Science Evidence

The finding in *Carter* SCC that the criminal prohibition on physician assistance in dying is unconstitutional will have an immeasurable impact on the deaths – and lives – of Canadians suffering from incurable illnesses. But the trial judgment is meaningful for reasons beyond that aspect of the decision. The *Carter* case might be described as part of a new generation of Canadian adjudication: high-stakes constitutional litigation of controversial social policy issues with vast evidentiary records grounded in the social sci-

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Science Evidence in Election Law Cases" (2014) 32:2 NJCL 173; Jodi Lazare, "When Disciplines Collide: Polygamy and the Social Sciences on Trial" (2015) 32:1 WYAJ 103.

7 Existing literature on the use of social science evidence in constitutional adjudication often criticizes the ease with which courts tend to defer to government on social policy matters when that evidence is complex or seemingly inconclusive. See e.g. David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51:4 UTLJ 425 at 441–42; Niels Petersen, "Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication" (2013) 11:2 NYU Intl J Cont L 294; Michael Pal, "Democratic Rights and Social Science Evidence" (2014) 32:2 NJCL 151; Lazare, *supra* note 6 at 117–120.

8 See Geoffrey Conrad & Jodi Lazare, "The Lawyer in Context: Toward an Integrated Approach to Legal Education" in Ruth Sefton-Green, ed, « *Démoulages* » *: du carcan de l'enseignement du droit vers une éducation juridique* (Paris: Société de Législation comparée, 2015) 45 (on the deficiencies of legal education with respect to training in non-legal subjects).

ences.[9] Much of that evidence was presented by expert witnesses. This Part will suggest that the Supreme Court's new approach to the evidence in these kinds of cases means that its critical evaluation by trial judges is paramount. It will also explain the value in examining the treatment of the evidence in *Carter* BCSC.

A. Why critical evaluation matters

Expert evidence is valuable in elucidating complex facts, often not directly related to the parties to the litigation. Unlike adjudicative facts, which make up the "who did what, where, when, [and] how" of the case – that is, the immediate facts giving rise to the dispute – legislative facts – the social and economic facts surrounding a dispute – are often "introduced into evidence through the use of expert witnesses at trial."[10] Legislative facts rely on "social and economic data to establish a more general context for decision-making."[11] They are, in other words, the same type of facts that legislators look at in developing social policy.

The distinction between adjudicative and legislative facts was conceptualized in order to differentiate between applicable evidentiary approaches.[12] Historically, this distinction extended to the different treatment of the two types of facts by appellate courts – a distinction that persisted until recently in Canada. Prior to 2013, whereas appellate courts could not, except in cases of gross error on the part of the trial judge, revisit adjudicative facts,

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9 For other examples, some dealing with health policy, see e.g. *Chaoulli v Québec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*]; *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134; *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].

10 John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert Sharpe, ed, *Charter Litigation* (Toronto: Butterworths, 1987) 213 at 215. See also Graham Mayeda, "Taking Notice of Equality: Judicial Notice and Expert Evidence in Trials Involving Equality Seeking Groups" (2009) 6:2 JL & Equality 201; Claire L'Heureux-Dubé, "Re-Examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26:3 Ottawa L Rev 551; *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 151, 127 DLR (4th) 1 [*RJR-MacDonald*]; *R v Spence*, 2005 SCC 71 at para 68, [2005] 3 SCR 458.

11 Hagan, *supra* note 10 at 215.

12 See Kenneth Culp Davis, "An Approach to Problems of Evidence in the Administrative Process" (1942) 55:3 Harv L Rev 364 at 402–10.

reviewing judges considered themselves at liberty to re-examine legislative facts. Where trial judges relied on "complex social science evidence," their factual findings would merit less deference on the part of reviewing courts.[13] Moreover, where lower courts were involved in constitutional balancing, deference to the trial judge's factual inferences was likely to be even less, given that the determination of a *Charter* infringement often requires "a broad review of social, economic, and political factors in addition to scientific facts."[14] Were a trial judge to stumble over the complexities of evidence from unfamiliar disciplines – a not entirely inconceivable occurrence, as I discuss below – a low standard for intervention meant that appellate courts could come to different conclusions based on the same evidence. Recently, however, the threshold for appellate review of legislative facts was raised: in the absence of a palpable and overriding error, appellate courts are no longer free to re-evaluate a trial judge's determinations of social, or legislative, fact.

In *Canada (AG) v Bedford*, the Supreme Court retreated from its earlier position on appellate review of legislative facts. It set out two principal reasons for why reviewing courts should no longer distinguish between adjudicative and legislative facts with respect to the standard of review. First, the time and resources involved in reviewing large volumes of evidence and "reconciling differences between the experts, studies and research results," would duplicate the trial judge's role and "increase the costs and delay in the litigation process."[15] Second, according to the Supreme Court, "social and legislative facts may be intertwined with adjudicative facts," making it nearly impossible for appellate courts to properly distinguish between the two.[16] Moreover, by 2013, constitutional rights adjudication and the associated reliance on social science evidence had "evolved significantly" since the Supreme Court established different standards of review in 1995.[17] In the intervening years, the case law had favoured the presentation of social science evidence by an expert witness, the assessment of whom, both in terms of credibility and content of their testimony, fell to the trial judge.[18] Further,

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13 *RJR-MacDonald*, *supra* note 10 at para 79.

14 *Ibid* at para 141.

15 *Bedford*, *supra* note 9 at para 51.

16 *Ibid* at para 52.

17 *Ibid* at para 53.

18 *Ibid* at paras 51–53.

experience has demonstrated the importance of the trial judge's role "in preventing miscarriages of justice flowing from flawed expert evidence."[19] Accordingly, "[t]he distinction between adjudicative and legislative facts can no longer justify gradations of deference."[20]

In recent years, authors have pressed for precisely this sort of end to the adjudicative-legislative fact distinction where appellate review is concerned.[21] Michelle Bloodworth, for example, writes that the distinction between social and adjudicative facts is untenable, as all knowledge is imperfect, or subjective, whether it comes from a lay witness or an expert.[22] Bloodworth argues that it is illogical for the Supreme Court to call for consideration of social and legislative facts when interpreting *Charter* rights, while simultaneously denying the trial judge's capacity to effectively deal with this kind of evidence.[23] Given the increased frequency with which courts rely on vast amounts of empirical data to evaluate social policy, re-evaluation of the evidence by a reviewing court of its own accord does not promote judicial economy or the judicious use of resources. But is there some merit in the now outdated idea that the "privileged position of the trial judge,"[24] does not extend to the evaluation of the kinds of facts considered in crafting legislation? Stated otherwise, what are the consequences of do-

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19 *Ibid* at para 53, citing The Honourable Stephen T Goudge, *Report of the Inquiry into Pediatric Forensic Pathology in Ontario: Policy and Recommendations*, vol 3 (Toronto: Ontario Ministry of the Attorney General, 2008) [*Goudge Report*]. The *Goudge Report* is the culmination of a commission of inquiry (the Goudge Inquiry, headed by retired Justice Stephen T Goudge of the Ontario Court of Appeal) into the problem of flawed forensic pathology, following the wrongful conviction of several individuals based on the erroneous expert testimony of Dr Charles Smith, a forensic pathologist. While the Commission's mandate was limited to the subject of pediatric forensic pathology, the report has come to be recognized as an authority on the use of scientific expert witnesses in Canadian adjudication.

20 *Bedford*, *supra* note 9 at para 53.

21 See e.g. John Monahan & Laurens Walker, "Social Science in Research and Law" (1988) 43:6 American Psychologist 465 (calling for the abandonment of the distinction and an end to the treatment of legislative facts as facts).

22 "A Fact is a Fact is a Fact: *Stare Decisis* and the Distinction Between Adjudicative and Social Facts in *Bedford* and *Carter*" (2014) 32:2 NJCL 193 at 209.

23 *Ibid* at 210.

24 *RJR-MacDonald*, *supra* note 10 at para 79.

ing away with the distinction between adjudicative and legislative facts and enhancing the privileged status of the trial judge with respect to the evaluation of all evidence adduced in first instance?

As the first major policy-laden *Charter* decision reviewed by the Supreme Court since it confirmed the end of the adjudicative-legislative fact distinction, *Carter* SCC sheds some light on the potential effects of effectively immunizing trial judges' evidentiary findings from appellate review, where that evidence is made up of empirical research by social scientists. The end of the distinction places an enormous weight on the shoulders of trial judges, many of whom are neither trained nor skilled in the methods of the social sciences.[25] At the very least, the revised standard of appellate review leads to the increased importance of the role of the trial judge in admitting, evaluating, weighing, and drawing inferences from legislative and social facts.

The following parts seek to demonstrate that the trial decision in *Carter* BCSC should serve as an example for other judges facing complex qualitative and quantitative evidence. At the same time, they also suggest that in the hands of a different trial judge, the case could have become a cautionary tale of the risk that layperson trial judges might misconstrue similarly vast evidentiary records. The challenges identified are, of course, not unique to first instance judges; appellate court judges are often no better equipped to evaluate complex and contradictory social facts. But as a case makes its way up the appeals process, the evidentiary record is scrutinized by increased numbers of judges at each level of court, creating a sense of safety in numbers and consensus. As the number of judges increases, so do the chances that the evidence will be examined by a judge with the requisite awareness of the risks and challenges associated with expert evidence from the social sciences. Thus, the risk of uncritical reliance on unsound evidence, or of misapprehension of complex scientific evidence, is minimized. The new approach to appellate review of social facts, however, suggests that trial judges must now be particularly adept at dealing with large volumes of complex and conflicting empirical evidence. It is true that the questions that gave rise to the modified standard of review – the distinct roles of trial and appellate courts and the blending of different types of facts – needed to be addressed.[26] Scarce judicial resources can inhibit access to justice and it

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[25] See Conrad & Lazare, *supra* note 8, on jurists' general lack of extra-legal training.

[26] *Bedford*, *supra* note 9 at paras 51–52.

is indeed the trial judge's job to assess the credibility of witnesses, be they lay or expert. The concern, however, is that under the new standard of appellate review, the consequences of a trial judge misinterpreting complex evidence become graver, as the judge is given the final word on the evidentiary basis of significant decisions affecting polycentric and often divisive social policy. But the risk can be minimized. As Justice Smith's treatment of the evidence suggests, the challenges associated with empirical evidence may be overcome.

B. Why Carter *BCSC*

As an example worth following, the trial decision in *Carter* BCSC is valuable in two respects. First, in evaluating the constitutionality of the ban on assisted death, Justice Smith scrutinized an enormous amount of empirical evidence. The "considerable evidentiary record" included 36 binders containing 116 affidavits, some of which were "hundreds of pages in length and [attached] as exhibits many secondary sources," as well transcripts and other documents.[27] Much of that evidence was presented by expert witnesses, totalling 57 in number, 18 of whom were cross-examined.[28] While the evidentiary record was vast, it was not inordinate; *Charter* challenges to social policy typically rely on a substantial evidentiary record and often draw heavily on empirical evidence given by social scientists.[29] Indeed, the absence of cogent evidence would create a risk of determining questions of "fundamental importance to Canadian society" in a "factual vacuum."[30] Rights adjudication has profound effects of "the lives of Canadians."[31] As such, the relevant facts "may cover a wide spectrum dealing with scientific, social, economic and political aspects."[32] Thus, *Carter* BCSC exemplifies the judicial reliance on social science data that often goes into constitutional rights balancing.

Second, it is worth considering what factors may have contributed to Justice Smith's thoughtful approach. Justice Smith's lengthy career as a

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27 *Carter* BCSC, *supra* note 2 at para 114.

28 *Ibid* at paras 114, 160.

29 See e.g. *Bedford*, *supra* note 9; *Chaoulli*, *supra* note 9.

30 *Mackay v Manitoba*, [1989] 2 SCR 357 at 361, 61 DLR (4th) 385.

31 *Ibid*.

32 *Ibid*.

legal academic prior to her appointment to the bench may be significant. At the University of British Columbia, she served as dean of the Faculty of Law, taught in a number of areas, including evidence, civil litigation, and the *Charter*, and published articles in the fields of evidence, civil litigation, and *Charter* equality rights.[33] It is not surprising that she would have turned her mind to the challenges discussed below – and to ways to mitigate some of the attendant risks – before encountering them as a judge.[34]

In addition to her academic experience, Justice Smith has served on the Board of Governors and as the Executive Director of the Ottawa-based National Judicial Institute (NJI),[35] which is devoted to improving justice through judicial education in Canada and internationally.[36] At the NJI, she has been involved in training judges in Canada and abroad and has led workshops on the *Charter* and evidence.[37] Finally, her work in judicial and legal education has also touched on the value of judicial impartiality.[38] This is not to say that only judges with the same history of scholarship and academic experience as Justice Smith will be equipped to deal with the intricate nature of the evidence in complex policy adjudication. Indeed, one hope of this paper is that all judges might strive to emulate the example of judicial treatment of the evidence in *Carter* BCSC. Rather, Justice Smith's background means simply that it is not surprising that her approach provides a positive example for judges facing similarly complex and weighty evidentiary records.

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33 Canadian Bar Association, "The Honourable Madam Justice Lynn Smith", online: CBA <www.cba.org/cba/cle/PDF/Constit09_Smith_bio.pdf> [CBA, "Smith"]. See also Lynn Smith, "The Equality Rights" (1991) 20:2 Man LJ 377 (for an example of her scholarship on the *Charter* prior to her appointment to the bench).

34 See e.g. Lynn Smith, "The Courts and Different Kinds of Objectivity" (1987) 45:1 Advocate 17 (on the importance of objectivity in judging).

35 *Ibid*; University of British Columbia, "The Honourable Lynn Smith, Q.C." (August 2015), online: UBC <president.ubc.ca/files/2015/08/brief_bio_lynn_smith.pdf> [UBC, "Smith"].

36 National Judicial Institute, "About the NJI" (2014), online: NJI <www.nji-inm.ca/index.cfm/about/about-the-nji/>.

37 UBC, "Smith", *supra* note 35.

38 See The Law Society of British Columbia, "Minutes of the Benchers' Meeting" (12 July 2013), online: LSBC <www.lawsociety.bc.ca/docs/about/minutes/2013-07-12.pdf>.

II. The Judge as Layperson

Lack of training in scientific theories and methods may constitute one of the principal barriers to law's critical use of social science evidence.[39] In many cases, judges and lawyers do not possess the skills required to properly evaluate complex scientific evidence stemming from disciplines traditionally understood as being outside of law. For instance, writing about the Supreme Court of the United States' treatment of the kind of evidence typically tendered in policy-related adjudication, one American scholar describes judges' and lawyers' "lack of even a minimum acquaintance" with science.[40] Another observes the "incompetence" that characterizes the judicial use of empirical evidence.[41] When examined in light of the statistical nature of much of the evidence, as well as its contradictory and inconclusive character, the trial decision in *Carter* BCSC, while an apparent exception to these critiques, also serves to highlight some of the potential hazards of judicial reliance on the social sciences. These limits extend to the jurist's ability to evaluate the validity and reliability of evidence from the social sciences. What we are left with, then, is a judiciary that recognizes the need to draw on empirical evidence but that, as will be discussed in this Part, may not effectively use such evidence.

There are a number of consequences of this knowledge gap, but certain risks associated with uncritical reliance on the social sciences stand out upon a close reading of *Carter* BCSC. Among them is the risk that in the absence of real knowledge about science, judges might fall prey to the "mystique of science,"[42] and in turn struggle in their determination of what constitutes expert evidence, ultimately accepting too much potentially unreliable empirical evidence. Further, limited capacity to critically evaluate social science data in the courtroom means that judges may misinterpret

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39 See Conrad & Lazare, *supra* note 8 at 50–51, 53 for a similar argument about judicial capacity to evaluate the social sciences.

40 Peter W Sperlich, "Social Science Evidence and the Courts: Reading Beyond the Adversary Process" (1980) 63:4 Judicature 280 at 282.

41 James R Acker, "Social Science in Supreme Court Criminal Cases and Briefs: The Actual and Potential Contribution of Social Scientists as Amici Curiae" (1990) 14:1 Law & Hum Behav 25 at 40. Recent Canadian authorities voice similar concerns, see e.g. *Goudge Report*, *supra* note 19 at 500–502.

42 *R v Mohan*, [1994] 2 SCR 9 at 21, 114 DLR (4th) 419 [*Mohan*], citing *R v Béland*, [1987] 2 SCR 398 at 434, 43 DLR (4th) 64.

the evidence or prefer evidence from one witness over another for reasons unrelated to the validity or reliability of the evidence.

A. Discerning reliability in Carter *BCSC*

In dealing with expert evidence, trial judges play what has come to be known as a "gatekeeping" role. As gatekeepers, trial judges should "screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission."[43] What constitutes admissible expert evidence has developed incrementally. Trial judges' determinations are now directed by a four-step test. To be admissible, evidence must be relevant and it must be "of necessity in assisting the trier of fact."[44] Proposed expert evidence must also not be excluded by another rule of evidence – for example, the general rule that in criminal proceedings, the Crown cannot lead evidence to impugn the character of the accused.[45] Last, the evidence must be given by a "properly qualified expert" – that is, "a witness who has shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."[46] These four steps are to be followed by a holistic weighing of the costs and benefits associated with the evidence.[47] At this stage, in the criminal context in which the test has been substantially developed, the judge must determine whether the probative value of the evidence outweighs its prejudicial effect on the accused.[48] Experience suggests, however, that applying this test to evidence about human behaviour – that is, to much of the evidence in *Carter* BCSC – is an exceedingly difficult task, even for trained scientists.[49] That judges with little to no training in the social sciences would find the exercise challenging is unsurprising.

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43 *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 16, 383 DLR (4th) 429 [*WBLI*].

44 *Mohan*, *supra* note 42 at 20.

45 *Ibid* at 20, 25.

46 *Ibid* at 25.

47 *WBLI*, *supra* note 43 at para 19.

48 *Ibid*.

49 David M Paciocco, "Coping With Expert Evidence About Human Behaviour" (1999) 25:1 Queen's LJ 305 at 319 [Paciocco, "Coping With Expert Evidence"].

The inability, on the part of some judges, to evaluate empirical evidence has led to increased amounts of social science experts being permitted to present their evidence in Canadian courtrooms. Referring to social scientists, experienced litigator Marlys Edwardh observed two decades ago "an explosion of areas of expertise and of expert opinions."[50] Others write: "our courtrooms have become 'the showcase for the latest syndromes and theories offered by the scientific community.'"[51] Most recently, Justice Doherty, of the Ontario Court of Appeal, observed that "a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything," particularly where human behaviour is concerned.[52] As explained above, *Carter* BCSC was no exception to the proliferation of expert opinions about human behaviour. The decision is emblematic, in fact, for its reliance on a legion of experts, all bringing distinct and contrasting points of view on the questions before the court.

This explosion of expert knowledge, and the consequent pressure on parties to support their arguments using expertise, creates the risk that courts will be flooded with an excess of specialized knowledge and, in some cases, knowledge that goes beyond the scope of a witness's expertise. Aware of this risk, the Supreme Court has consistently warned that "trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence."[53] Where an expert's evidence contains anecdotal evidence that "does not speak to the particular facts before the Court,"[54] or where it otherwise "strays

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50 John Norris & Marlys Edwardh, "Myths, Hidden Facts and Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38:1 Crim LQ 73 at 74.

51 Paciocco, "Coping With Expert Evidence", *supra* note 49 at 306–7, citing Steven Skurka & Elsa Renzella, "Misplaced Trust: The Courts' Reliance on the Behavioural Sciences" (1998) 3:1 Can Crim L Rev 269 at 270.

52 *R v Abbey*, 2009 ONCA 624 at para 72, 97 OR (3d) 330; leave to appeal to SCC refused, 33656 (8 July 2010) [*Abbey*]. Note that while Doherty JA was referring to criminal courts and a specific type of sociological evidence, similar observations about the volumes of experts offering scientific explanations may be applied in the civil context, particularly where legislation is being challenged under the *Charter*.

53 *R v Sekhon*, 2014 SCC 15 at para 46, [2014] 1 SCR 272 [*Sekhon*]. See also *Goudge Report*, *supra* note 19 at 471–475.

54 *Sekhon*, *supra* note 53 at para 50, citing *R v Sekhon*, 2012 BCCA 512 at para 27, 331 BCAC 170, Newbury JA, dissenting.

beyond its proper scope, it is imperative that the trial judge not assign any weight to the inadmissible parts."[55] The Supreme Court has not however precluded the admissibility of such evidence, thus creating the risk that this kind of evidence of limited value might affect the trial judge's reasoning.

In *Carter* BCSC, Dr. Hendin, a psychologist, provided expert testimony for the Attorney General. He was called for his expertise in suicide prevention and the effects of the legalization of physician-assisted dying in certain jurisdictions. On the issue of whether depression might affect an individual's desire to request assisted death, he testified "that a number of studies have shown that general practitioners are not reliably able to diagnose depression, let alone determine whether depression is impairing [a patient's] judgment."[56] As an expert in suicide prevention however, and not in competence assessment, he was not, in the opinion of Justice Smith, equipped to provide compelling evidence on the assessment of competence to choose assisted death, as he was called to do.[57] Instead, Justice Smith preferred the plaintiffs' evidence, including that of Dr. Smith, a psychiatrist and clinical professor, with "a great deal of experience in assessing cognitive functioning."[58]

Likewise, Justice Smith remarked on the limits of evidence given by a clinical psychologist and associate professor with respect to an individual's competence to request assisted death, as the witness stated on cross-examination that he had never, in his professional capacity as a psychologist, "been involved in assessing someone's capacity to make medical decisions and that he is unfamiliar with the test for medical decision-making capacity."[59] Moreover, the studies relied on by that witness "did not involve people actually seeking physician-assisted dying," but rather, dealt with "traditionally-defined suicide among older adults."[60] This stood in opposition to the plaintiffs' evidence on the same question, which included evidence from Dr. Donnelly, a "specialist and Associate Professor of geriatric psychiatry" with

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55 *Sekhon*, *supra* note 53 at para 48.

56 *Carter* BCSC, *supra* note 2 at para 794.

57 *Ibid* at para 796.

58 *Ibid* at paras 778, 795.

59 *Ibid* at paras 768–769.

60 *Ibid* at para 827.

"extensive practical experience doing competency assessments" and "who teaches in that area."[61]

Justice Smith was ostensibly adept at identifying – and mitigating – the risks that flow from the presentation of unreliable evidence and the acceptance of evidence beyond a witness's field of expertise. She did so by carefully and expressly considering the extent and limits of the witnesses' expertise in the subject at hand, both in terms of their experiences and the methods by which they reached their conclusions. For example, with respect to the "feasibility of physicians assessing competence in the context of physician-assisted death, [Justice Smith noted] the expertise and experience of the psychiatrists" called by the plaintiffs,[62] as contrasted with the expertise of some of the witnesses called by the Attorney General of Canada.[63] Further, aware that the value of the evidence tendered varied according to differing levels of expertise among the experts, Justice Smith did not appear to place a disproportionate amount of weight on the evidence of one particular witness. Rather, her reasons refer to her analysis and weighing of the evidence "taken as a whole."[64] While this approach appears commonsensical, the possibility remains that other judges may fall short in distinguishing between similar but distinct fields of specialized knowledge.

B. Seeing beyond credentials in Carter *BCSC*

Appellate courts have long been aware of the danger that trial judges, with little background on which to base their evaluation of a witness's qualifications, might fail to distinguish between a competent expert and one who boasts impressive credentials but lacks the requisite knowledge for the case at hand. Unreliable evidence may be given undue weight when "submitted through a witness of impressive antecedents."[65] The risk is that, deferring to credentials, some judges might abdicate their responsibility for the ultimate decision; it is much easier to rely on a pre-eminent expert in a given field than to engage in a critical evaluation of the evidence presented. Comment-

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61 *Ibid* at para 762.

62 *Ibid* at para 795.

63 *Ibid* at paras 796, 797.

64 *Ibid* at paras 115, 798.

65 *Mohan*, *supra* note 42 at 21.

ing on the risk that judges will uncritically defer to credentialed experts, one behavioural scientist writes that "modern Americans will embrace almost any psycholegal theory or claim that highly paid and highly arrogant experts spin on the witness stand. We and our judges are blinded by jargon, fancy-sounding credentials and fancy degrees."[66] While this observation may depict a caricature, it is one that is nevertheless applicable in the Canadian context as well.[67]

In *Carter* BCSC, the risk of undue deference to demonstrated expertise may not have been realized. But the potential for uncritical regard for expert qualifications was present, given the list of witnesses put forward by parties on both sides of the litigation. Justice Smith heard evidence from veteran physicians in a number of medical fields ranging from gerontology, to neurology, psychiatry, palliative care, and cardiology, as well experienced professors of sociology, psychology, human rights, law, bioethics, and public health.[68] Experts were affiliated with institutions such as Cornell University, Harvard University, the University of Toronto, and a number of other respected universities. The plaintiffs, for example, tendered the evidence of Dr. Marcia Angell, a physician and senior lecturer at Harvard Medical School and the former editor-in-chief of the New England Journal of Medicine, as well as Professor Sheila McLean, an emeritus professor in law and ethics at the University of Glasgow and a former vice-chairperson of the International Bioethics Committee of UNESCO.[69] Likewise, the Attorney General of Canada relied on the evidence of Dr. Harvey Chochinov, a distinguished professor of psychiatry at the University of Manitoba and "the only Canada Research Chair in palliative care."[70] It is not difficult to understand the temptation for a layperson judge to simply defer to the expertise of such an impressive roster of witnesses, many of whom spent years accumulating knowledge in the field of assisted dying.

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66 Margaret A Hagen, *Whores of the Court: The Fraud of Psychiatric Testimony and the Rape of American Justice* (New York: Regan Books, 1997) at 11. See also David S Caudill & Lewis H LaRue, *No Magic Wand: The Idealization of Science in Law* (Lanham: Rowman & Littlefield Publishers, 2006); Lisa Dufraimont, "New Challenges for the Gatekeeper: The Evolving Law on Expert Evidence in Criminal Cases" (2012) 58:4 Crim LQ 531.

67 See Paciocco, "Coping With Expert Evidence", *supra* note 49 at 310.

68 *Carter* BCSC, *supra* note 2 at para 160.

69 *Ibid*.

70 *Ibid*.

That reasonable temptation underscores the importance of looking past an expert's credentials. Indeed, Justice Smith looked beyond the witnesses' statuses as "impressive, respected researchers,"[71] focusing instead on less obvious markers of reliability. For example, in evaluating Baroness Finlay's evidence on whether safeguards can effectively prevent abuse of vulnerable individuals, Justice Smith focused not on the witness's membership in the House of Lords, her "leading role in the debate about assisted suicide and euthanasia in the United Kingdom," or her status as a "very well-respected palliative care physician."[72] Instead, in placing little weight on Baroness Finlay's critique of the opposing evidence, Justice Smith pointed to the non-empirical methodology underlying her evidence.[73] Justice Smith's capacity to see past this long list of credentials might be attributable to her experience with judicial education and training.[74] But in such a situation, judges can hardly be faulted for the natural temptation to uncritically defer to expert witnesses, rather than attempt to look beyond the often wide-ranging credentials of experts to assess the substantive merit of their evidence. This is not to deny the relevance of the educational background of expert witnesses, but rather, to encourage, in addition to an assessment of their credentials, the critical evaluation of their actual experience and of the methodologies they employ.

C. How Carter *BCSC differentiates empirical methodologies*

The difficulty that many judges might face in evaluating empirical data does not end once an expert's professional qualifications and the subject matter of the evidence have passed the gatekeeping stage. Commentators in the United States have characterized judges as "[ranging] from closet Einsteins to proud Luddites" in their knowledge of scientific methodologies.[75] More than being untrained in the sciences, American judges have been known to resist instruction in matters with which they should have

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71 *Ibid* at para 651.

72 *Ibid* at para 664. See *ibid* at para 160 for the reference to the House of Lords.

73 *Ibid* at para 664.

74 CBA, "Smith", *supra* note 33.

75 John M Conley & David W Peterson, "The Science of Gatekeeping: The Federal Judicial Center's New *Reference Manual on Scientific Evidence*" (1996) 74:4 NCL Rev 1183 at 1206, cited in *Goudge Report*, *supra* note 19 at 500.

at least some familiarity. Professors Conley and Peterson, experienced in training judges in science, recount judges' statements that "studying methodology is too abstract, mere theory."[76] The professors' "uniform experience with hundreds of judges at every level is that the judges think methodology is something for academics to worry about."[77] While the same resistance has not been documented in Canada, it remains true that many judges have no background in the social or natural sciences.[78]

Judicial inexperience with scientific concepts and methodologies has obvious consequences with respect to the evaluation of empirical evidence. The case law demonstrates that some trial judges, untrained in the differing methodologies of distinct areas of inquiry, may confuse evidentiary reliability and scientific validity, and hold evidence to an inappropriate standard. In *R v Abbey*, for example, the trial judge was found to have misinterpreted expert evidence because he applied the language of quantitative research methods – "error rates," "random sampling," "peer review," and "[replication of] findings" – to evidence based on qualitative sociological research, clinical experience, and "familiarity with the relevant academic literature."[79] The Ontario Court of Appeal wrote that "[i]t was unhelpful to assess [the expert's] evidence against factors that were entirely foreign to [the expert's] methodology."[80] The trial decision in *Abbey* is a fitting example of the judicial mistreatment of empirical evidence due to its complex or technical nature. The result is the risk that trial judges may decide policy-related questions based on evidence that they may not fully grasp.[81]

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76 Conley & Peterson, *supra* note 75 at 1205. See also The Honourable Ian Binnie & Vanessa Park-Thompson, "The Perils of Law Office Science: A Partial Response to Professor Gary Edmond" (2015) 36:1 Adel L Rev 125 at 135–38.

77 Conley & Peterson, *supra* note 75 at 1206.

78 See e.g. The Honourable Mr. Justice Ian Binnie, "Science in the Courtroom: The Mouse That Roared" (2007) 56 UNBLJ 307 at 309. See also *Goudge Report*, *supra* note 19 at 500–02 (recommending the development of judicial training programs on the scientific method).

79 *Supra* note 52, at paras 105, 108.

80 *Ibid*.

81 Note that the trial decision in *Abbey* was corrected on appeal. Thus, like *Carter* BCSC, *supra* note 2, Justice Doherty's reasons at the Ontario Court of Appeal might be considered an example worth following of judicial treatment of social science evidence, albeit in the criminal law context. Moreover, that the trial judge's error in *Abbey* was corrected on appeal underscores the increased

Justice Smith's reasons contain a number of signs that she was proficient at understanding the empirical evidence before her. Alongside her comments on statistical or empirical studies are references to the methodologies employed by the authors and how those methodologies affected the data relied on. For example, with respect to the "Ganzini Depression Study," relied on as part of her survey of legislative regimes governing assisted dying in Oregon and Washington, Justice Smith demonstrated an acute awareness of the limitations of quantitative studies. She explicitly recognized that the reliability of such studies depends in part on response rates, as acknowledged by the authors of the study themselves.[82] Where sample sizes for another qualitative study were small, she recognized this among other limitations, ascribing an appropriate amount of weight to such evidence and using the study to provide context for the related quantitative data.[83] Likewise, Justice Smith acknowledged further instances where the generalizability of data flowing from quantitative studies was limited by sample size and other factors, and accordingly relied on some of this evidence as part of the broader context of the litigation rather than for its specific content.[84] Further, Justice Smith distinguished between more and less reliable evidence, according to the methods by which it was gathered or obtained. For example, the weight of evidence was weakened where it was based on second-hand knowledge only, of an article or a film.[85] Finally, Justice Smith was explicit about placing more weight on an expert opinion based on "evidence-based thinking" than on one that that departed from the mainstream.[86]

Justice Smith does not appear to have deferred unquestioningly – to either experts or their evidence – in the face of conflicting empirical data from disciplines outside of the law. This is unsurprising given her extrajudicial writings, wherein she acknowledges the limits of certain types of quan-

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importance of the trial judge's role in evaluating social science evidence under the new approach, according to which findings of legislative fact are no longer *de facto* reviewable by appellate courts.

82 *Carter* BCSC, *supra* note 2 at para 434.

83 *Ibid* at para 496.

84 *Ibid* at paras 445, 496.

85 *Ibid* at para 504. Justice Smith found parts of Professor Hendin's expert evidence problematic partly because they were based on an article written in Dutch.

86 *Ibid* at para 796.

titative data, stemming from ethical restrictions, the creation of simulated situations, and the inability to corroborate results.[87] Indeed, the reasons in *Carter* BCSC make a number of references to the inconclusive nature of the evidence and the impossibility of arriving at firm conclusions on certain matters, such as the potential impact on palliative care of legalizing physician-assisted death in Canada.[88] Thus, in her reasons in *Carter* BCSC and elsewhere, Justice Smith demonstrates a keen awareness of both the usefulness and the limits of social science evidence generally, by accepting that controversial social policy matters will rarely lend themselves to clear or discrete answers.

Justice Smith's other work also sheds light on the rationale behind her methodical review of the immense evidentiary record in *Carter* BCSC. In a 2011 speech at the University of New Brunswick, the judge spoke at length about the importance of writing reasons.[89] Reasons that contain a detailed and clear explanation of the evidence itself, as well as of the judge's reasoning in distinguishing between stronger and weaker evidence, confer a sense of legitimacy on the ultimate decision.[90] The effect of this approach is that the more complicated and lengthy the evidentiary record, the longer the resulting decision. The evidence in *Carter* BCSC was far from straightforward. That the record contained several differing and contradictory points of view, stemming from distinct areas of inquiry, and dealing with a number of questions related to legalizing physician-assisted death in Canada and abroad, helps to explain the length of the decision, which spanned 1416 paragraphs and almost 400 pages.

Canadians should expect, as a matter of course, that judges tasked with adjudicating social policy should be adept at sifting through voluminous records and evaluating not only the evidentiary claims put forward by the parties but also the means by which these claims were reached. But it should be evident at this stage that many Canadian judges are, by no fault of their own, not always equipped to make these difficult determinations where empirical data from qualified experts in fields far from the judge's legal expertise point in multiple directions and the law seeks a single an-

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87 See The Honourable Justice Lynn Smith, "The Ring of Truth, The Clang of Lies: Assessing Credibility in the Courtroom" (2012) 63 UNBLJ 10.

88 See e.g. *Carter* BCSC, *supra* note 2 at paras 647, 649, 731, 732.

89 Smith, *supra* note 87 at 30–33.

90 *Ibid*; Binnie, *supra* note 78 at 21.

swer. Faced with the same value-laden social policy question that Justice Smith was confronted with in *Carter* BCSC, it is easy to imagine that some judges might have more difficulty in drawing the factual conclusions that will form the basis of their decisions. Indeed, experience and scholarship indicate that many judges may not have fared as well.[91] The severity of the problem becomes clear when considering that under the Supreme Court's new approach to reviewing legislative facts, absent a serious error, a single judge has the final say on how empirical evidence is to be interpreted, even where the evidence is contradictory or where expert opinions are derived from methodologies foreign to the judge.

The trial decision in *Carter* BCSC suggests that these issues, while serious, are not insurmountable. Nor are these issues novel, although they may be exacerbated by the Supreme Court's new approach to legislative facts. *Carter* BCSC demonstrates that with cautious deliberation, missteps can be avoided. Further, as I discuss briefly below, the legal system might move toward mitigating the risks. But before thinking about ways forward, the following Part will draw out some further challenges to adjudicating social policy, the source of which lies not in the judicial role but in the role of the expert witness.

III. Tackling the Perils of Expertise

Thus far, this paper has set out some of the principal dangers inherent in judicial reliance on empirical evidence arising out of the lack of judicial expertise in evaluating empirical research. It has highlighted the presence of those dangers and suggested that Justice Smith's approach in avoiding some of the typical missteps in the judicial treatment of social science evidence is one to be emulated. This Part will shift the focus away from the judge and onto the expert witness in order to draw out similar institutional difficulties with litigating social facts. Specifically, it examines the existence of bias among expert witnesses, with "bias" being defined as the "predisposing influences that can tincture the accuracy of expert testimony" resulting from a lack of independence or impartiality,[92] and demonstrates how these issues were overcome in *Carter* BCSC.

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91 See e.g. Katherine Swinton, "What Do the Courts Want from the Social Sciences?" in Sharpe, *supra* note 10 at 187; Conley & Peterson, *supra* note 75; Binnie, *supra* note 78.

92 David Paciocco, "Unplugging Jukebox Testimony in an Adversarial System:

Due to its heavy reliance on social science evidence, *Carter* BCSC is fertile ground for exploring the typical delivery of that evidence in the form of expert testimony. The role of the expert witness is to "provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact."[93] While experts are called by parties to the dispute, their duty is to provide a neutral and independent opinion on the issue before the court, and not to advocate for the party that retained them.[94] The nature of the adversarial system, however, wherein parties pay for an expert's service, might naturally affect their independence.[95] Indeed, the *Carter* BCSC decision is a prime example of the ways in which bias, conscious or unconscious, can creep into the courtroom as an inevitable consequence of the adversarial system of adjudication. While Justice Smith appears to have weeded out much of the problematic evidence, giving less weight to lower value testimony, the decision suggests that the potential for bias was present at trial and that the same potential biases will continue to arise as long as courts rely on experts, a necessary corollary to the use of empirical evidence. The following paragraphs will examine some of the ways in which expert bias manifests itself in the trial process. The hope is that mere awareness on the part of lawyers and trial judges of the ways in which bias can flow from trial proceedings – and the ways in which its impacts may be mitigated – will encourage caution and deliberation on the part of trial judges in accepting and relying on the evidence of social science experts.

A. Adversarial litigation and the polarization of opinions in Carter *BCSC*

The adversarial system has been characterized by the "polarization of opinions" it produces.[96] Nowhere is this polarization more evident than in

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Strategies for Changing the Tune on Partial Experts" (2009) 34:2 Queen's LJ 565 at 572 [Paciocco, "Jukebox Testimony"].

93 William G Horton & Michael Mercer, "The Use of Expert Evidence in Civil Cases" (2004) 29:1 Adv Q 153 at 165, citing *National Justice Compania Naviera SA v Prudential Assurance Co Ltd*, [1993] 2 Lloyd's Rep 68 (QBD (Comm Ct)). See also *WBLI*, *supra* note 43 at paras 2, 26, 38, 46 (on the expert's duty to assist the court).

94 Horton & Mercer, *supra* note 93 at 165.

95 *Ibid*.

96 The Honorable Geoffrey L Davies, "Court Appointed Experts" (2005) 5:1

the competing testimony of opposing expert witnesses testifying on the same subject but expressing conflicting opinions. The trial in *Carter* BCSC typified the phenomenon of expert witnessing, as Justice Smith heard testimony from 57 experts. This is unsurprising given the controversial and divisive nature of the issues in *Carter* BCSC and the role of the expert in assisting the court by bringing clarity to complex information. Often however, rather than reveal the truth or illuminate the subject for the judge, the polarization of views may have the effect of distorting the subject matter.[97] Indeed, "duelling experts make bad teachers."[98] Further, the difficulty of uncovering the facts from what is presented by experts is compounded by the "natural human tendency to feel the need to do your best for the side you represent."[99] This kind of adversarial bias is "an almost inevitable consequence" of giving evidence within the current adversarial context,[100] and it has the potential to turn impartial experts into advocates for the retaining party's case.[101]

Where adversarial bias may be most deceptive and likely to affect honest witnesses is in its creation of confirmation bias or, the "unconscious tendency of those who desire a particular outcome to search for things that support that outcome and to ignore or reinterpret contradictory information."[102] The spin or selective presentation that may result from confirmation bias can be particularly dangerous for witnesses who depend on "subjective judgment or experience rather than objective science to achieve their opinions."[103] Even where evidence is conclusive, which it often is not, testimony may be "[coloured] either consciously or subconsciously by personal and professional prejudices."[104]

Queensland U of Technology L & Justice J 89 at 90.

97 *Ibid*.

98 Binnie, *supra* note 78 at 324.

99 Davies, *supra* note 96 at 91.

100 *Ibid* at 89.

101 See Paciocco, "Jukebox Testimony", *supra* note 92.

102 *Ibid* at para 17.

103 *Ibid*.

104 David A Thompson, "Should Reliable Scientific Evidence Be Conclusive and Binding on the Jury?" (1971) 48:1 Chicago-Kent L Rev 39 at 46–47.

Finally, the adversarial system of adjudication fosters confirmation bias by encouraging the sharing of theories and objectives between parties and their experts. The system thus promotes a "sense of joint venture" or "esprit de corps."[105] One social scientist experienced in giving expert testimony confirms this idea: in helping counsel organize their case, "[e]xpert witnesses do not merely give their opinions; they join a company."[106] Experts will often work with counsel on multiple aspects of the case, and not always limit their involvement to the distinct point on which they testify.[107] This sense of cooperation gives rise to the phenomenon of "noble cause distortion [or] corruption," that is, "the distorting effect that can occur from believing that you are on the side of the good."[108] According to this phenomenon, "[e]xpert witnesses who think that they are serving the public interest by testifying, particularly by combating reprehensible practices or conduct, can fall victim to this form of partiality."[109] The brief biographies of the experts in *Carter* BCSC demonstrate that many had devoted lengthy careers to researching and writing about physician-assisted death, some clearly sitting on one side of the debate.[110] It is only natural that some might have come to the case with preconceptions of what constitutes the good.

Of course it is not possible to measure the level of bias that resulted from the use of partisan experts in *Carter* BCSC. But the potential existence of bias – and the care with which Justice Smith approached the expert testimony – should nevertheless serve as both a caution and a lesson to parties and to triers of fact faced with lists of carefully selected experts on controversial social matters.

B. Rising above bias in Carter *BCSC*

There is no effective means of evaluating the degree to which the expert testimony in *Carter* BCSC was affected by bias. But the nature of the case

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105 Paciocco, "Jukebox Testimony", *supra* note 92 at 579.

106 J Morgan Kousser, "Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing" (1984) 6:1 The Public Historian 5 at 17.

107 *Ibid*.

108 Paciocco, "Jukebox Testimony", *supra* note 92 at 582.

109 *Ibid*.

110 See *Carter* BCSC, *supra* note 2 at para 160.

and some of the evidence tendered suggest that it was not immune from the typical dangers of expert evidence. Confirmation bias may well have been present at trial. Recall that confirmation bias may be especially dangerous where evidence does not stem from an "objective science."[111] Some authors would not characterize the social sciences as an objective science; they have been described as the "least accurate scientific evidence," and serious doubt has been expressed as to their probative value.[112] Justice Binnie has written that the "softer sciences, such as psychology," lend themselves less easily to "testing, critique and the generation of error rates."[113] Similarly, Professor Dworkin argues that the social sciences are more "fragile" than harder sciences.[114] At the same time, it must be recognized that social science studies can be more or less rigorous depending on the methodology used and the sample size. Many social science experts whose research involves quantitative and statistical analysis would dispute the idea that their work is less accurate or should have less probative value than the data produced by the physical sciences. When it comes to assessing scientific rigour, statistical inquiry and quantitative research should not be lumped together with qualitative research based on interviews of small sample groups.[115] But the observations of Justice Binnie and Professor Dworkin may nevertheless hold true with respect to certain forms of social science evidence. By its nature, given that it is less easily replicated and confirmed by further research, qualitative

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111 Paciocco, "Jukebox Testimony", *supra* note 92 at 578.

112 Thompson, *supra* note 104 at 41.

113 Binnie, *supra* note 78 at 322. Note that I do not adopt or endorse the "hard/soft" science distinction. Rather, I take Justice Binnie's reference to "soft" science to refer to the behavioural sciences, insofar as they are distinct from the natural, or physical, sciences. See generally Nicholas Bala & Jane Thomson, "Expert Evidence and Assessments in Child Welfare Cases" (December 2015) Queen's Law Legal Research Paper Series No 063 at 12, 14 (on distinctions between "hard sciences" as "biological, medical and physical sciences" and "soft" or "social and behavioural sciences").

114 Ronald Dworkin, "Social Sciences and Constitutional Rights: The Consequences of Uncertainty" (1977) 6:1 JL & Educ 3 at 6.

115 See e.g. Robyn Mounsey, "Social Science Evidence as Proof of Legislative Fact in Constitutional Litigation: A Proposed Framework for a Reliability Analysis" (2013) 32:2 NCJL 127 at 140–41 (on the distinction between the natural and social sciences for the purposes of evidentiary reliability being a "false dichotomy").

social science evidence, which constituted a significant portion of the record in *Carter* BCSC, heightens the risk of confirmation bias.

Much of the evidence admitted by Justice Smith came from psychologists, ethicists, sociologists, human rights experts, and legal researchers specializing in assisted dying. Moreover, the evidence given by some of the medical doctors had less to do with physiological processes, that is to say objectively verifiable data, and more to do with their experiences treating patients at the end of life. At a general level, the experts in *Carter* BCSC cannot be described as the prototypical "jukebox witness" – that is, as witnesses who "would play any tune in [their] testimony that [they were] paid to play."[116] Indeed, many of them testified based on years of experience researching physician-assisted death and did not appear to change their opinions to suit the party who had retained them. But the risks described above suggest that this sort of evidence may nevertheless be vulnerable to the subtle ways in which adversarial bias creeps into trial proceedings.

Justice Smith was aware of the potential for personal bias to affect expert testimony. In evaluating the evidentiary value of the Battin et al. study on whether safeguards in place in the Netherlands and Oregon effectively prevent abuse of vulnerable individuals, she expressed her doubt with respect to the impartiality of a critic of the study. Testifying for the Attorney General of Canada on the Battin et al. study, Dr. Pereira had spoken "from his deep and sincere conviction that assisted death is wrong and unnecessary."[117] Referring to another witness for the Attorney General, Dr. Hendin, Justice Smith wrote that "his passion on the topic, left [her] in some doubt as to his impartiality."[118] The Battin et al. study, on the other hand, was conducted by "highly qualified empirical researchers" who conducted a "rigorous" analysis, according to Professor Battin.[119] Further evidence on the same question was presented by Dr. Ganzini, a witness for the plaintiffs, whose objectivity was bolstered by the fact that her views on best practices with respect to certain types of patient requests had changed over the course of her long-term study of assisted death.[120] This sort of distinction suggests

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116 Paciocco, "Jukebox Testimony", *supra* note 92 at 566.

117 *Carter* BCSC, *supra* note 2 at para 664.

118 *Ibid*.

119 *Ibid* at para 651.

120 *Ibid*.

that Justice Smith was attuned to the warning signs of bias and to the idea that "dogmatism is an important indicator of bias or partiality."[121] Indeed, "[e]xpert witnesses betray their predispositions by being uncompromising and unwilling to modify their opinions when factual assumptions are changed or when compelling opposing positions are presented."[122] Justice Smith thus accepted the evidence that "the availability of assisted death in those jurisdictions has not inordinately impacted persons who might be seen as 'socially vulnerable.'"[123]

Similarly, the case was not immune to the risk that subjective judgment or experience might taint an expert's neutrality. Some of the opinions expressed by medical experts were anecdotal, based as they were on personal involvement with patients rather than on statistical or empirical data. Dr. Bentz, for example, testifying for the Attorney General of Canada on the inefficiency of safeguards in place in Oregon, based his evidence on his experience with a terminally ill patient.[124] Such anecdotal evidence is problematic in at least two interrelated ways. First, evidence based on personal experience cannot be relied on as representative overall. When considering evidence for the purpose of evaluating social policy, one individual's experience on a particular occasion does little to illuminate the broader issues and will therefore be of little assistance to the judge. Second, necessarily subjective in nature, anecdotal evidence offers only an individualized perspective on the question at hand. Without more than a personal view, the evidence cannot be tested or confirmed in order to draw generalized conclusions on broader societal views or interests. Indeed, in the accepted hierarchy of scientific evidentiary sources, opinions based on the expert's personal experience rank the lowest.[125] Contrasted with the statistical evidence tendered on the same subject, Justice Smith identified Dr. Bentz's evidence as anecdotal, preferring the plaintiff's evidence stating that the oversight process works

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121 Paciocco, "Jukebox Testimony", *supra* note 92 at 608

122 *Ibid*.

123 *Carter* BCSC, *supra* note 2 at para 662.

124 *Ibid* at para 410.

125 Steven N Goodman, "Judgment for Judges: What Traditional Statistics Don't Tell You about Causal Claims" (2007) 15:1 JL & Pol'y 93 at 106. Note that Goodman's remarks are directed at evidence of injury causation in the context of tort law. The idea that evidentiary strength and reliability will vary according to the methodology, however, is applicable to areas other than tort causation.

fairly well in Oregon.[126] Justice Smith did not expressly reject Dr. Bentz's evidence, but she was attuned to the dangers of anecdotal, or experiential, evidence given by experts and to the importance of relying on "evidence-based expert evidence"[127] over evidence based on personal experience.

The judge's critical approach to evidence based on personal experience was later reinforced by the Supreme Court. In *Carter* SCC, the Supreme Court was asked to evaluate fresh evidence submitted by the Attorney General on the slippery slope argument against the decriminalization or legalization of physician-assisted death. Specifically, the Attorney General sought to advance evidence that permitting the practice will result in illegitimate deaths of "decisionally vulnerable" patients and send Canada down "the slippery slope into euthanasia and condoned murder."[128] The evidence consisted of an affidavit from Professor Montero, a bioethics professor called as an expert on euthanasia in Belgium, which detailed "a number of recent, controversial and high profile cases of assistance in dying in Belgium which would not fall within the parameters suggested in [the Supreme Court's] reasons."[129] In addressing the affidavit, the Supreme Court cautioned against judicial overreliance on anecdotal or individualized evidence, which may not be generalizable to the legal and social context of the case. The Court endorsed Justice Smith's detailed analysis of the evidence as a whole: "[t]he resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence."[130] Thus the Supreme Court confirmed the need for careful attention in mitigating some of the potential dangers of expertise, particularly where expert evidence is anecdotal in nature.

The contrast between the different types of evidence tendered on the same question – anecdotal on the one hand and statistical/empirical on the other – illustrates how the above-described dangers associated with expert testimony make their way into the adjudicative process and that certain forms of evidence are more likely to give rise to a greater risk of bias. As Justice Smith's treatment of the evidence demonstrates, however, awareness

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126 *Carter* BCSC, *supra* note 2 at para 653.

127 *Goudge Report*, *supra* note 19 at 479. See also *Sekhon*, *supra* note 53 (on the Supreme Court's general rejection of the reliability of anecdotal expert testimony).

128 *Carter* SCC, *supra* note 3 at paras 114, 120.

129 *Ibid* at para 111.

130 *Ibid* at para 120.

of the distorting effects of bias and express acknowledgement of this danger can go a long way toward mitigating its potential destructive impacts on judicial decision making.

Conclusion: Judging the Social Sciences After *Carter*

In *Charter* disputes about controversial social policy affecting large numbers of Canadians, the Supreme Court often has the final judicial say. But the fact that two appellate courts will normally review the trial decision does not diminish the significance of the trial judge's role. In exercising the gatekeeping function and determining what weight to ascribe to each piece of evidence, it is the first instance judge who creates the evidentiary basis both for her decision and for subsequent appeals. Given that appellate courts are no longer at liberty to review a trial judge's findings of legislative fact, it follows that today more than ever it is essential that trial judges treat social science evidence correctly and effectively. However, as I have suggested, the adversarial method of presenting evidence does not always facilitate correct and effective treatment of empirical evidence.

The trial decision in *Carter* BCSC demonstrates that the challenges flowing from adversarial adjudication need not undermine the reasoned resolution of disputes about social policy. The risks diminish as judges demonstrate greater sensitivity to the difficulties associated with judging large amounts of conflicting empirical data. Justice Smith's approach to the record in *Carter* BCSC enabled her to avoid some of the characteristic missteps associated with judicial reliance on contested evidence about human behaviour. But demonstration alone is rarely an effective pedagogical tool and questions remain about how the legal system can assist judges in applying the same discriminating approach to similar evidence.

Precise methods of creating discriminating users of empirical evidence are beyond the limited scope of this paper, which aims simply to highlight one example of thoughtful treatment of this kind of evidence. Nevertheless, in reading *Carter* BCSC, some methods of promoting judicial capacity to evaluate empirical data come to mind. For instance, the common law on the independence of expert witnesses might benefit from a stricter threshold for admissibility. The Supreme Court recently ruled that an obvious lack of independence on the part of an expert witness should affect the admissibility

of that expert's evidence.[131] But only in the clearest of cases does an expert's inability to provide objective evidence render the evidence inadmissible – for example, where an expert "assumes the role of an advocate … "[132] Given the subtle and nuanced ways that bias can creep into adversarial proceedings, particularly in social policy cases where judges hear from large numbers of partisan experts, the line between expertise and advocacy can be difficult to trace.[133] By maintaining a "not particularly onerous" threshold for admissibility, according to which a personal, professional, or financial interest alone does not preclude admissibility,[134] the law provides little help in mitigating the risks associated with expert testimony.

On a more rudimentary level, the legal system as a whole might do more to foster familiarity among lawyers and judges with the methods of other intellectual disciplines, particularly those on which the law regularly draws.[135] Law schools would do well to instil in students a sense of literacy with respect to the complex evidentiary concepts they may encounter as jurists, by creating courses that aim to "enable students to become more sophisticated consumers of science and understand its relationship with law."[136]

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131 *WBLI*, *supra* note 43.

132 *Ibid* at para 49.

133 See e.g. *Bedford v Canada (AG)*, 2010 ONSC 4264 at para 182, 327 DLR (4th) 52 (where the trial judge was "struck by the fact that many of those proffered as experts … had entered the realm of advocacy … ").

134 *WBLI*, *supra* note 43 at para 49.

135 See Conrad & Lazare, *supra* note 8.

136 Glenn R Anderson, *Science and the Law*, Syllabus (Schulich School of Law, Dalhousie University, Fall 2015) at 1, online: <www.dal.ca/content/dam/dalhousie/pdf/law/Academic%20Information%20Syllabi%20Moots%20Regulations/Syllabi/Science%20and%20the%20Law%20LAWS%202230%2003%20Fall%202015%20Course%20Outline%204%20pp.pdf>. See also Université du Québec à Montréal, *Health Sciences and Law*, Course Description, online: <www.etudier.uqam.ca/cours?sigle=CIN5000&p=7308>, which introduces students to different types of expert testimony related to environmental science as well as basic principles in varied disciplines such as toxicology, medicine, epidemiology, physiology, psychology, and neuropsychology [translated by author]. While these two courses stand out, the emphasis in similar courses at most Canadian law school courses does not appear to be on creating competent users of scientific research, but rather on the laws of evidence and procedural rules related to expert testimony.

What such courses might look like and where they would fit into the law school curriculum are questions for further reflection.[137]

Canadian judges are regularly called upon to decide divisive questions affecting social policy and impacting the lives of many. To do so effectively, they must regularly rely on the work of empirical researchers who study human behaviour and evaluate the impact of laws and social policies. As in *Carter* BCSC, rights adjudication with wide-ranging effects requires judges to critically appraise the work of empirical researchers, in the form of expert evidence, so as to establish the factual bases for their often controversial decisions. In the preceding pages, I have attempted to demonstrate that while judicial reliance on social science data is vital to the interpretation of *Charter* rights and freedoms, institutional limits and the structure of adjudication may give rise to a danger that complex evidence will be misconstrued or misinterpreted by trial judges. This danger is all the more serious in a context where a single trial judge typically has the final word on the significance of the varied and often inconclusive evidence. But as the treatment of the evidence at trial in *Carter* BCSC makes clear, this danger can be overcome.

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[137] This suggestion should not be understood as endorsing an exclusively vocational view of the law school. I am of the view that law faculties can deliver both an intellectual and a professional education. Moreover, there is value, outside of the professional context, in studying the languages and mechanisms of disciplines outside of the law. See Conrad & Lazare, *supra* note 8 at 62.

A Missed Opportunity: Affirming the Section 15 Equality Argument against Physician-Assisted Death

*Maneesha Deckha**

In the 2012 decision of *Carter v Canada (AG)* the British Columbia Supreme Court found that Section 15 equality rights under the *Canadian Charter of Rights and Freedoms* were infringed by the blanket prohibition against assisted death in the *Criminal Code*. Madam Justice Lynn Smith's application of the substantive equality model is a critical factor in the judgment, enabling a responsive and nuanced understanding of disability, the systemic disadvantages that people with disabilities experience, and the disability rights responses to physician-assisted death. Her equality analysis also exhibits a respect for the agency of those in vulnerable positions because of their physical health. These dimensions lead to a sophisticated judicial treatment of the disability rights debate on physician-assisted death in the Section 15 portion of the trial decision. The views of disability scholars feature significantly in this portion of the decision and the diverse perspectives within the disability community about physician-assisted death are synthesized and explored. The Section

En 2012, dans l'arrêt *Carter v Canada (PG),* la Cour suprême de la Colombie-Britannique a statué que l'interdiction générale de l'aide médicale à mourir par le *Code criminel* violait le droit au traitement égal garanti par l'article 15 de la *Charte canadienne des droits et libertés*. L'application du cadre juridique de l'égalité réelle par la juge Lynn Smith est un facteur déterminant de cet arrêt et permet une compréhension nuancée et réceptive du handicap, des désavantages systémiques que les personnes avec un handicap rencontrent et des réponses possibles à l'aide médicale à mourir d'un point de vue du droit des personnes avec un handicap. Son analyse fondée sur l'article 15 illustre également un respect pour la capacité des personnes en situation de vulnérabilité due à leur santé physique. Ces dimensions supportent un traitement juridique sophistiqué du débat sur les droits des personnes avec un handicap et sur l'aide médicale à mourir, lequel est abordé dans la décision de première instance. C'est effectivement dans les portions dédiées à l'analyse fondée sur

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15 analysis also extends generous judicial recognition to the fundamental autonomy and embodied interests at stake for those wishing to pursue physician-assisted death. The combined effect of Justice Smith's Section 15 analysis, as this article will argue, is a progressive line of reasoning about access to physician-assisted death that advances judicial discourse about inequality in relation to disability. It is regrettable that neither the dissenting judgment of the British Columbia Court of Appeal nor the unanimous judgment of the Supreme Court of Canada endorsed the trial judge's Section 15 equality ruling. This article explains the positive egalitarian impulses in the trial decision's Section 15 analysis to illuminate how Justice Smith advances judicial discourse about inequality in relation to disability. In view of enhancing the critical equality impact of the decision, the article also identifies some concerns with the remedies she crafts in terms of their imbrication in biomedical power disparities that typically work to disadvantage non-normative bodies.

l'article 15 de cette décision qu'on accorde beaucoup d'importance aux points de vue des spécialistes des droits des personnes avec un handicap et que les perspectives variées sur l'aide médicale à mourir émanant de la communauté des personnes avec un handicap sont abordées et synthétisées. L'analyse fondée sur l'article 15 accorde aussi une reconnaissance juridique appréciable à l'autonomie fondamentale qui est en jeu pour celles qui désirent recourir à l'aide médicale à mourir. Le présent article démontre que l'effet cumulatif de l'analyse fondée sur l'article 15 est un raisonnement progressiste sur l'accès à l'aide médicale à mourir qui fait avancer le discours judiciaire en ce qui a trait à l'inégalité reliée au handicap. Il est désolant que ni l'opinion dissidente du jugement de la Cour d'appel de la Colombie-Britannique, ni le jugement unanime de la Cour suprême du Canada n'appuie le jugement fondé sur l'article 15 de la juge d'instance. Le présent article explique les motivations égalitaristes et positivistes qui sous-tendent l'analyse fondée sur l'article 15 de la cour d'instance pour clarifier comment la juge Smith fait progresser le discours judiciaire en ce qui a trait à l'inégalité reliée au handicap. Dans le but d'accroître l'impact crucial de cet arrêt sur l'égalité, le présent article identifie enfin des inquiétudes par rapport à l'imbrication de la réparation conçue avec les disparités de pouvoir biomédical qui tendent généralement à désavantager les corps non-normatifs.

Introduction

Section 15 of the *Canadian Charter of Rights and Freedom* (*Charter*) guarantees the right to equality.[1] Over the last decade or so, this provision has settled some long-standing social controversies as well as initiated judicial participation in other constitutional challenges.[2] While the precise legal issues diverge in Section 15 equality jurisprudence, a common feature in these cases is the Supreme Court of Canada's (Supreme Court) ability to fashion a *substantive* version of the equality right. Substantive equality, as opposed to formal equality, refers to a systemic, flexible, and contextual understanding of discrimination and oppression, i.e., one that attends "to the multiple and varied manifestations and dynamics of inequality … "[3] Articulations of substantive equality help to illuminate the unequal impacts of a law on different groups of people. This is because it allows for a focus on the *effects* of the law in precluding the mainstream recognition and inclusion of historically, socially, or culturally disadvantaged groups as human beings deserving of full respect and dignity.[4]

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1 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. For examples of other uses of the Section 15 right in constitutional jurisprudence, see Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003) 48 McGill L J 627. For more context and critical perspective on the *Charter* see e.g. Andrew Petter, *The Politics of the* Charter*: The Illusive Promise of Constitutional Rights* (Toronto: University of Toronto Press, 2010).

2 Section 15 has guided the articulation of the legality of polygamy (*Reference Re Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96), same-sex marriage (*Halpern v Canada (AG)* (2003), 265 OR (3d) 161, 25 DLR (4th) 529), and prostitution (*Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2011 BCCA 515, 40 BCLR (5th) 88).

3 The Honourable Claire L'Heureux-Dubé, "Preface" in Fay Faraday, Margaret Denike, & M Kate Stephenson, eds, *Making Equality Rights Real* (Toronto: Irwin Law, 2006) 3 at 4 [Faraday et al, "Making"]. For a discussion on how substantive equality relates to systemic stereotyping, see Sophie Moreau, "The Wrongs of Unequal Treatment" in Faraday et al, "Making", 31 at 36–38. For a discussion on the value placed on substantive equality in Canadian society, both in the present and historically, see Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:5 Dal LJ at 21–27.

4 Luc B Tremblay, "Promoting Equality and Combating Discrimination Through Affirmative Action: The Same Challenge? Questioning the Canadian Substantive Equality Paradigm" (2012) 60 Am J Comp L 181 at 190–191.

Although the adoption of a substantive equality framework nowhere near guarantees that all equality interests will be vindicated in a particular dispute, the framework seeks to prevent the perpetuation of systemic disadvantage. It can thus serve as a helpful tool when marshaling a constitutional challenge to long-standing laws that impair the dignity and autonomy interests of individuals that typically imbue an equality claim.[5] It can be particularly useful, then, in legal disputes where rights to what we can do to our bodies are at stake and where the harms faced by socially stigmatized or disadvantaged bodies might not be easily perceived by mainstream society. And while there is ample room for the Supreme Court to refine its application of the substantive equality model and what the model requires,[6] an equality analysis can shine a much needed spotlight on systemic disadvantage against marginalized and non-normative bodies in invalidating traditional yet problematic legal norms.[7]

Indeed, this is what occurred at the trial level in the 2012 decision of *Carter v Canada (AG)* (*Carter* BCSC),[8] where the British Columbia Supreme Court found that Section 15 equality rights under the *Charter* were infringed by the blanket prohibition against assisted death in the *Crimin-*

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5 Susanne Baer, "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism" (2009) 59:4 UTLJ 417 at 427–30.

6 For indications of how the Supreme Court has fallen short of substantive equality ideals in its application of the framework, see Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after *Withler*" (2011) 16:1 Rev Const Stud 31 and generally, Faraday et al, "Making", *supra* note 3. Section 15's definition of substantive equality also does not encompass distributive justice (Tremblay, *supra* note 4).

7 For analyses of the potential of substantive equality in challenges to discrimination in health law areas, see Martha Jackman, "Health Care and Equality: Is there a Cure?" (2007) 15 Health LJ 87; Yude M Henteleff, Mary J Shariff & Darcy L MacPherson, "Palliative Care: An Enforceable Canadian Human Right" (2011) 5:1 McGill LJ 107 at 130; Estair Van Wagner, "Equal Choice, Equal Benefit: Gendered Disability and the Regulation of Assisted Human Reproduction in Canada" (2008) 20:2 CJWL 231.

8 2012 BCSC 886, 287 CCC (3d) 1 [*Carter* BCSC]. It is important to note that one Canadian province – Québec – has passed legislation legalizing physician-assisted death (PAD) along somewhat similar lines to the conditions established in *Carter v Canada (AG)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter* SCC]. See *An Act Respecting End-of-Life Care*, RSQ c S-32.0001.

al Code.[9] The main litigant, Gloria Taylor, was a competent terminally ill woman who wanted to be able to end her life with physician assistance before her natural death. Both the provincial and federal governments resisted her constitutional challenge, but she ultimately prevailed, making it the first time that a Canadian court legalized physician-assisted death (PAD). Madam Justice Lynn Smith's application of the substantive equality model is a critical factor in the judgment, enabling a responsive and nuanced understanding of disability, the systemic disadvantages that people with disabilities experience, and the disability rights responses to PAD. Her equality analysis also exhibits a respect for the agency of those in vulnerable positions because of their physical health. These dimensions lead to a sophisticated judicial treatment of the disability rights debate on PAD in the Section 15 portion of the trial decision where the views of disability scholars feature significantly and the diverse perspectives within the disability community about PAD are synthesized and explored. The Section 15 analysis also extends generous judicial recognition to the fundamental autonomy and embodied interests at stake for someone like Taylor. Her Section 15 analysis, as this article will argue, should be considered a progressive line of reasoning about access to PAD that advances judicial discourse about inequality in relation to disability.

Despite these strengths, neither the dissenting judgment of the British Columbia Court of Appeal nor the unanimous judgment of the Supreme Court endorsed the trial judge's Section 15 equality ruling that the absolute nature of the prohibition on assisted death in the *Criminal Code* was unconstitutional in violating the right to equality under Section 15.[10] Both elected to anchor their rulings in Section 7 autonomy arguments.[11] This is regrettable. Although valuable in its own right, the Supreme Court's Section 7 reasoning does not capture the egalitarian dimensions of the decision that the Section 15 equality analysis does, nor does it allow the Supreme Court to affirm the progressive orientation of the trial judgment in this regard. Justice Smith's discussion of the disability rights debate over PAD, her sophisticated understanding of how autonomy implicates equality for a marginalized social group, and the embodied nature of the decision that come through in her Section 15 equality analysis are lost in the Court of Appeal and Supreme

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9 RSC 1985, c C-46; *Carter* BCSC, *supra* note 8 at paras 1161–62.

10 *Carter v Canada (AG)*, 2013 BCCA 435 at 7, 293 CRR (2d) 109 [*Carter* CA], rev'd by *Carter* SCC, *supra* note 8.

11 *Carter* CA, *supra* note 10 at para 5; *Carter* SCC, *supra* note 8 at para 92.

Court decisions. As the Supreme Court's Section 7 analysis is largely silent on the topic of disability rights, the disability studies orientation of the trial judgment's Section 15 analysis does not receive a broader airing and much needed juridical and social attention. This article explains the positive egalitarian impulses in the trial decision's Section 15 analysis to illuminate how Justice Smith advances judicial discourse about inequality in relation to disability. In view of enhancing the critical equality impact of the decision, the article also identifies some concerns with the remedies she crafts in terms of how these remedies are imbricated in biomedical power disparities that typically work to disadvantage non-normative bodies.

I wish to be clear that the focus of the article is not on whether Justice Smith's conclusion denouncing the absolute nature of the ban is ultimately a progressive one for the equality-seeking disability rights movement. While I do believe this to be the case, and what follows arguably supports such a conclusion, it is a position I cannot do justice to here. My argument instead is about judicial discourse. Part I of this article reviews Justice Smith's decision to explain the architecture of her doctrinal analysis with respect to the Section 15 claim that led her to hold that the criminal prohibition against PAD violates Taylor's equality rights. Part II then discusses the nuanced equality analysis on disability the decision delivers in the course of assessing the discriminatory effect of subsection 241(b) of the *Criminal Code* on those with seriously compromised physical conditions who wish to die earlier rather than later. It also considers several objections to advocating for a Section 15 analysis due to particular elements of Section 15 doctrine as well as limits to the substantive equality framework in general. While acknowledging the legitimacy of these objections, this part proceeds to explain why the trial judge's Section 15 analysis is nonetheless preferable to an analysis of PAD that foregoes a Section 15 analysis. After defending the desirability of a Section 15 analysis in *Carter*, Part III revisits the remedies provided by Justice Smith through a critical equality lens to consider how the decision promotes existing power disparities in biomedicine. Specifically, I distill the biopolitical and medicalized implications of the remedies to identify how the calibre of the remedies from a critical equality perspective could be improved. It is here that I include a brief discussion of the new federal amendments allowing for PAD, to take note of where the new law stands in relation to these remedies and critiques.[12]

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[12] *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, RSC 2016, c 3 [*Medical Assistance in Dying Act*].

I. The *Carter* BCSC Decision

A. Overview

Carter BCSC[13] involved a *Charter* challenge to the constitutionality of subsection 241(b) of the *Criminal Code*, which prohibited PAD.[14] The plaintiffs, Gloria Taylor, Lee Carter, and three others,[15] claimed that this prohibition violated Sections 7 and 15 of the *Charter* and could not be saved under Section 1.[16] They sought an immediate constitutional exemption permitting Ms. Taylor to seek a PAD and a declaration of invalidity of the impugned provisions.[17] In relation to Section 15, the plaintiffs claimed that the prohibition had a "disproportionate impact on physically disabled persons,"[18] who, unlike those who can commit suicide on their own, cannot die without the assistance of another.[19] With respect to Section 7, the plaintiffs argued that subsection 241(b) deprived individuals of their right to life, liberty, and security of the person by precluding "competent, grievously and irremediably ill adult individuals who voluntarily seek physician-assisted

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13 *Carter* BCSC, *supra* note 8.

14 *Ibid* at para 100. To be exact, the plaintiffs challenged sections 14, 21, 22, 222, and 241, which together make up the prohibition on PAD. The crux of the challenge addressed subsection 241(b). This section reads: "Everyone who (…) 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" (*supra* note 9, s 241(b)).

15 Gloria Taylor had the neurodegenerative disease known as "ALS" (amyotrophic lateral sclerosis) and sought relief to obtain a PAD. Lee Carter and Hollis Johnson, two other plaintiffs, assisted Lee Carter's mother in obtaining an assisted death in Switzerland. The last two plaintiffs were Dr. William Shoichet, a family physician willing to participate in PAD, and the British Columbia Civil Liberties Association.

16 Section 1 of the *Charter* is critical to the analyses of all *Charter* challenges. It is further described below. In essence, the section allows state action that has infringed a *Charter* right to nonetheless be "saved" if it meets the requirements of the doctrinal test established.

17 *Carter* BCSC, *supra* note 8 at para 27. Section 52 of the *Charter* allows the court to declare invalid legislation that infringes a *Charter* right and cannot be saved by Section 1.

18 *Carter* BCSC, *supra* note 8 at para 26.

19 *Ibid* at para 15.

dying on an informed basis from receiving such assistance."[20] Justice Smith found that both rights were infringed, that the legislation could not be saved under Section 1, and granted both remedies, albeit slightly revised, sought by the plaintiffs.

The defendants – the governments of Canada and the province of British Columbia – responded largely in unison.[21] They both argued that *Rodriguez v British Columbia (AG)*[22] was binding and thus thereby required the court to dismiss the present claim;[23] alternatively, the defendants argued that Section 1 would save any rights infringement[24] given that the sanctity of life is a fundamental Canadian value.[25] In defence of the ban's breadth, the federal government argued that the current laws were necessary to protect persons in vulnerable circumstances and nothing short of an absolute prohibition would suffice.[26] Both governments maintained that those who are ill and disabled require the law's protection against ableist attitudes that might make health care providers, substitute decision makers, and family members erroneously conclude that certain lives are not worth

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20 *Ibid* at para 25.

21 *Ibid* at para 34. More specifically, the government of British Columbia adopted the arguments of the government of Canada.

22 [1993] 3 SCR 519, 1993 7 WWR 641 [*Rodriguez*]. *Rodriguez* involved an almost identical constitutional challenge to the criminal law against PAD. The challenge was unsuccessful and the defendants in *Carter* took the position that this finding of the Supreme Court is binding on the *Carter* BCSC court. Justice Smith disagreed with the defendants' position, concluding that although *Rodriguez* is binding, it did not severely limit the plaintiffs' claim since *Rodriguez* did not address whether subsection 241(b) infringed the right to life under Section 7 and nor did it address whether it infringed the right to equality under Section 15 (*Carter* BCSC, *supra* note 8 at para 13). Although *Rodriguez* addressed the security of the person and liberty interests under Section 7, it did not address whether the deprivation was in accordance with the principles of fundamental justice – overbreadth and gross disproportionality. In terms of equality rights, the *Rodriguez* Court only briefly discussed the possibility of a constitutional claim and stated that any infringement would be a reasonable limit and justified under Section 1.

23 *Carter* BCSC, *supra* note 8 at paras 34, 861.

24 *Ibid* at paras 33, 34.

25 *Ibid* at paras 168–69.

26 *Ibid* at paras 31, 621.

leading.[27] The defendants argued that the law, although autonomy-reducing, promotes the dignity and equality interests of vulnerable groups[28] and is in line with the "fundamental Canadian value" that is the preservation of human life.[29]

Justice Smith rejected these arguments, ruling that the effects of the provision far over-stretched its purpose of protecting vulnerable persons.[30] As discussed further below, Justice Smith concluded that it was possible to structure a regime of PAD that did not put vulnerable parties at risk and completed her reasons by delineating conditions under which one could receive such assisted death.[31] Justice Smith reached this conclusion after careful and comprehensive analysis. At almost 400 pages, the judgment meticulously canvassed both legal and ethical grounds. It began by addressing the debate on the ethical nature of medical end-of-life practices since "both legal and constitutional principles are derived and shaped by societal values."[32] Justice Smith then reviewed how opinions vary as to whether current legal end-of-life practices are ethically distinguishable from PAD,[33] noting that ethicists and medical practitioners "widely concur that current legal end-of-life practices are ethically acceptable."[34] For their part, the plaintiffs argued there is no ethical distinction between suicide and PAD. Justice Smith agreed, stating that the ethical distinction vanishes when "the patient's decision for suicide is entirely rational and autonomous, it is in

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27 *Ibid* at para 359.

28 *Ibid* at paras 32, 1069. Canada's arguments regarding the prevention of wrongful deaths can be found at paragraphs 748–54.

29 *Ibid* at para 168.

30 *Ibid* at para 853.

31 *Ibid* at para 1393.

32 *Ibid* at para 317. The judge identified three additional reasons why the ethical debate was relevant. First, she stated it was important to know whether there is consensus among physicians that performing assisted-death would be ethical. Second, the plaintiffs argued there is no bright ethical line between current legal end-of-life practices, including suicide, and PAD. Third, the prohibition may be contrary to the societal consensus on assisted-death.

33 Current legal end-of-life practices include withholding life-sustaining treatment, palliative sedation, administering dosages to hasten death, treatment cessation, and pain management.

34 *Carter* BCSC, *supra* note 8 at para 5.

the patient's best interest, and the patient has made an informed request for assistance."[35] After canvassing the testimonies from over fifty expert witnesses on the values and principles underlying PAD,[36] and accepting the clear social consensus on the high value of human life, Justice Smith concluded that in PAD "[t]he physician provides the means for the patient to do something which is itself ethically permissible. It is unclear, therefore, how it could be ethically impermissible for the physician to play this role."[37]

When she proceeded to doctrinal analysis, Justice Smith began with Section 15 – discussed in detail below – and then addressed the Section 7 claim.[38] Section 7 of the *Charter* protects the right to life, liberty, and security of the person, and the right to only have these liberties infringed upon when such infringements are in accordance with the principles of fundamental justice (an internal requirement within Section 7).[39] Justice Smith held that the prohibition violated both the right to life and security of the person as protected under Section 7.[40] With regard to the right to life, Justice Smith accepted only one of the submissions ("that the right to life is also engaged because the provisions may cause her to end her own life earlier than she would otherwise want to"),[41] but innovatively reframed it as the "right *not* to die."[42] She found that the provision effectively shortens the lives of persons, namely those who are aware of their eventual physical incapability

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35 *Ibid* at para 339.

36 Fifty-seven experts testified including researchers, physicians, and academics on the complexity of the ethical nature of PAD. A comprehensive list of all experts and their occupation begins at para 160 of the trial judgment.

37 *Carter* BCSC, *supra* note 8 at para 339.

38 *Ibid* at paras 1286–1383.

39 This concept has been described as "the basic values of our legal system and its constitutional traditions" (JM Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29:1 Osgoode Hall LJ 51 at 55).

40 *Carter* BCSC, *supra* note 8 at paras 1, 1304.

41 *Ibid* at para 1309.

42 *Ibid* at para 1322 [emphasis in original]. The plaintiffs had also argued "that Gloria Taylor's right to life is engaged by the impugned provisions because they deprive her of the right to make and carry out the decision to end her own life" (*ibid* at para 1307).

of ending their own life, by causing them to take their lives earlier than they would otherwise.[43] She further found that the plaintiffs' security interests, though varied in relation to the prohibition, were all clearly engaged.[44] The Supreme Court affirmed Justice Smith's reasoning on Section 7.[45]

Justice Smith's finding of *Charter* violations perpetrated by subsection 241(b) of the *Criminal Code* meant that it was incumbent on the government to justify these infringements under Section 1. At the core of Canada's submission on both the Section 7 principles of fundamental justice and the Section 1 proportionality analyses was the proposition that nothing short of the blanket prohibition would be sufficient to protect those who are rendered particularly vulnerable.[46] In rejecting this claim, Justice Smith relied upon evidence from permissive jurisdictions on the effectiveness of safeguards (namely, mandatory psychiatric evaluations,[47] requiring a written request,[48] imposing a waiting period,[49] and limiting the eligibility to "those patients who are grievously and irremediably ill,"[50] among others) against the risks inherent in permitting PAD ("competence, voluntariness, informed consent, ambivalence and socially vulnerable individuals"[51]), the impact of PAD on other forms of care, and the effect of PAD on physician-patient

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43 *Ibid*.

44 Ms. Taylor's situation was comparable to that of Ms. Rodriguez's, and the liberty interests of Ms. Carter and Mr. Johnson were engaged due to the possibility of imprisonment (see *ibid* at para 17). See also *supra* note 15 for a brief description of the situations of the five plaintiffs and *Rodriguez*, *supra* note 22 and accompanying text for more on the *Rodriguez* decision.

45 *Carter* SCC, *supra* note 8 at para 86.

46 Canada stated that age or disability may increase vulnerability. Canada also argued there is a strong risk of involuntary deaths due to mental capacity, depression, incompetence, coercion, undue inducement, and psychological manipulation (*Carter* BCSC, *supra* note 8 at paras 748–54).

47 *Ibid* at para 873.

48 *Ibid* at para 874.

49 *Ibid*.

50 *Ibid* at para 877.

51 *Ibid* at para 761.

relationships.[52] After reviewing extensive evidence compiled from international studies, Justice Smith concluded that "it is possible for a state to design a system that both permits some individuals to access physician-assisted death and socially protects vulnerable individuals and groups."[53] She found that it was possible to screen out individuals who are ambivalent,[54] depressed,[55] coerced,[56] influenced, [57] or misinformed.[58] As well, Justice Smith found that the voluntariness of the decision making about PAD of vulnerable individuals such as the elderly and people with disabilities could also be confirmed by physicians properly conducting capacity assessments.[59] Further, she stated the risks inherent in permitting PAD could not only be identified but also reduced through a "carefully-designed system imposing stringent limits that are scrupulously monitored and enforced."[60] As a result, she held the absolute prohibition was not in accordance with the principles of fundamental justice[61] and, predictably, the infringement was not saved under Section 1.[62]

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[52] Several jurisdictions allow PAD: Belgium, Netherlands, Switzerland, Luxembourg, Columbia, Montana and Oregon. For a detailed description of their practices, see *ibid* at part VIII.

[53] *Ibid* at para 667.

[54] *Ibid* at para at 843.

[55] *Ibid* at para 798.

[56] *Ibid* at para 815

[57] *Ibid*.

[58] *Ibid* at para 831.

[59] *Ibid* at paras 847, 853.

[60] *Ibid* at para 883. The plaintiffs suggested requirements such as a mandatory psychiatric evaluation, formal written request, minimum waiting period, and the option limited to those who are suffering intolerably from an illness.

[61] *Ibid* at paras 1371, 1378. The effect of the provision was held to be inconsistent with the principles of fundamental justice because it was grossly disproportionate and overbroad. The plaintiffs had also argued that the provision was arbitrary, but since the majority in *Rodriguez* held the provision was not arbitrary (see *supra* note 22 at 5), Justice Smith held that she was bound by that decision (*Carter* BCSC, *supra* note 8 at para 1331).

[62] It would be extremely difficult to save a Section 7 violation with Section 1 because of the similarity between the two concepts. For a discussion of these

The Supreme Court affirmed Justice Smith's analysis, holding that the Section 7 deprivations were overbroad and thus not in accordance with the principles of fundamental justice. The Section 7 deprivations also failed the proportionality test under Section 1 because the complete ban on PAD failed to minimally impair the right at stake.[63] To be sure, the Supreme Court's Section 7 analysis generates a forward-looking decision with respect to the right to choose what happens to one's body. It is a monumental judgment in the Canadian juridical landscape regarding autonomy rights, which, of course, are related to equality movements and social justice ends. Yet, in choosing not to address the central equality argument the case raises, the Supreme Court missed an opportunity to endorse Justice Smith's progressive approach to the equality and rights issues that are implicated by the decision. By conducting a Section 15 analysis, Justice Smith was able to distill the important equality issues at stake more closely and explicitly than a Section 7 analysis allows. To understand her equality-minded contributions, the next section summarizes her conclusions on Section 15.

B. The Section 15 equality analysis

1. General doctrinal test

The mechanics of Section 15 have been unsettled in recent years. At the time of the trial decision, a two-step test inquiring into whether the law creates a distinction based on an enumerated or analogous ground and, if so, whether this distinction creates a disadvantage or perpetuates prejudice, shaped the Section 15 analysis and remains good law to this day.[64] Also at

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two sections, see Jacquelyn Shaw, "A Death-Defying Leap: Section 7 *Charter* Implications of the Canadian Council for Donation and Transplantation's Guidelines for the Neurological Determination of Death" (2012) 6:1 McGill JL & Health 41 at 121.

63 *Carter* SCC, *supra* note 8 at paras 86, 121.

64 The most recent authority on Section 15 is *Québec (AG) v A*, 2013 SCC 5 at 66, [2013] 1 SCR [*Québec v A*], which the Supreme Court cited most recently in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 16, [2015] 2 SCR 548 [*Kahkewistahaw First Nation*]. In this most recent decision, the Supreme Court describes the second step of the test slightly differently than in *Québec v A*, that is, as an inquiry into whether the law "has the effect of reinforcing, perpetuating or exacerbating (systemic) disadvantage" (*ibid* at paras 17, 20). *Withler v Canada*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*] was the

the time of the trial decision, four related factors typically guided the inquiry into disadvantage and prejudice: pre-existing disadvantage, correspondence with actual characteristics, ameliorative purposes or effects, and the interests affected.[65] The Court recently affirmed these factors as constitutive of substantive inequality but clarified that there is no "rigid template."[66] Justice Smith went through all four factors in *Carter* BCSC but the guiding principle for the entire Section 15 analysis, as she reminds us, is substantive equality.[67] Thus, Justice Smith adopted a contextual approach to determine whether the law comports with the underlying anti-discrimination principle of Section 15 and, indeed, the entire *Charter*, namely the protection of human dignity.[68] She reached this determination through assessing the four factors enumerated above.

2. Application

Justice Smith found that the first step of the Section 15 analysis is easily satisfied: the criminal prohibition draws a distinction between people of

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most recent authority on Section 15 analysis at the time of the trial decision and Justice Smith relied on its enunciation of the test (*Carter* BCSC, *supra* note 8 at paras 1022, 1026). For a discussion of the imprecision in the *Withler* articulation of discrimination, see Koshan & Hamilton, *supra* note 6 at part IV.

65 *Carter* BCSC, *supra* note 8 at para 1085. These factors were set out initially in *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 and were affirmed in *Withler*, *supra* note 64.

66 *Québec v A*, *supra* note 64 at para 331, Abella J citing *Withler*, *supra* note 64 at para 66. There are also cases where the "reasonable person" was used to apply an objective standard for determining discrimination. For a discussion on this tool, see Hart Schwartz, "Making Sense of Section 15 of the *Charter*" (2011) 29 NJCL 201 at 213–17, cited in *Carter* BCSC, *supra* note 8 at para 1024.

67 The Supreme Court recently affirmed this view in *Kahkewistahaw First Nation*, *supra* note 64 at para 17.

68 The philosophical notion of dignity has fallen in and out of favour with the Supreme Court; at one time it formed a part of the Section 15 test but it is currently thought to be too hard to define and apply. See Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto, Carswell: 2007) at 55–28 to 55–29 and 55–31 to 55–32; Schwartz, *supra* note 66 at 202–03. Now, human dignity is affirmed as the underlying principle of the entire *Charter* (*Québec v A*, *supra* note 64 at para 329, Abella J).

different abilities that creates an increased burden on people with physical disabilities.[69] She rejected the defendants' two arguments: 1) that there is no distinction because the law prohibits PAD for everyone; and 2) that people of all abilities have the option to decline hydration and nutrition. The first failed because there is evidence of a distinct impact on people with physical disabilities and the second does not succeed because it is only people with disabilities who are left with only this one undesirable option.[70]

With respect to the second step, both sides agreed that people with physical disabilities experience a disadvantaged situation relative to able-bodied individuals.[71] They disagreed as to whether the law furthers the disadvantage. Justice Smith accepted the claimant's argument that the law does not correspond to the situation of people with physical disabilities because it is founded on the "false premise" that "people with disabilities are more susceptible than others … or more likely to be suicidal."[72] Justice Smith also found that the paternalism implicit in the law affects people with physical disabilities differently than able-bodied people,[73] adversely affecting an autonomy interest that is "fundamentally important and central to personhood."[74] She concluded that the law against PAD breaches Section 15.[75]

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69 *Carter* BCSC, *supra* note 8 at para 1077.

70 *Ibid* at paras 1075–76. This effect of the prohibitions – that physically disabled people are at a relative disadvantage in comparison to able-bodied people – is recognized in Jennifer J Llewellyn & Jocelyn Downie, "Restorative Justice, Euthanasia, and Assisted Suicide: A New Arena for Restorative Justice and a New Path for End of Life Law and Policy in Canada" (2010-2011) 48 Alta L Rev 965 at 968. In this piece, the authors argue that there are benefits to applying restorative justice principles in cases involving euthanasia and assisted death. In framing their argument, they outline the disadvantages to the current criminal approach. One of these is the disproportionate burden felt by people with physical disabilities and their families due to the ability requirements for legal suicide.

71 *Carter* BCSC, *supra* note 8 at para 1102.

72 *Ibid* at para 1110.

73 *Ibid* at para 1130.

74 *Ibid* at para 1155.

75 *Ibid* at paras 1161–62.

C. The Section 1 justification analysis

1. General doctrinal test

Having established that the law offends Section 15, Justice Smith moved on to determine whether it is nonetheless justified under Section 1. The government must show that the limit of the right is prescribed by law, i.e., the limitation must be accessible and precise,[76] which the impugned criminal provision is held to be. The government must also demonstrate that the law is justified in a free and democratic society, an element analyzed through focusing on the law's purposes and proportionality.[77]

2. Application

Justice Smith found that the purpose of the criminal ban is "to protect vulnerable persons from being induced to commit suicide at a time of weakness" and that the state interest in this goal is "the protection of life and maintenance of the *Charter* value that human life should not be taken."[78] She further found that this purpose has not changed since *Rodriguez*[79] and that she is thereby bound to find this step satisfied.[80] It is with respect to the proportionate nature of the law that the criminal ban fails.[81] Having clarified the question at this stage as to whether a "less drastic" measure is

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[76] *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 50, [2009] 2 SCR 295 citing Hogg, *supra* note 68 at 122. If the rights infringement was found to be the result of action not prescribed by law, then the infringement will necessarily fail to be justified (see Barbara Billingsley, "Justification" in Leonard Rotman, ed, *Constitutional Law: Cases, Commentary and Principles* (Toronto: Thomson Carswell, 2008) 837 at 838.

[77] *Carter* BCSC, *supra* note 8 at para 1169.

[78] *Ibid* at para 1190.

[79] *Rodriguez*, *supra* note 22 at 19–20.

[80] *Carter* BCSC, *supra* note 8 at paras 1204–05.

[81] Similar to the previous step, the court is bound by the precedent from *Rodriguez* that the prohibition of PAD is rationally connected to the objective of the legislation (*ibid* at paras 1208–09).

available for achieving the objective[82] – and not, as the defendants argued, whether the prohibition "falls within a range of reasonable alternatives"[83] – she relied on evidence from jurisdictions with legalized PAD in finding that such an alternative does exist.[84] The defendants thus failed to prove that the law minimally impairs the equality right.[85] Further, the government failed to demonstrate an adequate balance between the salutary effects and deleterious effects of the impugned legislation.[86] This step provided a crucial broad perspective on the situation, where the costs and benefits of the legislation can be weighed.[87] Justice Smith stated that the salutary effects of a prohibition of PAD include: simplicity,[88] communication of an anti-suicide message,[89] protection of vulnerable populations,[90] clarity of physicians'

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82 *Carter* BCSC, *supra* note 8 at para 1211.

83 *Ibid* at para 1226.

84 *Ibid* at para 1243.

85 *Ibid* at para 1244.

86 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 76–77, [2009] 2 SCR 567 [*Hutterian Brethren*]. As explained in the *Carter* SCC decision, the Supreme Court modified the Section 1 analysis after *Rodriguez* in *Hutterian Brethren*. In the *Rodriguez* decision, the Supreme Court provided direction on the deference to be granted by the judiciary towards the legislature regarding the constitutionality of laws in a Section 1 analysis, namely, that complex regulatory schemes warrant more deference than penal statutes (*Carter* BCSC, *supra* note 8 at para 1168, citing *Rodriguez*, *supra* note 22). Justice Smith found that this case involved legislation in the second category thus less deference is necessary (*Carter* BCSC, *supra* note 8 at para 1180).

87 This step was once not considered important and was used to provide a summary of the findings in the first two steps (*Carter* BCSC, *supra* note 8 at para 994). However, the Supreme Court in *Hutterian Brethren* provided clarification on the purpose of the third step, attributing a distinct purpose to it (*ibid* at paras 994, 1246, referring to *Hutterian Brethren*, *supra* note 86 at paras 76–77). This change, which the *Carter* BCSC court finds is substantive in nature, is a significant part of the reason why the British Columbia Supreme Court was not bound in this case by the Supreme Court decision in *Rodriguez* (*Carter* BCSC, *supra* note 8 at paras 994, 1003; *Rodriguez*, *supra* note 22).

88 *Carter* BCSC, *supra* note 8 at para 1268.

89 *Ibid* at para 1265.

90 *Ibid* at para 1267.

roles,[91] and the maintenance of a high value for human life.[92] She found that these could be maintained without a blanket prohibition[93] however, and are outweighed by the following deleterious effects:[94] belittlement of the wishes of the terminally ill,[95] lack of patient candour with their physicians, the denial of autonomy, and a lack of regulation for those instances of PAD that happen despite criminalization.[96]

D. Summary

Justice Smith thus concluded that the PAD prohibition violated Section 15 on grounds of disability and could not be saved under Section 1: the government failed to justify the law in failing to demonstrate that the law did not minimally impair the equality right and that the law's salutary effects outweighed its detrimental ones. With this Part having outlined the doctrinal result in Justice Smith's decision, the next Part proceeds to identify how it reflects a disability studies perspective.

II. The Disability Insights of the Equality Analysis

Justice Smith's commitment to the substantive equality model to process equality claims is the principal reason for the decision's equality-favouring outcome in favour of PAD where a competent, non-depressed, yet grievously ill individual seeks to end her life with the assistance of a physician. As she emphasized, the Supreme Court recently identified substantive equality as the "animating norm" for constitutional equality law, declaring that the norm requires close attention to context and "the law's real impact on the claimants and members of the group to which they belong."[97] Even

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91 *Ibid* at para 1270.

92 *Ibid* at para 1275.

93 *Ibid* at para 1283.

94 *Ibid* at para 1285.

95 *Ibid* at para 1266.

96 *Ibid* at para 1282.

97 *Ibid* at para 1022, citing *Withler*, *supra* note 64 (per McLachlin CJ and Abella J at paras 1–3).

after the trial decision, the Supreme Court stressed the substantive equality undercurrent to Section 15, reaffirming it as an effects-focused and contextual doctrine aimed at preventing entrenchment of systemic disadvantage.[98] The substantive equality model enabled Justice Smith to examine the context surrounding the law, an examination that yielded multiple progressive equality insights in relation to disability.

A. A nuanced understanding of the disability studies debate on PAD

A prominent feature of Justice Smith's decision is her nuanced understanding of disability rights. Justice Smith recognized the traditional and continuing social prejudice against individuals with disabilities,[99] but her decision also offered further sophisticated analysis not found in cases from other jurisdictions that make only brief mentions of ableist discrimination.[100]

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98 See *Québec v A*, *supra* note 64 at para 332; *Kahkewistahaw First Nation*, *supra* note 64 at para 17. Interestingly, the Canadian government did not concede an effects-based violation; instead, it emphasized the statute's purposes of protecting the vulnerable and preserving the sanctity of human life. The Canadian government argued that "persons with disabilities are treated with equal dignity and respect since they, along with the able-bodied, are equally denied access to assisted death" (*Carter* BCSC, *supra* note 8 at para 1128). Justice Smith quickly dispensed with this argument: "I think it ignores the adverse impact/unintended effects discrimination analysis central to the substantive equality approach … In this case, by Canada's admission, the legislation operates to deprive non-vulnerable people such as Ms. Taylor of the agency that they would have if they were not physically disabled. Thus, although (as Canada submits) the law is 'equally paternalistic to the able-bodied and the disabled', the paternalism does not affect them all in the same way, with very significant consequences" (*ibid* at para 1130).

99 She wrote that "[d]isabled people have experienced marginalization in Canadian society, including in connection with the delivery of health care. Health care providers may, like other people, overestimate the difficulty in living with certain kinds of disability and wrongly assume that life in some circumstances is 'not worth living'" (*ibid* at para 194).

100 The Supreme Court of the Unites States wrote in *Baxter v Montana*, 2009 MT 449 [*Baxter*]: "While the government may impugn on privacy rights, liberty interests, and other Article II rights in proper circumstances ... the individual always retains his [*sic*] right of human dignity. So too with persons suffering from mental illness or disability and involuntary commitment" (at para 86). In *Washington v Glucksberg*, 521 US 702 (USSC 1997) at 732, 117 S Ct 2258,

Perhaps as much as a judicial decision can do, the *Carter* trial decision gave a full accounting of the debate in the disability rights community about PAD.

In beginning her equality analysis by defining pre-existing disadvantage, Justice Smith affirmed the plaintiffs' position that "disabled people face pre-existing disadvantage, vulnerability, stereotyping and prejudice in Canadian society."[101] Here, the judgment also refers to affidavit evidence from a disability studies theorist noting the "direct and systemic … pervasive and persistent"[102] nature of this discrimination. Further, in assessing the risks of lifting the ban, Justice Smith canvassed in considerable detail the evidence from disability studies scholars about their objections to legalizing PAD.[103] She noted the serious concern articulated by many that physicians immersed in the mainstream medical model of disability, which views bodily variations as lamentable conditions to be corrected,[104] will be quick to endorse wishes of individuals with disabilities to seek death rather than counsel them against suicide as they would others.[105] Justice Smith presented and accepted the evidence from disability theorists who note how ableist social attitudes dehumanize those with disabilities and problematically assume that loss of bodily control and increased dependence on others equates to a life without dignity, thereby perpetuating stereotypes about the lives and experiences of those with disabilities.[106]

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138 L Ed (2d) 772 [*Glucksberg*], the Supreme Court of the United States identified the State's interest in protecting:

> the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and "societal difference" [footnotes omitted]. The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.

101 *Carter* BCSC, *supra* note 8 at 1099.

102 *Ibid*.

103 *Ibid* at paras 848–52.

104 See Alison Kafer, *Feminist, Crip, Queer* (Bloomington: Indiana University Press, 2013) at 5.

105 *Carter* BCSC, *supra* note 8 at paras 851–52.

106 *Ibid* at paras 848–50, 853.

In incorporating these insights, Justice Smith signalled her respect for disability studies perspectives. While not a uniform school of thought, disability studies as an academic discipline generally aims to challenge presumptions about normality.[107] Proponents seek to examine the degree to which impairments are socially constructed as "disability" by the material world and by widespread prejudices about productivity and participation.[108] In acknowledging these perspectives in relation to the mainstream medical model, which often situates disability as a functional limitation of the body,[109] Justice Smith legitimated the project of disability studies scholars to deconstruct entrenched Western norms of ability and normative bodies.

At the same time that Justice Smith fully validated the disability studies critique articulated by the defendants' experts, she avoided treating all individuals with disabilities as one homogeneous group. First, she was alert to the various ways disability arises.[110] Moreover, she recognized the different perspectives within the PAD debate articulated by individuals of different abilities. She acknowledged the defendants' position, supported by affidavits from disability scholars, that persons with disabilities are at risk of subtle coercion to end their lives due to ableist norms and acknowledged that disability is socially conceptualized.[111] Yet, Justice Smith also gave voice to the plaintiffs' submissions that such a position is "patronizing, and … that such an assumption infantilizes disabled people and feeds prejudice and discrimination against them."[112] She was also aware of the submissions of the intervener Ad Hoc Coalition of People with Disabilities which questioned the blanket assumption that all disabled people are vulnerable and incap-

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107 See Anastasia Liasidou, "The Cross-Fertilization of Critical Race Theory and Disability Studies: Points of Convergence/ Divergence and Some Educational Policy Implications" (2014) 29:5 Disability & Society 724 at 726.

108 See Natasha Saltes, "'Abnormal' Bodies on the Borders of Inclusion: Biopolitics and the Paradox of Disability Surveillance" (2013) 11:1/2 Surveillance & Society 55 at 58.

109 *Ibid*.

110 She wrote: "In my view, it is important to recognize that there are many reasons why a person might be seriously physically disabled: disabilities may be congenital, acquired through trauma, or arise form disease. In that end and in their nature, physical disabilities vary widely, as do people who live with them" (*Carter* BCSC, *supra* note 8 at para 1101).

111 *Ibid* at paras 1118, 1127.

112 *Ibid* at para 1088.

able of making informed choices about their lives.[113] Indeed, Justice Smith endorsed the concern about paternalism, concluding that not all disabled people are in need of protection.[114] She also rejected the defendants' view, given the totality of evidence before her, that disabled people will seek assistance with death at a disproportionate rate to the rest of society if PAD is sanctioned and available, due to ableist social pressures from physicians, family, and caregivers.[115]

To be sure, Justice Smith was aided in this full exposition of the disability studies critique of ableism by precedent recognizing systemic discrimination in Canadian society against people with disabilities.[116] She was also

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[113] *Ibid* at para 1125.

[114] *Ibid* at para 1129. She stated that Canada's position problematically "rests upon the assumption that even the most independent-minded, clearest-thinking person with physical disabilities needs protection from the bias of doctors and caregivers" (*ibid*).

[115] *Ibid* at para 811. She pointed to the evidence offered for the plaintiffs by disability theorists who contest the traditional paternalistic view. Justice Smith highlighted the evidence of a disability studies scholar who favoured PAD but not without stressing that "clinicians who perform such assessments would have to be aware of the risks of coercion and undue influence, of the possibility of subtle influence, and the risks of unconscious biases regarding the quality of the lives of persons with disabilities or persons of advanced age" (*ibid* at para 815).

[116] Justice Smith included in her decision a passage from *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 SCR 703 [*Granovsky*] which formed a part of the plaintiff`s arguments:

> … many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual`s condition at all but are located in the problematic response of society *to* that condition. ... Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself. Problematic responses include, in the case of government action, legislation which discriminates *in its effect* against persons with disabilities, and thoughtless administrative oversight

(*Carter* BCSC, *supra* note 8 at 1135, citing *Granovsky* at para 30 [emphasis in original]). Also included is the following passage from *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 at para 56, 74 ACWS (3d) 41 [*Eldridge*]: "It is an unfortunate truth that the history of disabled persons in Canada is

assisted by the legal dispute before her where the parties have each used a disability rights framework to advance their divergent views on which position will best respect the rights and lives of people with disabilities. Yet, it was she who incorporated the divergence of views on this issue that the critical substantive equality framework generates. As a result, Justice Smith was able to convey a rich account of the disability rights critique – an element absent in the Supreme Court's Section 7 reasoning. Indeed, the Supreme Court's decision contains no explicit mention of disability rights or disability perspectives.

B. An expansive vision of autonomy and respect for agency

Another progressive feature of the equality judgment is the extent to which it balanced concerns about exploitation of vulnerability with the affirmation of vulnerable individuals to still make important life decisions. This is most apparent in the way the decision defined the nature of the equality interest at issue. Specifically, Justice Smith did not define it as the ability to control the timing and nature of one's own death, which is how the defendant governments defined the equality interest at issue and what they denied to be an interest protected by the Constitution.[117] In contrast, the trial decision took the following point of departure in identifying the nature of the interest:

> Autonomy with respect to physical integrity is a value of fundamental importance in the Canadian Constitution. Its place in the constitutional order is paralleled by its place in the common law. The starting point in our law – the default position – is that persons control their own physical integrity. Instances when other persons or the state are permitted to usurp that control are the exception, not the rule…. In fact, the historical direction of the law has been to limit and circumscribe the occasions when an individual's physical integrity may be

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largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjugated to invidious stereotyping and relegated to institutions" (*Carter* BCSC, *supra* note 8 at para 1099).

[117] *Carter* BCSC, *supra* note 8 at para 1146.

> usurped, as part of the increasing recognition of full personhood in previously excluded categories of persons.[118]

Justice Smith clearly underscored the importance of autonomy to what is at stake in the litigation. She thus explicitly resisted the narrow definition that the defendant governments wanted her to adopt and which prevails, for example, in leading American PAD jurisprudence.[119] In defining the interest more broadly as one of autonomy over physical integrity, she affirmed an expansive view of the right at stake. Justice Smith also made clear the critical importance of respecting autonomy. Although she stressed a few paragraphs later that autonomy is not a constitutional trump against other values directed at protecting vulnerable groups from dehumanization, she went on to affirm that it is still "fundamentally important" and "central to personhood."[120] We are reminded that disrespecting autonomy has exclusionary consequences.

The endorsement of an expansive view of autonomy and its critical relation to personhood in the judgment leads to a recognition of the agency that individuals with compromised abilities, even at the ends of their lives, can hold and should be recognized as holding. Although autonomy and agency

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[118] *Ibid* at paras 1149–50.

[119] *Ibid* at para 1157. See *Glucksberg*, *supra* note 100 at 727–28, which states:

> [t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected ... The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted "right" to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause [footnotes omitted].

[120] *Carter* BCSC, *supra* note 8 at paras 1153–55. For insight into why a liberal conception of choice should not automatically trump other considerations when attending to widespread social problems involving exploitation and vulnerability, see Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice" (2013) 18:2 Rev Const Stud 161; Janine Benedet & Isabel Grant, "Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities" (2014) 22:2 Fem Leg Stud 131 at 135 (criticizing in particular the social model of disability for the premium it ascribes to choice).

are often used interchangeably, it is helpful to appreciate that by "agency," I refer to the making of a choice with an awareness of the social relations that structure that choice. If autonomy in the classic liberal sense is captured by the concept of self-governance, we can understand agency not simply as the ability to exercise rational choice (and so deny the impact of social relations in structuring our choices),[121] but as doing so in the context of power relations and the constraints they may impose.[122] Justice Smith's decision afforded individuals with physical impairments this self-directing ability, instead of disavowing the validity of their choices to die because of the backdrop of ableism against which such choices are made.

The substantive equality framework provides a prominent place to this expansive view of autonomy by recognizing and prioritizing agency (and the corresponding need to ensure that the conditions for agency exist). It shifts the focus from abstract values concerning the protection of vulnerable citizens and the related belief in the sanctity of human life – purposes that governments both in Canada and elsewhere have identified as the reasons for the complete prohibition[123] – to a consideration of the effect of universal abstract values as concretely applied to actual human lives. This permits the judgment to highlight the fact that maintaining life at all costs is not a universally shared value,[124] and should yield to the choice not to endure prolongation of life where the quality is not desirable according to that individual.[125] In questioning the universal nature of the sanctity of human life, the judgment aligns with recent policy reports that interrogate the assumption

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121 This is the distinction that Susan Sherwin draws in "A Relational Approach to Autonomy in Health Care" in Susan Sherwin, coordinator, *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998) 18 at 33, cited in Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011) at 390, n 105.

122 See Kathryn Abrams, "From Autonomy to Agency: Feminist Perspectives on Self-Direction" (1999) 40:3 Wm & Mary L Rev 805 at 806.

123 *Carter* BCSC, *supra* note 8 at para 1190; *Glucksberg*, *supra* note 100 at 728; *Vacco v Quill* [1997] 521 US 793 at paras 805–06.

124 *Ibid* at para 1268.

125 The Royal Society of Canada Expert Panel End of Life Report notes that most Canadians lack appropriate access to palliative care (*End-of-Life Decision Making* (Ottawa: RSC, 2011), online: <rsc-src.ca/sites/default/files/pdf/RSCEndofLifeReport2011_EN_Formatted_FINAL.pdf> at 12 [RSC Report]).

"that continued existence is always of benefit to the person in question."[126] By de-emphasizing the need to preserve life at all costs the judgment appropriately distances itself from the implicit religious connotations about the sanctity of human life grounded in a particular worldview that not everyone shares.[127] This position signals respect for and inclusion of different views about human life.

C. Embodying the decision

What is more, the judgment, for all its extensive legal reasoning, does not neglect the individual bodies affected by the loss of autonomy inherent in the prohibition on assisted death. All too often, even in health care decisions, the bodies that anchor the legal dispute and the question of how they should be cared for by our health care systems are absent in legal judgments.[128] This absence of the body in abstract argumentation often entails adverse results for those whose bodies are marginalized.[129] Justice Smith highlighted the physical impact on the individuals who must live in their bodies through pain and deterioration, as well as the terror, fear and emotional suffering it causes them and their families. In addition to quoting the deposition from plaintiff Gloria Taylor at multiple points to illustrate the plaintiffs' overall submission that "the interests at stake in this case are fundamental, relating to personal integrity, autonomy and fundamental choices

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126 *Ibid* at 57.

127 See Ngaire Naffine, "Varieties of Religious Intolerance" (2006) 8 UTS Law Review 103 at 105.

128 See e.g. Annette F Street & David W Kissane, "Discourses of the Body in Euthanasia: Symptomatic, Dependent, Shameful and Temporal" (2001) 8:3 Nurs Inquiry 162; Y Michael Barilan, "The Story of the Body and the Story of the Person: Towards an Ethics of Representing Human Bodies and Body Parts" (2005) 8:2 Med Health Care Philos 193.

129 See e.g. Susan M Wolf, "Erasing Difference: Race, Ethnicity, and Gender in Bioethics" in Anne Donchin & Laura M Purdy, eds, *Embodying Ethics: Recent Feminist Advances* (Lanham, MD: Rowman & Littlefield, 1999) 65; Lisa C Ikemoto, "The Fuzzy Logic of Race and Gender in the Mismeasure of Asian American Women's Health Needs" (1996) 65 U Cin L Rev 799; Deleso Alford Washington, "Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of 'Cultural Competency'" (2009) 72:4 Alta L Rev 961.

about one's own body and life,"[130] the judgment gave space to affected individuals to articulate their assessment of their own health and life situations by quoting their affidavits at length.[131] Justice Smith presented the experiences of individuals living with serious illnesses in a compelling light and concluded that the prohibition produces "severe and specific deleterious effects" on them.[132]

While it would have been possible to locate such insights about the autonomy interest, including detailing the embodied nature of the interest, in the Section 7 portion of the trial judgment, it is significant that they resided instead in the Section 15 portion. Connecting autonomy over fundamental life choices with *equality* enables an understanding of how individuals are made unequal in society when autonomy is thwarted and their pre-existing disadvantage amplified. After all, the ban against PAD does not simply represent a denial of a fundamental life choice, but also represents a distinction that creates further *social disadvantage* for an already marginalized group. The impact of autonomy deficits on social experiences of equality, particularly regarding the individual right to control one's body and physical integrity, can be illustrated in various contexts. Indeed, in matters of health care, equality motivations helped generate the new norm of informed consent as a corrective to physician paternalism in the allopathic tradition. Nan D Hunter speaks to this point by reference to the American experience of the rise of the informed consent doctrine:

> The women's and racial justice movements were especially significant in the move toward recognition of patient-autonomy rights. Physician disrespect of patients had long been exacerbated by race and gender, and equality movements of the mid-twentieth century included these issues as part of their agendas. This equality-focused "master frame" of social change, and the new social meanings that resulted from it, shaped the contours, timing, and social meaning of the informed-consent doctrine.[133]

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[130] *Carter* BCSC, *supra* note 8 at paras 1143–44. See also paragraphs 52, 54, 56, to see the extent to which the Supreme Court references Taylor's words.

[131] *Ibid* at paras 1278–79.

[132] *Ibid* at para 1281.

[133] "Rights Talk and Patient Subjectivity: The Role of Autonomy, Equality, and Participation Norms" (2010) 45 Wake Forest L Rev 1525 at 1530–31.

Hunter's statements about feminist and anti-racist mobilization to address the then prevailing norm of beneficence giving rise to paternalism as a matter of equality refer to overall health care decision making. This should not discount the application of her insight to specific kinds of health care decision making. For example, feminists have long recognized the crucial adverse effect that the inability to control one's physical integrity has on equality outcomes with respect to matters of reproduction, whether in the decision to terminate a pregnancy[134] or in the struggle to continue a pregnancy.[135] If it is reasonable to accept the connection between autonomy and equality in matters relating to initiating life then this link should also be extended to matters relating to facilitating death.

D. Objections to using Section 15

All of these elements of the Section 15 reasoning coalesce into a forward-looking decision on disability rights. Yet, at this point some may wonder if there is a downside to a Section 15 analysis such that its absence at the Supreme Court is actually a better outcome for the disability rights community and furthers the desire for more socially aware judicial discourse.

1. Problems with Section 15's doctrinal elements

This concern may begin with the insight that equality-seeking groups have not enjoyed much success with Section 15 in challenging legislation at the Supreme Court. Indeed, at least since the more progressive revision of the doctrine in *R v Kapp*,[136] there has been no favourable Section 15 judgment from the Supreme Court where the full extent of the discrimination alleged was found.[137] As Jennifer Koshan notes, recent Supreme Court

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134 See e.g. Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography, and Sexual Harassment* (New York: Routledge, 1995).

135 See e.g. Dorothy Roberts, *Race, Reproduction and the Meaning of Liberty* (New York: Vintage, 1997).

136 2009 SCC 41, [2008] 2 SCR 483.

137 See Jennifer Koshan, "Redressing The Harms of Government (In)Action: A Section 7 Versus Section 15 *Charter* Showdown" (2013) 22:1 Const Forum Const 31 at 34–35. A review of Section 15 claims brought before the Supreme Court since 2015 reveals that this situation has not changed.

decisions have productively revised equality doctrine to avoid the pitfalls of comparator groups, proof tests about dignity, and other shortcomings identified by critical equality scholars with previous Section 15 doctrine.[138] Yet, she reveals that "in spite of the Court's acknowledgement of criticisms of earlier equality rights cases, and in spite of being presented with alternative approaches that take substantive equality more seriously, the Court is making it very difficult for claimants to prove discrimination even in cases where there is strong evidence of specific harms caused by the inequality."[139]

One example of a new barrier is the Supreme Court's emphasis on stereotyping and prejudice as evidence of disadvantage. As Koshan observes, this definition of discrimination excludes "other harms of discrimination such as marginalization, oppression, and deprivation of significant benefits."[140] Another roadblock to success for equality-seeking claimants is the proclivity of the Supreme Court to legitimate government purposes as neutral when plaintiffs challenge large benefits-conferring legislation as discriminatory.[141] To add to these impediments, the Supreme Court seems to prefer basing a decision on an alternative ground to Section 15 where possible[142] – a preference witnessed in its *Carter* SCC decision. All of these factors raise the very real possibility that the plaintiffs' Section 15 claim in *Carter* BCSC would have failed at the Supreme Court. A decision from the Supreme Court denying the equality claim could have left a powerful precedent undermining or even contesting the disability and embodied perspectives the trial decision advanced. Viewed in this light, the lack of a Section 15 analysis at the Supreme Court is not so much a missed opportunity but a lucky break for equality-seeking groups.

For the sake of argument let us concede that had it addressed Section 15, the Supreme Court would have rendered a disappointing analysis that eroded or even erased the progressive elements of Justice Smith's decision. This indeed would have been unfortunate in terms of the harmful precedent that would have been established. At the same time, avoiding Section 15 for

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138 *Ibid* at 32.

139 *Ibid* at 35.

140 *Ibid* at 32. Koshan and her co-author discuss an array of further concerns with the Supreme Court's approach to Sections 15(1) and (2) in a series of articles she cites (*ibid*, n 12).

141 *Ibid* at 32–33.

142 *Ibid* at 34.

fear of a retrograde decision is also unfortunate. Equality rights become illusory if we fear their poor enforcement and consequently avoid challenging legislation on equality grounds. It is surely no answer to deficiencies in Section 15 doctrine to render this ground obsolete in *Charter* litigation. Rather, courts should continue to articulate more robust visions for what substantive equality demands. That is why Justice Smith's Section 15 analysis is so valuable. Through the actual analysis she conducted, a nuanced account of inequality and disability emerged that arguably resulted in a progressive, equality-favouring decision in favour of people with physical disabilities. The Supreme Court should have endorsed a progressive interpretation of Section 15 in relation to the ban on PAD for persons with disabilities in order to advance judicial discussion about disability rights.

2. Disability critiques of the substantive equality model

To be sure, even a robust vision of substantive equality has its limits which prompt legal commentators in both Canada and the United States working within the framework of disability studies and what is increasingly known as critical disability studies to question the usefulness of anti-discrimination claims housed in the substantive equality model. Critical disability studies, like disability studies, objects to the medical model of disability, advocating instead for an understanding of disability as a deeply mediated site of power.[143] But critical disability studies also applies a critical filter to the premises, terms, and methodology that disability studies has employed, thus placing the latter's "conventions, assumptions and aspirations of research, theory and activism in an age of postmodernity."[144] Another notable feature of disability studies' more critical iteration is showcased by critical disability studies' intersectional orientation and desire to engage with feminist, queer, and postcolonial theory rather than privilege materialist or Marxist analyses.[145] Although the national legislative and constitution-

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143 See Kafer, *supra* note 104 at 5–6.

144 Dan Goodley, "Dis/entangling critical disability studies" (2013) 28:5 Disability & Society 631 at 632, referencing the work of Margrit Shildrick, *Dangerous Discourses of Disability, Subjectivity and Sexuality* (London: Palgrave Macmillan, 2009); Margrit Shildrick, "Critical Disability Studies: Rethinking the Conventions for the Age of Postmodernity" in Nick Watson et al, eds, *Routledge Handbook of Disability Studies* (London: Routledge, 2012) at 30–41

145 Goodley, *supra* note 144; Simo Vehmas & Nick Watson, "Moral Wrongs, Dis-

al contexts in which the critiques of disability studies and critical disability studies operate in Canada and the United States are different, these critiques share the view that substantive equality analyses inadequately incorporate the tenets of disability studies and do not benefit judicial understandings about disability enough to counsel their continued usage. Three recurring concerns are the adherence to the medical model of disability, an underappreciation of disability stigma, and, as articulated by critical disability studies scholars, the lack of an awareness of intersectionality within the substantive equality framework.

Underlying the first concern is the claim that current substantive equality analyses are incompatible with the social model of disability and align instead with the problematic medical model. Since equality claims frequently require discrimination to be based on unchangeable characteristics, a person's disability has to be understood as fixed.[146] Biology and society are kept separate.[147] The social model of disability contests this understanding.[148] This critique leads to a second shortcoming of the substantive model: that similar to formal equality,[149] it does not adequately account for the systemic nature of disability prejudice.[150] Specifically, the able-bodied person's normative stature is not interrogated within the substantive equality model.[151] The species norm, as Ani Satz puts it, that positions disability as

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advantages, and Disability: A Critique of Critical Disability Studies" (2013) 29:4 Disability & Society 638 at 638–40.

146 See Martha T McCluskey, "How the Biological/Social Divide Limits Disability and Equality" (2010) 33 Washington University JL & Pol'y 109 at 120 [McCluskey, "Biological"].

147 See *ibid* at 18.

148 See Daphne Gilbert & Diana Majury, "Infertility and the Parameters of Discrimination Discourse" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) at 293–94.

149 See Gilbert and Majury, *supra* note 148 at 3.

150 See Martha T McCluskey, "Rethinking Equality and Difference: Disability Discrimination in Public Transportation" (1988) 97:5 Yale LJ 863 at 865–68, 872–73 [McCluskey, "Rethinking"]; Samuel R Bagenstos; "The Structural Turn and the Limits of Antidiscrimination Law" (2006) 94:1 Cal L Rev 1.

151 See McCluskey, "Biological", *supra* note 146 at 123–24.

abnormal remains unquestioned[152] with the result that disability is viewed as a weakness rather than a difference.[153] Finally, critical disability theorists worry that the substantive equality model reinforces a hierarchy among inequalities.[154] As critical race feminists initially illuminated,[155] the model is not designed to address intersecting grounds of discrimination and thus struggles to accept the possibility that a person might identify as part of many different "minorities" and, as such, might argue that their experiences of inequality take shape through this multiplicity.[156] Another recurring critique emphasizes the claim that any substantive equality judgment will be inefficient without state-sponsored social programs.[157]

3. Assessing the objections

These critiques are correct in suggesting that the substantive equality model is also limited in its ability to expose and remedy marginalization, exploitation, and oppression related to disability. Deficits in Justice Smith's equality analysis from a critical disability studies perspective are simple enough to spot. For example, we observe that Justice Smith did not incorporate the literature's layered insights about terminology or which model is best to understand disability. She accepted the power of biomedicine to

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152 "A Jurisprudence of Dysfunction: On the Role of Normal Species Functioning in Disability Analysis" (2006) 6:2 Yale J Health Pol'y, L, and Ethics 221.

153 See McCluskey, "Biological", *supra* note 146 at 120, 122.

154 See *ibid* at 120.

155 See e.g. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 140 U Chicago Legal F 139.

156 See Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Devlin & Pothier, *supra* note 148 at 267–70. For discussions of the intersectionality of gender and disability, see e.g. Kristin Bumiller, "Quirky Citizens: Autism, Gender, and Reimagining Disability" (2008) 33:4 Signs 967; Rosemarie Garland-Thomson, "Feminist Disability Studies" (2005) 30:2 Signs 1557. Related to this critique is the concern that substantive equality models are identity-based, which leads to rigid and artificial ways of understanding discriminatory phenomena.

157 See generally Samuel R Bagenstos, "The Future of Disability Law" (2004) 114:1 Yale LJ 1; Jerome E Bickenbach, "Disability and Equality" (2003) 2:1 JL & Equality 7 at 12–15.

"know" the body and define disability (i.e., through assigning allopathic physicians the ability to determine eligibility for PAD). Nor did she contest the liberal parameters of Section 15 doctrine in general that constrain discussion of critical disability studies' many concerns about normalization, neoliberalism, and biopolitics in relation to disability.[158] Her reasoning also did not delve into the intersectional effects of the PAD ban. While Justice Smith, as noted above, highlighted the bodily effects of the legal prohibition on individuals, and in this regard "allow[s] the body to resurface as a significant element of the disability experience" in discussions of disability as some critical disability studies scholars advocate,[159] the judgment adheres to the liberal modernist limits of substantive equality doctrine. Whether these limits of the substantive equality model are so severe, however, to reject pursuing a Section 15 claim altogether is debatable. After all, such critiques could easily apply to all liberal *Charter* rights and the liberal legalism of the common law in general. Even Canadian scholars identifying as critical disability theorists are supportive of substantive equality as a model of equality rights to pursue.[160] More to the point, however, although the shortcomings inherent to current Section 15 analysis may mar the critical equality impact of Justice Smith's decision, her analysis still achieved a level of critical purchase that enriches judicial discourse about disability and systemic disadvantage.

The Supreme Court's Section 7-reliant decision does not incorporate insights and principles from disability studies or critical disability theory the way the trial decision did to explain the *systemic marginalizing* impact of the PAD prohibition. Nor might we expect it to. As Susanne Baer observes, many nations' constitutional doctrines treat autonomy and equality as dis-

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158 For an overview of concerns regarding normalization and biopolitics, see Saltes, *supra* note 108 at 56–62.

159 Goodley, *supra* note 144 at 634. A central tenet of disability studies is that the social model of disability denies the biologically linked suffering that physical, cognitive, and sensory impairments occasion. Goodley succinctly explains the underlying rationale of this disavowal as follows: "As a direct riposte to a medicalized and psychologized hegemonies of disability – that sited disability as a personal tragedy, biological deficiency and psychical trauma – disability studies relocated disability to social, cultural, economic and political registers. Having an impaired body did not equate with disability. In contrast, disability was a problem of society" (*ibid*).

160 See e.g. Richard Devlin & Dianne Pothier, "Introduction" in Pothier & Devlin, *supra* note 148, 1 at 8.

tinct, and often antithetical, fundamental rights mandating separate analyses with different foci.[161] When liberty is the right at stake, our attentions gravitate toward whether an individual has the ability to choose as a rational, autonomous actor or whether the state constricts choice.[162] It is in the arena of equality rights where one asks whether certain *conditions* prevent certain groups from making a choice that everyone else can (as in *Carter*).[163] We see this division in the *Charter*. It is with respect to Section 15 *Charter* rights that litigants typically hope to obtain judicial recognition of a contested law's participation in fostering the often hidden but ever-present *systemic disadvantage* that actually removes choices for some but not others.

As a result, the question of what critical understanding about disability is lost without a Section 15 equality analysis of the *Criminal Code*'s prohibition on assisted death has a different answer if we pose the same question about Section 7. It is not that one has more value than the other or that a Section 7 analysis cannot also generate a progressive social justice analysis – for those critical scholars and others who agree with the decision, the ultimate outcome at the Supreme Court in *Carter* SCC clearly illustrates that it can.[164] Rather, it is the potential of a Section 15 equality analysis to shine a spotlight on questions of *whom* does a law, because of larger and systemic social conditions, *include/enable* or *exclude/marginalize*. The Section 7 doctrine does not engage this question; its focus instead is on *what* is restricted and the importance of the suffering involved.[165] At the trial level in *Carter*, this focus within Section 15 doctrine yielded a critical insight about disability and its relation to systemic disadvantage as well as an explanation of how the prohibition of PAD furthers this disadvantage by restricting choices about death.

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161 *Supra* note 5 at 428, 435, 448. It is vital to note that Baer does not endorse this separation. Rather, she is interested in moving constitutional doctrines toward a triangulated relationship between the fundamental rights of dignity, equality and liberty. Baer argues that these rights and the work they do are best understood as indelibly inflected by one another (*ibid* at 430).

162 *Ibid* at 449.

163 As Baer succinctly puts it, "[e]quality is about who enjoys a liberty, while liberty is about what you enjoy" (*ibid* at 449).

164 See also *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (another recent Supreme Court decisions decided on Section 7 grounds that many would argue promotes social justice).

165 Baer, *supra* note 5 at 449.

In short, Justice Smith's decision is still deserving of merit for its contribution to critical judicial discourse about disability and inequality. Neither deficiencies with the mechanics of Section 15 doctrine nor the norms of the substantive equality model diminish the value of the decision in this regard. That being said, Justice Smith's reasoning could have gone further in its critical equality and disability vision as noted above. This comment is also applicable to the remedies it delivered. The next Part explains why.

III. Revisiting the Remedies

Recall that Justice Smith invalidated subsection 241(b) of the *Criminal Code* because it is a blanket prohibition that did not "allow for a stringently limited, carefully monitored system of exemptions."[166] As a remedy for the plaintiffs, Justice Smith issued two declaratory orders that subsection 241(b) violated the Section 7 and Section 15 rights of those who qualified for PAD under the "stringent conditions" regarding competence, being informed, grievously ill, etc.[167] In devising these conditions, Justice Smith drew from the dissenting judgments in *Rodriguez* at the Court of Appeal and the Supreme Court wherein Chief Justices McEachern and Lamer respectively set out what a person would have to prove to be eligible for PAD[168] as well as several other policy and legislative considerations.[169] As these declaratory orders were suspended for twelve months, the Supreme Court also provided a constitutional exemption for Gloria Taylor that set out a series of conditions she would have to fulfill and steps she would have to follow to legally access PAD.[170] There are several ways in which these remedies may be said to reinforce problematic power relations in biomedicine and thus may not actually be all that equality enhancing. This section explains these concerns. The criticisms discussed are: 1) the biopolitical and able-mindedness implications of the remedies; 2) the medicalization of death

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166 *Carter* BCSC, *supra* note 8 at para 124.

167 *Ibid* at paras 1233, 1393.

168 *Ibid* at paras 858, 1421, drawing from *Rodriguez v British Columbia* (1993), 76 BCLR (2d) 145, 14 CRR (2d) 34 [*Rodriguez*, BCCA] at paras 100–08 and *Rodriguez*, *supra* note 22 at 579.

169 *Carter* BCSC, *supra* note 8 at paras 862–71.

170 *Ibid* at paras 1411, 1413.

they promote; and 3) the valuation of the physician's autonomy over the patient's that they normalize.

A. Biopolitical and able-mindedness implications

Implicit within the *Carter* BCSC decision is a tolerance for a regime where the state, not the individual, is able to control life and death and manage the trajectories and experiences of bodies. Drawing from the work of Michel Foucault and Giorgio Agamben, we note that the decision exemplifies the concern that it is increasingly the state that attends to the biological processes of life and carries out the regulation and often repression of bodies.[171] These theories of biopower and biopolitics document how, since the 17th century, the traditional power of the sovereign to kill and take life has transformed into a biopolitics of the sovereign to "make live and to let die."[172] The state now approaches its subjects as biopolitical objects in need of technologies regulation to enhance and extend life. A critical exception to this approach occurs where, using Agamben's influential term, the state exercises its sovereign power to classify some individuals as "bare life" to be excluded from the normative political order.[173] In this subhuman zone presented as exceptional, accelerated death is legal.[174]

Scholars have noted how state prohibitions against PAD operate as a contemporary manifestation of biopower and biopolitics.[175] Although Jus-

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171 See Todd F McDorman, "Controlling Death: Bio-Power and the Right-to-Die Controversy" (2005) 2:3 Communication and Critical/Cultural Studies 257 at 258–65.

172 See Michel Foucault, *"Society Must be Defended": Lectures at the College de France, 1975-1976*, translated by David Macey (New York: Macmillan, 2003) at 241, cited in Megan Foley, "Voicing Terri Shiavo: Prosopopeic Citizenship in the Democratic Aporia between Sovereignty and Biopower" (2010) 7:4 Communication and Critical/Cultural Studies 381 at 383.

173 See Kristin G Cloyes, "Rethinking Biopower: Posthumanism, Bare Life, and Emancipatory Work" (2010) 33:3 Advances in Nursing Science 234 at 236; see also 235–37 for the important ways in which Agamben's theory of biopower diverges from that of Foucault.

174 See Dinesh Wadiwel, *The War against Animals* (Amsterdam: Brill, 2015) at 72–78.

175 Foley, *supra* note 172 at 395–96; McDorman, *supra* note 171.

tice Smith declared the absolute prohibition on PAD unconstitutional, her decision does not escape participating in these fields. For one, her remedy only recognizes the legitimacy of a small fraction of persons (those who are afflicted by a serious and degenerative medical condition who express a competent, fully informed, and non-ambivalent desire to end their lives) to control their deaths.[176] In her own words, it is a "stringent exception" to state control over how people can or cannot die.

In legislating such a general prohibition, the state will foster a normalized view of the meaning of human life that individuals are expected to adopt in the care of themselves and others. The state retains the sovereign power to assert which types of intentional termination of human life are legitimate (war, defences to homicide, capital punishment, suicide etc.) and which are not. Sovereignty over the body moves from the individual to the state.[177] From this perspective, in excluding only a fraction of the population from the criminal prohibitions, one could critique the *Carter* decision for extending the traditional currents of biopower and reinforcing the problematic biopolitical configurations of (post)modern day Western democracies.[178] The government's new amendments to the *Criminal Code* to legalize

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[176] The RSC Report notes that there are four diseases that are particularly challenging to the provision of adequate end-of-life care: dementia, kidney disease, heart disease, and chronic obstructive pulmonary disease. In light of this data, Justice Smith's ruling would have an impact on a small percentage of individuals deciding on end-of-life care due to terminal illnesses (*supra* note 125 at 12).

[177] Victor Toom, "Bodies of Science and Law: Forensic DNA Profiling, Biological Bodies, and Biopower" (2012) 39:1 JL & Soc'y 151 at 152.

[178] Llewellyn and Downie show how a criminal response to PAD is limited in what it can offer those directly involved in assisted suicide and society as a whole. But in terms of the question of biopower it can be said that their restorative justice proposal can be critiqued in the same way as the criminal law system. Even though the courts and legislatures are not as heavily involved, it is still a group of legal and health care professionals who judge the actions of those involved in assisted suicide and thus the merits of the personal decision to seek aid in dying. However, since the premise of restorative justice in the context of end-of-life decisions, as Llewellyn and Downie describe it, is that "the more one is embedded in a web of relationships of equal respect, concern, and dignity, the less likely one is to cause harm," there is the potential within this structure to acknowledge individual autonomy by not directly equating assisted death with crime (*supra* note 70 at 977). See *Criminal Code*, *supra* note 9, as amended by the *Medical Assistance in Dying*

PAD do not upset this dynamic. In fact, the amending legislation narrows the number of Canadians who can qualify by introducing the requirement that death be "reasonably foreseeable."[179]

Further, in not permitting those deemed legally incompetent (by reason of mental illness and cognitive impairment) to seek PAD – even if they had a pre-existing wish expressed when competent – the decision introduces an exception that distinguishes between mental and physical disabilities. This stance places the trial decision in *Carter* in a long line of medico-legal interventions restricting the autonomy of those exhibiting mental symptoms deemed abnormal and in need of treatment and, where possible, correction or reversal.[180] It also arguably violates Article 12 of the Convention on the Rights of Persons with Disabilities, which Canada has ratified. This Article guarantees equal recognition before the law and specifically requires states to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[181] The Committee for the Rights of

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Act, *supra* note 12, s 3. This section creates section 241.1 as an addition to the *Criminal Code* that sets out the framework for medical assistance in dying. Subsection 241.2(1) establishes the eligibility criteria along the general lines set out by the Supreme Court in *Carter* SCC. However, in defining what constitutes a "grievous and irremediable medical condition" in subsection 241.1(2), the amending statute, in contrast to other factors that echo the *Carter* SCC decision in terms of the kind of conditions that would qualify, includes the requirement that a person's "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."

179 *Criminal Code*, *supra* note 9, s 241.2(2)(d), as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 3.

180 For a deeper exploration of mental illness through a Foucauldian lens, see generally Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, translated by Richard Howard (Toronto: Random House of Canada Ltd, 1988); Arthur Still and Irving Velody, eds, *Rewriting the History of Madness: Studies in Foucault's "Histoire de la Folie"* (New York: Routledge, 1992); John Iliopoulos, "Foucault's Notion of Power and Current Psychiatric Practice" (2012) 19:1 Philosophy, Psychiatry, & Psychology 49; Gerald Turkel, "Michel Foucault: Law, Power, and Knowledge" (1990) 17:2 JL & Soc'y 170 at 172–75.

181 *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGA, 76th Mtg, UN Doc A/Res/61/106, (2006), in force May 3, 2008 (ratification by Canada 11 March 2010) at paras 1–2 [CRPD].

Persons with Disabilities' (CRPD) formal commentary on Article 12, paragraph 2, emphasizes that those with "cognitive or psychosocial disabilities" are at particular risk of having their equality rights violated through laws that remove their legal capacity due to their disability, insisting that states take action to ensure that rights are not automatically divested for those with non-physical disabilities.[182] Whether Article 12, paragraph 2, requires that those with cognitive and psychosocial disabilities be afforded a right to PAD on equal terms with those with physical disabilities is still an unsettled question.[183] Yet, one can make the argument that a law that would maintain such a distinction, as Justice Smith's eligibility factors regarding competence and lack of depression do,[184] violates the principle of equality,[185] and runs afoul of Article 12's equality guarantee.

More clearly, Justice Smith's reliance on physician assessments to determine capacity as part of the competence assessment for PAD contradicts the CRPD's commentary that characterizes such assessments as discriminatory.[186] The CRPD states that "[m]ental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon [but] is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity."[187] It further notes that "persons with cognitive or psychosocial disabilities have been, and still are, disproportionately affected by substitute decision-making regimes and denial of legal capacity" and that such regimes and denials violate the Convention's equality guarantee.[188] Health professionals' assessments of mental capacity to determine legal capacity for PAD, which trigger substitute decision making and can result in denials

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182 Committee on the Rights of Persons with Disabilities, General Comment No 1 (Eleventh session, 2014) at para 9 [CRPD, "General Comment No 1"].

183 See Elizabeth Peel & Rosie Harding, "A Right to 'Dying Well' with Dementia? Capacity, 'Choice' and Relationality" (2015) 25:1 Fem Psychol 137 at 139.

184 *Carter* BCSC, *supra* note 8 at paras 770–98.

185 Paul T Menzel & Bonnie Steinbock, "Advance Directives, Dementia, and Physician-Assisted Death" (2013) 41:2 JL Med & Ethics 484.

186 CRPD, "General Comment No 1", *supra* note 182 at para 15.

187 *Ibid* at para 14.

188 *Ibid* at para 9.

of legal capacity, are part of the "practices that in purpose or effect violate article 12 …"[189]

The CRPD provides a specific critique of capacity assessments that exhibit a "functional approach" to determining legal capacity, i.e., an approach that consists of an inquiry into whether or not a person's ability to make decisions is compromised past a particular threshold.[190] The CRPD writes:

> The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law… Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.[191]

Justice Smith accepted that "cognitive impairment and capacity are distinct; [and that] the presence of some cognitive impairment does not necessarily obviate the capacity to give informed consent."[192] Yet, she reviewed at length various medical views regarding the assessment of competence in general and, in particular, medical views with respect to manifestations of cognitive impairments and depression. She then concluded that "very careful scrutiny" would be required to ensure decisional capacity for PAD.[193] She affirmed the ability of psychiatrists – particularly contested agents of normalization[194] – and other

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189 *Ibid*.

190 *Ibid* at para 15.

191 *Ibid*.

192 *Carter* BCSC, *supra* note 8 at para 795.

193 *Ibid*. Justice Smith discusses the evidence about incompetence as a risk to improper PAD in paras 762–98.

194 See Saltes, *supra* note 108 at 62, 64. For critiques of the practices and discourses of psychiatry as a field see Paula J Caplan & Lisa Cosgrove, eds, Bias

physicians to perform this level of scrutiny.[195] In endorsing functional capacity assessments to exclude individuals with cognitive disabilities and mental illnesses, when found incompetent pursuant to such an assessment, from accessing PAD, Justice Smith's decision may be said to contribute to a two-tier disability rights landscape that privileges physical or sensory disabilities, a privileging that the excerpts from the CRPD's commentary above clearly contest. In doing so, the judgment exhibits what critical disability studies scholars are increasingly articulating as "*able-mindedness*,"[196] a term meant to accentuate the culturally normative presumptions about mental and cognitive abilities that are discriminatory.[197]

B. Medicalization of death

Closely related to the concern about biopolitics is the medicalization of death that the specific remedy normalizes. The medicalization of life experiences is a topic that has received widespread critical academic attention.[198]

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in Psychiatric Diagnosis (Lanham, MD: Jason Aronson, 2004); Shaindi Diamond et al, *Psychiatry Disrupted: Theorizing Resistance and Crafting the (R) evolution* (Montreal: MQUP, 2014); Ewen Speed, "Discourses of Acceptance and Resistance" in Mark Rapley, Joanna Moncrieff & Jacqui Dillon, eds, *De-Medicalizing Misery: Psychiatry, Psychology and the Human Condition* (Basingstoke: Palgrave Macmillan, 2011) at 123–140; Charles E Rosenberg, "Contested Boundaries: psychiatry, disease, and diagnosis (2015) 58:1 Perspect Biol Med 120 at 123–24. For critical appraisal of the field as well as reflections on how psychiatric practice guided by feminist analysis can benefit patients see Sally Swartz, "Feminism and psychiatric diagnosis: Reflections of a feminist practitioner" (2013) 23:1 Feminism & Psychology 41.

195 *Carter* BCSC, *supra* note 8 at para 798.

196 See e.g. Margaret Price, "The Bodymind Problem and the Possibilities of Pain" (2015) 30:1 Hypatia: a Journal of Feminist Philosophy 268 at 268 [emphasis added].

197 See Ashley Taylor, "The Discourse of Pathology: Reproducing the Able Mind through Bodies of Color" (2015) 30:1 Hypatia 181 at 185. Able-mindedness is perhaps even more problematic than able-bodiedness because, as Ashley Taylor notes, of how mental incompetence has historically been disproportionately attributed to those with marginalized race, class, and gender identities, an attribution that endures today (*ibid* at 185–88).

198 For citations to generative literature see Drew Halfmann, "Recognizing Medicalization and Demedicalization: Discourses, Practices, and Identities" (2012)

The medicalization of death is included in this literature and has been recognized as having profound effects on how individuals view end-of-life decisions.[199] Briefly, medicalization occurs when an everyday life occurrence is *defined* in medical terms/language; the medical analysis may or may not prescribe medical treatment/intervention to "fix" the problem.[200] In the case of *Carter*, both of these elements are present. The phenomenon of disability and assisted death requests are explained in medical (and medico-legal) terms relating to physical conditions, cognitive competence, and mental illnesses. The *Carter* SCC decision ultimately assigns authority to doctors to assess (diagnose?) whose death request is valid and permits only physicians to provide medical assistance in dying.[201]

Consider the medical requirements that Justice Smith set out as legal conditions for requesting PAD. First, the physician must declare that the patient is grievously ill and will not recover.[202] After ensuring the patient's decision is informed, the physician as well as a psychiatrist must attest that the patient "is competent and that her request for physician-assisted death is

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16:2 Health 186 at 187, 201 [Halfmann, "Recognizing Medicalization"]. For a discussion of the contemporary causes of medicalization see Peter Conrad, "The Shifting Engines of Medicalization" (2005) 46:1 J Health Soc Behav 3. Scholarly attention to how certain practices once medicalized may actually become demedicalized is now emerging as a separate focus (see Halfmann, *ibid*).

199 RSC Report, *supra* note 125 at 10, citing Economist Intelligence Unit, "The Quality of Death: Ranking End-of-Life Care Across the World 2010", *The Economist* (2010) at 15–20 which stated that the "medicalization of death in Canada has engendered a culture where many people are afraid to raise the topic of death." The report also found that Canada ranked relatively high in comparison to other countries in the area of "quality of death" but lower in public awareness about options and even lower for costs.

200 See Halfmann, "Recognizing Medicalization", *supra* note 198 at 187, citing the influential definition of medicalization provided by Peter Conrad, "Medicalization and social control" (1992) 18 Annu Rev Sociol 209 at 211; Heather Hartley & Leonore Tiefer, "Taking a Biological Turn: The Push for a 'Female Viagra' and the Medicalization of Women's Sexual Problems" (2003) 31:1/2 Women's Studies Q 42 at 43.

201 The new law expands this to nurse practitioners and nurses: *Criminal Code*, *supra* note 9, s 241.1(a), as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 3.

202 *Carter* BCSC, *supra* note 8 at para 1414.

voluntary and non-ambivalent."[203] If either practitioner cannot confirm this, that conclusion will be communicated to other doctors who may become involved at a later stage as well as to the court.[204] After this step, the patient's autonomy takes a back seat. She then has to seek permission of a court for the assisted death.[205] The new federal amending legislation has eliminated this step,[206] but it is worthwhile noting that Justice Smith's ruling would have permitted a court to decline an application for PAD on the basis that "at the material time" the patient is not "suffering from enduring and serious physical or psychological distress that is intolerable to her and that cannot be alleviated by any medical or other treatment acceptable to her."[207] No doubt, a court would have only felt qualified to make this assessment upon the opinion of medical experts.

In the course of this multi-step procedure, individuals' intimate decisions about their bodies are handed over to and tested by medical agents of the state. Private hopes for death become subject to public decisions that are, in turn, rendered legitimate by medical knowledge.[208] It is important to note that this model is not universal. Studies have addressed how PAD may de-medicalize death by pointing to the Swiss model for PAD and comparing it with the Oregon model from which the *Carter* BCSC decision more heavily draws.[209] In his discussion of the Swiss model, Stephen Ziegler notes that death is arguably de-medicalized since: 1) the assistance is rendered most frequently by non-physicians, which has the further de-medicalizing effect of enabling death to take place outside of hospitals and in the person's community; and 2) PAD is not restricted to the terminally ill.[210] While *Carter*'s

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203 *Ibid*.

204 *Ibid*.

205 *Ibid* at para 1415.

206 *Criminal Code*, *supra* note 9, s 241.2(1), as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 3.

207 *Carter* BCSC, *supra* note 8 at para 1415.

208 See Victor Toom, "Bodies of Science and Law: Forensic DNA Profiling, Biological Bodies, and Biopower" (2012) 39:1 JL & Soc'y 150 at 152.

209 See e.g. Stephen Ziegler, "Collaborated Death: An Exploration of the Swiss Model of Assisted Suicide for Its Potential to Enhance Oversight and Demedicalize the Dying Process" (2009) 37 JL Med & Ethics 318 at 322.

210 *Ibid* at 322, 325–26.

eligibility requirements at trial and at the Supreme Court did not explicitly mandate that an illness be terminal,[211] the initial procedures Justice Smith laid out for Taylor to access her constitutional exemption were immersed in a medical paradigm.

To appreciate the significance of this pathway to PAD, recall that the plaintiffs had sought a remedy that would have permitted assisted death where the suffering was *psychosocial* (and not necessarily also physical or psychological).[212] Justice Smith specifically rejected this category of suffering as a trigger for PAD eligibility.[213] She also declined to adopt the plaintiffs' suggestion that PAD could be carried out by a physician *or someone under the general control of the physician*.[214] Justice Smith restricted the assistance to physicians only.[215] She clearly invested the medical profession with trust, expertise, and authority to make the decision over who is entitled to assistance and who is not. There is ample scholarship that questions whether medicalization serves the interests of vulnerable populations,[216] in-

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211 Views have diverged as to how to interpret the Supreme Court's stance in *Carter* SCC on whether a medical condition has to be terminal. The competing arguments were recently aired in *Canada (AG) v EF*, 2016 ABCA 155, 34 Alta LR (6th) 1 before the Alberta Court of Appeal, which held that the Supreme Court in *Carter* SCC did not require that a condition be terminal for a patient to submit a request for PAD. For discussion of the case and its interpretation of *Carter* SCC, see Jennifer Koshan, "A Terminal Dispute? The Alberta Court of Appeal Versus the Federal Government on Assisted Death" (May 26, 2016), ABlawg: The University of Calgary Faculty of Law Blog, online: <ablawg.ca/2016/05/26/a-terminal-dispute-the-alberta-court-of-appeal-versus-the-federal-government-on-assisted-death/>.

212 *Carter* BCSC, *supra* note 8 at para 24.

213 *Ibid* at para 1390.

214 *Ibid* at 1385 [emphasis added].

215 *Ibid* at 1389. The RSC Report, in contrast, explicitly includes a survey of the opinions of various medical and social assistance professionals and canvasses their roles in end-of-life care, thereby encouraging a broader societal discussion on the roles that various professionals should play in assisted death (RSC Report, *supra* note 125 at 24, 61, 95).

216 See e.g. Ann V Bell, "The Margins of Medicalization: Diversity and Context Through the Case of Infertility" (2016) 156 Social Science & Medicine 39 at 40.; Deborah Findlay, "The Good, the Normal and the Healthy: The Social Construction of Medical Knowledge about Women" (1993) 18:2 Can J of

cluding scholarship that notes the adverse effects of psychiatric understandings of mental health on these same populations.[217] None of this scholarship can be detected in Justice Smith's reasoning.

C. Respecting autonomy appropriately

Following from this deference to the medical profession, Justice Smith's reasoning also prompts the critique that it is not the eligible individual whose autonomy is respected under Justice Smith's decision, but the attending physician's. Arguably, it is scientific knowledge about physical conditions and mental health that is valued rather than the patient's decision to die irrespective of whether a physician agrees with her. One may ask whether it is the doctor's or the patient's autonomy that the law respects. Elizabeth Schneider posed the same question in relation to the conceptualization of the right to abortion in the United States noting that it is not the woman's decision to abort that the law respects but the professional judgment of her doctor who agrees with her decision.[218] In setting up a system of respecting the patient's choice only where two physicians agree with her, *Carter* BCSC may be vulnerable to the same criticisms of medicalizing what should be an individual's own choice about what happens to her body.

Indeed, there is an absence of gendered analysis in the judgment as it does not consider the stereotypes against women specifically that shape their encounters with physicians and families.[219] This is in sharp contrast to

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Sociology 121; David Pfeiffer, "The Categorization and Control of People with Disabilities" (1999) 21:3 Disabil Rehabil 106.

217 See Sharon Cowan, "Looking Back (To)wards the Body: Medicalization and the GRA" (2009) 18:2 S & LS 247; Rachel Liebert, "Feminist Psychology, Hormones and the Raging Politics of Medicalization" (2010) 20:2 Fem & Psychol 278–83; Heather Hartley & Leonore Tiefer, "Taking a Biological Turn: The Push for a "Female Viagra" and the Medicalization of Women's Sexual Problems" (2003) 31:1/2 Women's Studies Q 42 at 43–44; Brenda A LeFrançois, Robert Menzies & Geoffrey Reaume, eds, *Mad Matters: A Critical Reader in Canadian Mad Studies* (Toronto: Canadian Scholars' Press, 2013).

218 Elizabeth M Schneider, "The Synergy of Equality and Privacy in Women's Rights" (2002) U Chicago Leg F 137 at 147.

219 For discussions on the relevance of these stereotypes, see e.g. Katerina George, "A Woman's Choice: The Gendered Risks of Voluntary Euthanasia and Physician-Assisted Suicide" (2007) 15:1 Med L Rev 1 at 16–18; Cheryl B Travis &

the decision's keen awareness of the stereotypes about the value of the lives of disabled people and the elderly that operate within the medical profession and within society at large, such that these groups are more vulnerable to being encouraged to die.[220] As an example of this absence, the decision does not query whose assisted death requests physicians are most likely to grant or how women constitute a vulnerable group within the disability community.[221] The lack of gendered information in the evidentiary record may explain this silence. Nevertheless, recent studies provide reason to suspect that the courts and medical profession will approach requests for PAD differently when these requests are made by women. As Jennifer Parks has argued, physicians are less likely to support the choices of women who wish to die, demonstrating an increased proclivity to deny their choices as competent and informed vis-à-vis the death wishes expressed by male patients. It is plausible that the increased tendency to question women's competence in decision making is influenced by long-standing systemic stereotyping of women as more irrational by the medical profession and by society at large.[222]

Conversely, as Katrina George points out, since women are socialized to be self-sacrificing caregivers rather than recipients of care, they will be more likely than men to internalize the dominant narrative that they are burdens to their families and should elect to die instead.[223] And while women

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Dawn M Howerton, "Risk, Uncertainty, and Gender Stereotypes in Healthcare Decisions" (2012) 35:3–4 Women Ther 207; Klea D Bertakis & L Jay Helms, "Patient Gender Differences in the Diagnosis of Depression in Primary Care" (2004) 10:7 J Womens Health Gend Based Med 689; Dana Yagil & Gil Luria, "Parents, Spouses, and Children of Hospitalized Patients: Evaluation of Nursing Care" (2010) 66:8 J Adv Nurs 1793.

220 Drawing from studies in permissive jurisdictions that do not reveal a disproportionate number of the disabled or the elderly as recipients of assisted death, Justice Smith expressed confidence in the ability of physicians to reject these stereotypes (*Carter* BCSC, *supra* note 8 at para 798).

221 The decision can also be said to be missing cultural perspectives, such as those highlighted in the RSC Report, *supra* note 119 at 17–18.

222 Jennifer A Parks, "Why Gender Matters to the Euthanasia Debate: On Decisional Capacity and the Rejection of Women's Death Requests" (2000) 30:1 Hastings Cent Rep 30 at 33–36.

223 George, *supra* note 219 at 18–23. Further, as most high profile legal cases on PAD have involved women as the plaintiffs, it may be that permitting PAD as Justice Smith has for Gloria Taylor will result in more women dying than men (*ibid* at 1). George examines the available data for several jurisdictions

are typically considerably less likely to opt for suicide than men, evidence from PAD-permitting jurisdictions indicate that they are more amenable to selecting PAD or euthanasia than suicide.[224] George attributes this latter phenomenon to women's preference for death modalities that "appear 'passive and compliant' and, therefore, compatible with cultural stereotypes of femininity."[225] My point is that, as Parks and George demonstrate, there are multiple ways in which PAD may affect women specifically. In choosing not to engage with this scholarship, Justice Smith missed an opportunity to address the gender inequality that currently exists within the medical profession. As such, while it may promote equality and dignity for individuals with physical disabilities overall, the decision may be a disservice to women within this group in failing to consider the gendered effects of legalizing PAD.

D. Summary

In at least three ways, Justice Smith's decision precludes a critical disability studies treatment of PAD by reinforcing problematic biopolitical and biomedical discourses with the remedies it devises and contradicting the CPRD Committee's position on the legitimacy of capacity assessments and substitute decision-making regimes. Of course, it may be too much to expect a single trial decision to enter into an analysis of patterns of gendered differentiation in terms of whose assisted death preferences are genuinely autonomous and/or respected. Also, given everything else the decision addresses, it may also be unrealistic to expect a court to engage with the literature critiquing the phenomenon of medicalization. At the same time, it is worth noting the implicit able-mindedness of the decision by virtue of its endorsement of capacity assessments. It is equally worth locating the decision as part of the biopolitical matrix and highlighting the deference that the decision shows to the medical profession. Although the Supreme Court does not delineate the steps a person must take before they can qualify for PAD as Justice Smith's decision did, the Supreme Court does generally de-

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regarding the gender of PAD- and euthanasia-seekers but finds the evidence inconclusive since the characteristics of those requesting PAD are not usually available (*ibid* at 7–8).

224 *Ibid* at 24–25.

225 *Ibid* at 24, citing Silvia Sara Canetto, "Elderly Women and Suicidal Behaviours" in Silvia Sara Canetto & David Lester, eds, *Women and Suicidal Behaviour* (New York: Springer Publishing Company) 215 at 227.

fine the group of people who will qualify for PAD through the existence of medical conditions. Further, the Supreme Court does not contest the overall embeddedness of the trial decision in medico-legal discourse either or express any concern about the able-mindedness presuppositions of capacity assessments.

The new federal amendments to the *Criminal Code* legalizing PAD, which received Royal Assent on June 17, 2016, also do not question these central elements.[226] The steps that must be followed pursuant to the new federal amending legislation for individuals to access what the legislation terms "medical assistance in dying" or "MAID" do vary somewhat from those Justice Smith mandated (most notably, a court order is no longer required).[227] The new provisions regarding eligibility, safeguards, and the steps that must be followed, however, do not disturb the deference that Justice Smith accorded to the medical profession other than to extend the power to provide medical assistance in dying to nurse practitioners along with physicians (after two independent physicians have confirmed the eligibility of a patient request).[228] The legislative history indicates the federal government extended the scope of health providers who could provide MAID to ensure access in geographic areas where MAID-performing physicians would not be readily available.[229] Where the provisions refer to physicians alone, it is important to note that, unlike Justice Smith's specifications, the amending legislation does not require that psychiatrists be involved – the statute uses the general term of "medical practitioner," defining it as "a person who is entitled to practise medicine under the laws of a province."[230] While this certainly diminishes the power of psychiatrists as specialist medical practitioners to evaluate the legitimacy of MAID requests, it entrusts physicians in general with the ability to do so – a clear expression of deference

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226 *Medical Assistance in Dying Act*, *supra* note 12, amending *Criminal Code*, *supra* note 9.

227 *Criminal Code*, *supra* note 9, s 241.1, as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 3.

228 *Criminal Code*, *supra* note 9, s 241.2(3) as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 3.

229 Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient-Centred Approach* (February 2016) [Joint Committee, *Report*].

230 *Criminal Code*, *supra* note 9, ss 227(5), 241.1, as amended by *Medical Assistance in Dying Act*, *supra* note 12, s 2.

to their profession as a whole. Expected provincial and territorial health-related regulation regarding the logistics and administration of MAID in each jurisdiction will very likely reinforce the presence of physicians and health care practitioners working with or under them as essential components of the regulatory frameworks that jurisdictions develop for the practice of MAID.[231] Entrenching the medicalization of the MAID framework further is, as mentioned earlier, the inclusion of the requirement that a person's death be "reasonably foreseeable."[232]

The new law also establishes capacity assessments as an important safeguard in determining who can access MAID and thus adopts the distinction both judgments maintained between physical and mental disabilities in rendering those with mental disabilities ineligible for MAID if found incapable. It remains to be seen, however, whether the new law will backtrack from even this modest position by denying MAID to individuals who submit a request in order to put an end to suffering caused by mental illness. The House of Commons and the Senate passed a bill that did not reflect the advice the federal government received on how to handle requests rooted in psychiatric conditions from the Special Joint Committee on Physician-Assisted Dying ("the Committee") appointed by Parliament in December 2015 to undertake further consultation and study but also to make recommendations to the federal government as to the legislative framework it should institute in this area.[233]

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[231] See Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report* (November 30, 2015) at 6, 24–26 [Provincial-Territorial Advisory Group, *Final Report*]. The Advisory Group affirms that PAD should only be available after a request is assessed by two physicians and should be carried out by a health practitioner – either a physician or nurse practitioner or a registered nurse or physician assistant acting under the direction of a physician or nurse practitioner (*ibid* at 25–26, 28–29). It is important to note, however, that the Advisory Group has also recommended that "self-administered physician-assisted dying," where a physician does not have to be present, be a legal option as well (*ibid* at 23). It remains to be seen whether future legislation will permit this.

[232] *Criminal Code*, s 241.1(2)(d), *supra* note 14, as amended by *Medical Assistance in Dying Act*, s 3, *supra* note 12.

[233] The Committee was struck soon after an expert panel charged with consultations with the public, the interveners in *Carter* SCC, and medical and other stakeholders, delivered its findings to Parliament on December 15, 2015. The External Panel on Options for a Legislative response to *Carter* was established on July 17, 2015. It was originally tasked, as its title suggests, with providing guidance for a legislative response to the Supreme Court's ruling but that por-

The Committee recognized that the presence of a mental illness does not necessarily preclude legal capacity[234] and concluded that disallowing individuals with mental illnesses from accessing PAD would constitute a *Charter* violation.[235] It thus recommended "[t]hat individuals not be excluded from eligibility for medical assistance in dying based on the fact that they have a psychiatric condition."[236] Although the federal government did not adopt this position in drafting the Act, it did mandate in the final version that the Ministers of Justice and Health within 180 days of the Act's Royal Assent "initiate one or more independent reviews of issues relating to requests by mature minors for medical assistance in dying, to advance requests and to requests where mental illness is the sole underlying medical condition."[237] There is thus some scope for some of the able-mindedness of the current law to be redressed in the near future. Still, the legislative debate that has occurred with respect to the possible inclusion/exclusion of those suffering from a mental condition in the MAID framework has shown no inkling of challenging the legitimacy of capacity assessments along the lines exempli-

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tion of the mandate was removed by the newly elected Ministers of Justice and Health following the Fall 2015 federal election. The Committee's mandate, critically, did include this legislative component (see Joint Committee, *Report*, *supra* note 228 at 2, 7). For a link to the External Panel findings see *External Panel, Options for a Legislative Response to* Carter v Canada, *Consultations on Physician-Assisted Dying – Summary of Results and Key Findings* (December 15, 2015), online: <www.justice.gc.ca/eng/rp-pr/other-autre/pad-amm/toc-tdm.html>. Also created before the Committee was the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, in which all provinces and territories except Quebec participated (British Columbia acted as an observer only). This body issued its Provincial-Territorial Advisory Group, *Final Report*, *supra* note 231, on November 30, 2015.

234 Joint Committee, *Report*, *supra* note 229.

235 *Ibid* at 14. This understanding was also shared by the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying. See Provincial-Territorial Expert Advisory Group, *Final Report*, *supra* note 231 at 15 where it states that "[t]he Court's declaration is also not restricted to physical illnesses, diseases or disabilities, and includes mental illness."

236 Joint Committee, *Report*, *supra* note 228 at 14–15.

237 *Medical Assistance in Dying Act*, *supra* note 12, s 9.1(1), amending *Criminal Code*, *supra* note 9.

fied by the CPRD Committee's concerns about rendering people incapable rather than supporting them in making decisions.[238]

Conclusion

For the first time in its history, Canada's highest court has held that an absolute ban on assisted death is unconstitutional under Section 7 of the *Charter* as it violates the rights to life, liberty, and security of the person for those individuals who are suffering intolerably from a "grievous and irremediable" medical condition, are mentally competent, informed, and non-ambivalent about their wish to die, but cannot commit suicide without the assistance of someone else. Since the Supreme Court decided the matter definitively under Section 7, the unanimous Supreme Court did not address the Section 15 equality argument raised by the plaintiffs. Although understandable, the equality lacuna is regrettable. In omitting a discussion of Section 15, the Supreme Court foreclosed a fuller discussion of whether banning PAD for individuals with physical disabilities enhances or detracts from such individuals' opportunities for autonomy and expression of personhood.

Justice Smith's interpretation of the equality interests at stake did address these important points and also vindicated the plaintiffs' equality claim. To be sure, the *Carter* trial decision is the product of multiple doctrinal tests, empirical assessments, and lines of reasoning. Central to the equality analysis, however, is the trial court's commitment to substantive equality. This equality model facilitates an effects-based focus that encourages judicial discussion of the social context in which laws operate. Through Justice Smith's progressive interpretation, the substantive equality model yielded a complex understanding of the disability rights debate on PAD as well as a generous conceptualization of the autonomy interests at stake for someone like Gloria Taylor. Justice Smith's substantive equality analysis on the disparate impact of prohibiting PAD on disadvantaged groups also served to foreground the embodied nature of the legal dispute. This foregrounding was accomplished in part through the narratives presented by Gloria Taylor and other affected individuals as to how the PAD prohibition would materially affect their health and bodies. For these reasons, and despite the

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238 See e.g. House of Commons, *Journals*, 42nd Parl, 1st Sess, No 74 (16 June 2016) at 645–47 (the amendments made by the Senate to Bill C-14 and returned to the House of Commons); *House of Commons Debates*, 42nd Parl, 1st Sess, No 74 (16 June 2016) at 4602–29 (the House of Commons' consideration of the Senate's amendments).

critiques that could nonetheless apply to certain aspects of the Section 15 analysis due to the doctrine's limits, including the limits of the substantive equality framework, it would have been desirable for the Supreme Court to endorse Justice Smith's Section 15 analysis as strongly as it did her Section 7 analysis. At the very least, it is hoped that concerns about critical disability and discrimination can inform the interpretation of the new law and its scheduled review such that questions of biopolitics, able-mindedness, medicalization, and patient autonomy become central to the emerging regulatory framework.

Precedent Revisited: *Carter v Canada (AG)* and the Contemporary Practice of Precedent

*Debra Parkes**

In addition to the important substantive changes to Canadian law brought about by *Carter v Canada (AG)*, the decision is significant for its consideration of the doctrine of *stare decisis*. This article examines the circumstances under which Canadian courts, including courts lower in the relevant hierarchy, might be entitled to revisit otherwise binding, higher court precedents and to depart from them. At least in constitutional cases, the *Carter* trial decision affirms that trial judges may reconsider rulings of higher courts where a new legal issue is raised or where there is a change in circumstances or evidence that "fundamentally shifts the parameters of the debate." Following a review of the recent Supreme Court of Canada case law on *stare decisis*, including *Carter*, the

En plus des modifications importantes à la loi canadienne suscitées par l'arrêt *Carter c Canada (PG)*, ce jugement est important en raison de son examen du principe du *stare decisis*. Le présent article analyse les circonstances en vertu desquelles les tribunaux canadiens, y compris les tribunaux moins élevés dans la hiérarchie pertinente, pourraient réexaminer et s'écarter de précédents autrement obligatoires rendus par les tribunaux supérieurs. Dans *Carter*, la cour d'instance affirme que les juges de première instance peuvent reconsidérer les décisions provenant de tribunaux supérieurs lorsqu'une nouvelle question de droit est soulevée ou lorsqu'une modification de la situation ou de la preuve « change radicalement la donne », du moins dans les affaires

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article turns to some critiques of the Court's newly articulated approach to revisiting precedents in lower courts, and responds to those critiques. The article also looks to the recent case law in which courts largely reject attempts to reconsider precedents from higher courts, revealing that the pull to follow precedent remains strong in Canadian law.

constitutionnelles. À la suite de l'examen de décisions récentes de la Cour suprême du Canada concernant le principe du *stare decisis*, y compris l'arrêt *Carter*, cet article traite de certaines critiques quant à l'approche de la Cour en ce qui concerne la révision de précédents par les tribunaux inférieurs, puis répond à ces critiques. Cet article examine également la jurisprudence récente dans laquelle les tribunaux rejettent largement les tentatives de réexamens de précédents provenant de tribunaux supérieurs, révélant de ce fait que l'attrait de la règle du précédent demeure élevé en droit canadien.

INTRODUCTION

Carter v Canada (AG) (*Carter* SCC),[1] is a case about life and death. The stakes for litigants do not get higher. The claim was filed in April 2011 on behalf of Lee Carter and Hollis Johnson, a couple who had accompanied Lee's 89-year-old mother, Kay Carter, to Switzerland to have a physician-assisted death. Gloria Taylor, who was living with Amyotrophic Lateral Sclerosis (ALS), was added as a plaintiff shortly thereafter.[2] The plaintiffs argued that the criminal offence of assisting suicide[3] violated their rights under Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Charter*).[4] The decision of the Supreme Court of Canada, rendered in March 2015 in the plaintiffs' favour and declaring the offence invalid insofar as it prohibited assistance to competent, consenting adults facing grievous, irremediable and intolerable medical conditions,[5] has been called "historic and far-reaching"[6] in its impact. Other contributions to this special volume examine that impact and the many meanings of *Carter* SCC across law and society. This paper focuses its attention on the trial stage of the litigation, examining the lawyerly question of whether the trial judge was entitled to decide the case as she did, declaring the impugned law invalid, when confronted with a precedent of the Supreme Court of Canada upholding that

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1 2015 SCC 5, [2015] 1 SCR 331 [*Carter* SCC].

2 The Supreme Court of Canada also heard from 25 intervenors who took various approaches to the issue (some strongly in favour of physician assisted death; some strongly opposed), including disability rights groups, religious groups, medical organizations, and many others.

3 *Criminal Code*, RSC 1985, c C-46, s 241 provides: "[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."

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 *Carter* SCC, *supra* note 1 at para 4: "[w]e conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition."

6 Tonda MacCharles, "Supreme Court Strikes Down Assisted Suicide Ban", *The Toronto Star* (6 February 2015).

very same law in a *Charter* challenge twenty years earlier in *Rodriguez v British Columbia (AG)* (*Rodriguez*).[7]

I intend two meanings for the term "revisiting" in the title of this paper. First, the paper examines the circumstances under which Canadian courts, particularly courts lower in the relevant hierarchy, might be entitled to revisit otherwise binding, higher court precedents and to depart from them. In another sense, the paper revisits, in the light of the recent developments in the case law, what I said about *stare decisis*, and particularly the vertical convention of precedent, in my previous published work.[8]

As any first year law student can tell you, the doctrine of *stare decisis* means, at least, that courts lower in the relevant hierarchy are bound to apply the law as expounded by higher courts.[9] Precedent was against Taylor and Carter, but they prevailed at trial. Justice Smith held that she was not bound by the decision in *Rodriguez* because the law and the legal analysis, particularly with respect to Section 7 of the *Charter*,[10] had changed significantly from *Rodriguez*. The social and legislative facts were also sufficiently different, as exemplified by a substantial body of evidence from a number of jurisdictions that had decriminalized physician-assisted death and had subsequently studied the effectiveness of various safeguards in these jurisdictions to protect vulnerable community members from coercion or pressure to end their lives.

While all of this was enough to convince Justice Smith to depart from *Rodriguez*, a majority of the British Columbia Court of Appeal did not share

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7 [1993] 3 SCR 519 at 615, 82 BCLR (2d) 273.

8 Debra Parkes, "Precedent Unbound: Contemporary Approaches to Precedent in Canada" (2007) 32 Man LJ 135. That article has been cited in a number of cases, but it is, in some respects, dated because it was written before the recent flurry of case law on the relationship between *stare decisis* and constitutional supremacy discussed below.

9 See generally, *ibid* at 136. This is the vertical convention of precedent (that courts lower in the hierarchy are bound by decisions of higher courts) whereas the horizontal convention relates to the treatment by appellate courts of their own decisions.

10 Section 7 of the *Charter*, *supra* note 4, provides that "[e]veryone 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."

her view of the doctrine of *stare decisis*[11] or its application to the case at bar.[12] They overturned her decision, citing recent decisions of the Saskatchewan Court of Appeal[13] and Federal Court of Appeal,[14] as well as my 2007 article,[15] for the proposition that "anticipatory overruling" of this kind is inappropriate in Canadian law.[16] They held that the "the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*."[17] In

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[11] *Carter v Canada (AG)*, 2013 BCCA 435 at paras 54, 58–59, 365 DLR (4th) 351 [*Carter* BCCA].

[12] *Ibid* at para 107.

[13] *Saskatchewan v Saskatchewan Federation of Labour*, 2013 SKCA 43 at paras 48–50, 361 DLR (4th) 132 [*Saskatchewan Federation of Labour* SKCA]. This decision was later overturned by the Supreme Court of Canada: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 [*Saskatchewan Federation of Labour* SCC].

[14] *Air Canada Pilots' Association v Kelly et al*, 2012 FCA 209 at paras 47–48, [2013] 1 FCR 308, leave to appeal to SCC refused, 10711 (28 March 2013) [*Kelly*].

[15] *Carter* BCCA, *supra* note 11 at para 316. It appears that I may have introduced the language of "anticipatory overruling" into the Canadian case law, since a search of all Canadian cases on both CanLII and Quicklaw/LexisNexis reveals only two that contain the phrase: *Saskatchewan Federation of Labour* SKCA, *supra* note 13 and *Carter* BCCA, *supra* note 11, both of which cited it in conjunction with my article. In the piece, I described anticipatory overruling as occurring when a lower court is bound by a higher court precedent but refuses to follow it when the lower court "is firmly of the view that the higher court will overrule its own precedent when given the chance": Parkes, *supra* note 8 at para 17. My discussion relied heavily on a case comment by Dale Gibson in which he acknowledged the heretical nature of anticipatory overruling but argued that it could be applied in clear cases. See Dale Gibson, "*Stare Decisis* and the Action *Per Quod Servitium Amisit* – Refusing to Follow the Leader: *R. v Buchinsky*" (1980) 13 CCLT 309. I stated that, given the relatively relaxed approach to the horizontal convention of precedent evident in recent Canadian appellate case law, "it might be argued that the case for anticipatory overruling by intermediate courts is stronger than it might have been at the time Gibson wrote his case comment in 1980. However, the reality is that there are very few cases where it can truly be said that an overruling by the SCC is very likely or inevitable (as opposed to the CA simply disagreeing with the precedent of the SCC)": Parkes, *supra* note 8 at para 22.

[16] *Carter* BCCA, *supra* note 11 at para 316.

[17] *Ibid* at para 324.

such a situation, they maintained, the trial judge's role is to "allow the parties to gather and present the evidence and to make the necessary findings of fact and of credibility, so as to establish the evidentiary record upon which the Supreme Court can decide whether to reconsider its earlier decision."[18] Justice of Appeals Finch dissented for reasons similar to those of Justice Smith.

The Supreme Court of Canada upheld the trial decision, confirming the approach to the vertical convention of precedent that the Court had articulated in the intervening case of *Canada (AG) v Bedford* (*Bedford*).[19] The unanimous Court in *Carter* SCC said:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate."[20]

The Court went on to apply this standard to Justice Smith's decision, holding that "both conditions were met."[21] The Section 7 law was sufficiently different from *Rodriguez*, presenting a "new legal issue" for the trial judge. In addition, the evidence established new social and legislative facts that fundamentally altered the parameters of the debate, undermining key foundations of *Rodriguez*, such as the premise that "a blanket prohibition" on assisted suicide "is necessary to protect against the slippery slope" toward vulnerable people being involuntarily euthanized.[22]

In a recent case comment on *Carter* SCC, Dwight Newman argues that the Supreme Court of Canada has abandoned an established rule against an-

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18 *Ibid* at para 316, citing *Kelly*, *supra* note 14 at para 48.

19 2013 SCC 72 at para 42, [2013] 3 SCR 1101 [*Bedford*].

20 *Carter* SCC, *supra* note 1 at para 44 [footnotes omitted].

21 *Ibid* at para 45.

22 *Ibid* at para 47.

ticipatory overruling without adequate explanation.[23] He sees the *Bedford*/*Carter* line of cases as displaying a "shockingly standardless approach to precedent."[24] He also argues that the Supreme Court has essentially collapsed the two approaches to precedent (horizontal and vertical) into the same analysis.

To examine the cogency of Newman's critique and to gauge the scope and impact of the *Bedford*/*Carter* SCC approach to the vertical convention, it is necessary to look more closely at the way that the judicial role and process of judging is articulated in these decisions and to understand the contours of the contemporary Canadian doctrine of *stare decisis* within that context. Following a review of the recent Supreme Court of Canada case law on *stare decisis*, attention will be turned to some critiques of the approach to the vertical convention of precedent articulated in *Bedford* and *Carter* SCC, and responses to those critiques. The final Part of the paper looks to the future of the vertical convention, briefly examining a handful of post-*Bedford*/*Carter* SCC lower court decisions to get a sense of how the doctrine is being conceived of and applied. In short, the floodgates have not opened; the vertical convention of precedent remains quite strict. The paper concludes with some brief thoughts on the theory versus practice of precedent.

I. The Practice of Precedent: Recent Supreme Court of Canada Case Law

Recent cases before the Supreme Court of Canada have prompted the Court to explicitly address *stare decisis* and both the vertical and horizontal conventions of precedent. Throughout its recent case law, the Court has cited familiar rhetoric about the pursuit of "certainty" in the common law, but has been more explicit about the extent to which it will abandon precedents (even relatively recent ones) in favour of correcting decisions now thought to be wrong in the light of new evidence or doctrine.

What has been most significant in the last five years is the extent to which the Court has revised the vertical convention of precedent, allowing some limited room for lower courts to revisit otherwise binding precedents,

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23 Dwight Newman, "Judicial Method and Three Gaps in the Supreme Court of Canada's Assisted Suicide Judgment in *Carter*" (2015) 78:2 Sask L Rev at 218.

24 *Ibid* at 219.

at least in constitutional cases. To understand this trend, it is necessary to read *Bedford* and *Carter* SCC together with the other key Supreme Court of Canada decisions explicitly addressing *stare decisis* in the last decade or so. This Part canvasses the decisions in roughly chronological order, drawing attention to the, at times, differing accounts of *stare decisis* and the way that the subject matter of the case may influence the practice of precedent. The opinions of Justice Rothstein are an interesting study in this regard.

A word on terminology: my use of the term "practice of precedent" arises from my view that precedent is best understood as a judicial practice shaped by legal culture and a host of other factors rather than as a doctrine or rule.[25]

A. R v Henry *(2005)*

I have previously traced the development of the functional and pragmatic approach of the Supreme Court of Canada and intermediate appellate courts to the horizontal convention of precedent (their decisions to overrule their own precedents) in the early *Charter* era.[26] *R v Henry* (*Henry*),[27] decided in 2005, ten years before *Carter* SCC, is regularly cited in recent cases for its articulation of the contemporary approach to *stare decisis*, particularly the horizontal convention.[28] In *Henry*, the Court revisited two post-

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[25] See Adam Gearey, Wayne Morrison & Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Abingdon: Routledge–Cavendish, 2009) at 75–76:

> [P]recedent is not to be understood as a rule or doctrine but as judicial practice. That practice is shaped by, among other things, the rules on court hierarchy, ideas as to the nature of case law and the 'law-making' nature of judicial determination of disputes. Such ideas reflect general jurisprudential beliefs, even if not so clearly articulated by the judge.

[26] Parkes, *supra* note 8 at 149–58.

[27] 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].

[28] I am grateful to Jula Hughes for reminding me of *United States of America v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*], a decision in which the Supreme Court of Canada reconsidered the constitutionality of extraditing Canadians to face the death penalty in another country just 10 years after it had upheld that practice under *Charter* review in *Kindler v Canada (Minister of Justice)*, [1991] 2 SCR 779, [1991] SCJ No 63. In *Burns*, a differently consti-

Charter precedents, *R v Kuldip* (*Kuldip*)[29] and *R v Mannion* (*Mannion*),[30] interpreting the right against self-incrimination in Section 13 of the *Charter*, which together created confusion and a lack of clarity in this area of the law of evidence.[31] In overruling aspects of those two precedents, the Court articulated a clear rule that Section 13 protects against any *compelled* statements being used against a person in a subsequent proceeding,[32] returning to the stated purpose of Section 13 articulated 20 years earlier in *Dubois*.[33] Any statements that were voluntarily given by the accused are not protected by Section 13 (such as, in *Henry*, the accused's testimony at his first trial).

The Court in *Henry* stated that it "should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection."[34] In the result, it overruled one aspect of the case law that has been beneficial to the accused (the rule from *Mannion* that an accused could not ordinarily be cross-examined on prior voluntary testimony) and one aspect that had been favourable to the Crown (the rule from *Kuldip* permitting cross-examination on all prior testimony, provided it was used to impeach credibility, rather than to incriminate the accused).

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tuted Court unanimously held that Section 7 of the *Charter* requires that the Minister of Justice seek assurances that the death penalty will not be sought before signing an extradition order, citing changes in the social science evidence about the practice of the death penalty, particularly in the United States. Significantly, the Supreme Court in *Burns* did not overrule *Kindler*, opting instead to distinguish it. In fact, the words *stare decisis* and precedent do not appear in the *Burns* opinion, yet the Court focuses on changes in the social and legislative facts surrounding the death penalty. See Richard Haigh, "A *Kindler*, Gentler Supreme Court? The Case of *Burns* and the Need for a Principled Approach to Overruling" (2001) 14 SCLR (2d) 139 at 157 (arguing that the Supreme Court lacks "a specialized theory to guide the overturning of previous constitutional decisions").

29 [1990] 3 SCR 618, 1 CR (4th) 285.

30 [1986] 2 SCR 272, 31 DLR (4th) 712.

31 See e.g. Gary Trotter, "*R. v. Henry*: Self-Incrimination and Self-Reflection in the Supreme Court" (2006) 34 SCLR (2d) at 420, commenting on the pre-*Henry* state of the law: "Twenty years of experience with section 13 of the *Charter* has given rise to inconsistency and dubious distinctions."

32 *Henry*, *supra* note 27 at para 59.

33 *Dubois v R*, [1985] 2 SCR 350, 23 DLR (4th) 503.

34 *Henry*, *supra* note 27 at para 44.

The relatively transparent, pragmatic approach taken by the *Henry* Court to overruling its own precedents – admitting error or unworkability – is preferable to an approach that distinguishes cases on technical grounds, reinterprets them substantially without admitting a change, or continues to apply a law thought to be unjust.[35] The Court offered three "compelling reasons" for overruling its own precedents (the unworkability of former rules, unfairness to the accused, and inconsistency with the purpose of the *Charter* section), but generally seemed quite comfortable with its power to do so.

B. R v Nedelcu *(2012)*

Skipping ahead a few years, the precedent set in *Henry*, overruling key aspects of the Court's recent decisions in *Mannion* and *Kuldip*, was itself revisited in the 2012 decision in *R v Nedelcu*.[36] The Court's willingness to revisit *Henry* illustrates the diminished role that horizontal *stare decisis* plays in the *Charter* era. The Supreme Court, and lower courts across the country, are clearly wrestling with the many ways that the right against self-incrimination can be interpreted and applied, and the implications of those different approaches for accused persons and the trial process. In *Nedelcu*, the driver of a motorcycle was charged with impaired driving and dangerous driving causing death after his co-worker died while riding as his passenger. When the deceased's family also brought a civil action, Nedelcu testified on examination for discovery that he had no memory of the crash. At his subsequent criminal trial, Nedelcu provided a detailed account of the events.[37] The legal issue for the Supreme Court was whether Nedelcu's Section 13 *Charter* right prevented him from being cross-examined on his testimony at the examination for discovery. Criminal lawyers saw *Henry* as offering clarity and a workable rule (compelled evidence was protected and inadmissible; voluntary evidence was not protected and therefore, admissible), as unpalatable as that may be in some cases.[38] However, in *Nedelcu*, a majority of the Supreme Court resurrected the approach from the earlier case law

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35 Parkes, *supra* note 8 at 152.

36 2012 SCC 59, [2012] 3 SCR 311.

37 *Ibid* at paras 50–54.

38 See e.g. Megan Savard, "One Step Forward, Two Steps Back: The Supreme Court's Decision in *Nedelcu*" Addario Law Group (4 January 2013), online: <www.addario.ca/one-step-forward-two-steps-back-the-supreme-courts-decision-in-nedelcu/>.

that had attempted, with great difficulty, to distinguish between incriminating and non-incriminating evidence. *Nedelcu* arguably returns us to lack of clarity, since a renewed focus on incriminating versus non-incriminating evidence as the threshold question creates considerable room for argument about the use to which a prior statement of the accused can be put.[39]

In *Nedelcu*, the majority opinion framed the issue as an interpretation question (what does "incriminating" mean in Section 13?) and purported not to be overruling *Henry*. The dissenting judges were unconvinced, seeing the new interpretation of incriminating versus non-incriminating evidence as incompatible with the ruling in *Henry*. As such, *Nedelcu* is an example of the Court overruling a precedent in an indirect way. It is preferable for courts to be clear about their treatment of a precedent, reconsidering and overruling (if necessary) in a transparent way. No doubt the facts in *Nedelcu* – particularly the spectre of an undoubted liar being acquitted of a serious crime through the exclusion of his earlier evidence – loomed large in the decision to effectively overrule (or at least, substantially modify) *Henry*.

C. Ontario (AG) v Fraser *(2011)*

Just a few months before *Nedelcu*, in *Ontario (AG) v Fraser* (*Fraser*),[40] the Court was similarly divided on this very issue of the approach it should take to overruling (or not) its recent *Charter* precedents. *Fraser* is one in a series of *Charter* cases dealing with the Court's evolving interpretation of Section 2(d) freedom of association in the context of labour law. It is an area in which differing ideological approaches and views of the appropriate role of government in regulating labour-management relations loom large. It is also an area in which the courts have had to wrestle with the precedential value of early *Charter* decisions.

In *Fraser*, the Court rejected a claim by agricultural workers that the freedom of association protected in Section 2(d) of the *Charter* included a right to form a union which, if recognized, would render unconstitutional Ontario legislation setting out a regime for the legal protection of "agricul-

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39 See Sara Hanson, "*R v Nedelcu*: The Right Against Self-Incrimination and the Return to the Unworkable Distinction" (24 November 2012), theCourt.ca (blog), online: <www.thecourt.ca/2012/11/24/r-v-nedelcu-the-right-against-self-incrimination-and-the-return-to-the-unworkable-distinction/>.

40 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*].

tural workers' associations"[41] that did not include protection for collective bargaining by these associations. The Court was faced with its own decision three years earlier in *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia (British Columbia Health Services)*[42] which had recognized a right to bargain collectively in Section 2(d), a decision which itself had revisited and overruled an earlier decision to the contrary from 1990.[43] As it would also do in *Nedelcu*, the majority opinion chose to reinterpret (and indeed, limit) the scope of its recent ruling in *British Columbia Health Services*. In so doing, the majority rejected the agricultural workers' claim that the workers said flowed directly from the *British Columbia Health Services* ruling. While the separate legislative regime for agricultural workers' associations was less favourable to workers than the *Labour Relations Act, 1995*[44] in many respects, including for example, imposing no duty on employers to bargain with the workers' associations, the majority held that the Section 2(d) right was not infringed.[45]

Justice Rothstein wrote a lengthy opinion, concurring in the result but holding that it was necessary to overrule *British Columbia Health Services* which, in his view, had wrongly expanded the scope of Section 2(d), tipping the balance in favour of unions and workers. He framed his departure from the majority as a disagreement about *stare decisis*, making various arguments in favour of overturning this very recent precedent, despite the fact that none of the parties had asked the Court to do so. Reading Justice Rothstein's dissent, it is difficult to escape the conclusion that his fundamental difference with the majority was with respect to the correct interpretation of the right itself, more particularly, how strongly labour rights should be protected under the *Charter* and how much state regulation of the labour market the *Charter* should require, not about principles of *stare decisis*. The majority opinion upheld the three-year-old precedent of *British Columbia Health Services*, which declared the right to bargain collectively to be pro-

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41 *Agricultural Employees Protection Act*, SO 2002, c 16.

42 2007 SCC 27, [2007] 2 SCR 391 [*British Columbia Health Services*].

43 *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)*, [1990] 2 SCR 367, 72 DLR (4th) 1.

44 SO 1995, c 1, Schedule A.

45 *Fraser*, *supra* note 40 at paras 106–07. For extensive analysis and critique of *Fraser*, and discussion of its impact on labour and constitutional law, see Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada: Farm Workers and the* Fraser *Case* (Toronto: Irwin Law, 2012).

tected by Section 2(d) of the *Charter*, whereas Justice Rothstein urged the court to overturn this recent precedent in favour of the previous approach (in the 1989 Labour Trilogy) which had denied such protection. As we will see, a few years later, in another group of labour cases, Justice Rothstein takes the same substantive position – that the Labour Trilogy carved out the appropriate, limited role for Section 2(d) rights in the labour context – while again differing from the majority on whether to overrule a precedent.

D. Canada v Craig *(2012)*

In *Canada v Craig* (*Craig*),[46] decided just before *Bedford*, Justice Rothstein wrote an opinion for the Court which overruled its 35 year-old precedent-setting decision, *Moldowan v Canada* (*Moldowan*),[47] on the interpretation of a section of the *Income Tax Act* limiting deductible losses from farm income where farming was not the taxpayer's primary source of income.[48] *Moldowan* had been criticized in a 2006 decision of the Federal Court of Appeal, *Gunn v Canada* (*Gunn*),[49] and the trial judge in *Craig* had refused to apply *Moldawan* for the reasons articulated in *Gunn*. Tax law scholars Neil Brooks and Kim Brooks have extensively critiqued the decision in *Craig*, and the Court's willingness to overrule an established precedent that was consistent with the government's stated tax policy approach and that had been applied regularly by the Canada Revenue Agency for decades.[50] On behalf of the Court, Justice Rothstein adopted what Brooks and Brooks describe as a "plain meaning" approach to the *Income Tax Act*, which they argue is strikingly different from the Court's contextual and purposive approach in other areas of statutory interpretation.[51] Brooks and Brooks point

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46 2012 SCC 43, [2012] 2 SCR 489 [*Craig*].

47 [1978] 1 SCR 480, 77 DLR (3d) 112.

48 RSC 1985, c 1 (5th Supp), s 31(1) as it appeared on 1 August 2012. At the time of *Craig*, *supra* note 46, the section provided that the loss a taxpayer could claim from farming would be restricted "where a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income."

49 2006 FCA 281, [2007] 3 FCR 57.

50 "The Supreme Court's 2012 Tax Cases: Formalism Trumps Pragmatism and Good Sense" (2014) 64 SCLR (2d) 267.

51 *Ibid* at 269–70.

to *Craig* as an example of "the staggering failure of the Court's formalism" in tax cases.[52] The horizontal *stare decisis* analysis in *Craig* consists of a loose balancing test, citing the familiar language of balancing certainty and correctness.[53] At the same time, the Court's analysis on this point arguably tilts significantly in the direction of "correcting" what the Court sees as an erroneous interpretation in *Moldowan*.

In overruling *Moldowan*, Justice Rothstein made clear his view that the vertical convention of precedent was strict here: the trial judge should have followed *Moldawan*, despite disagreeing with it and favouring the analysis in *Gunn*. He said:

> It may be that *Gunn* departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was "an awkwardly worded and intractable section and the source of much debate" (p. 482). Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.
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> But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.[54]

In an interesting postscript, Parliament reacted swiftly to *Craig* by amending the *Income Tax Act* to return the law to the *Moldawan* interpretation limiting farm loss deductions.[55]

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[52] *Ibid* at 273.

[53] *Craig*, *supra* note 46 at para 27. The same language is used by Justice Rothstein in *Fraser*, *supra* note 40 at para 133.

[54] *Ibid* at paras 20–21.

[55] *Income Tax Act*, *supra* note 48, s 31(1) as it appeared on 12 December 2013. The provision has since read that farming loss would be restricted "[if] a taxpayer's chief source of income for a taxation year is neither farming nor a combination of farming and some other source of income that is a subordinate source of income for the taxpayer." See Canada Revenue Agency, Federal Budget Announcement, "Budget 2013 – Restricted Farm Losses" (15 July 2015), online: CRA <www.cra-arc.gc.ca/gncy/bdgt/2013/qa09-eng.html>; *Economic Action Plan 2013 Act, No 2*, SC 2013, c 40, s 14.

Brooks and Brooks argue that Justice Rothstein's tax decisions continued a trend toward formalism found in the Court's tax cases in the years before his appointment. During his decade-long term, Justice Rothstein was the top Court's go-to judge in tax cases, writing a majority of the Court's decisions in that field. The stated commitment to finding the "plain meaning" of the tax statute, without an attempt to discern the policy purposes of particular tax provisions, "allows the Court to escape responsibility for the outcomes of its decisions. The results are thought to be preordained by the words the drafters chose."[56] There are parallels between this approach and appeals for a strict adherence to the doctrine of *stare decisis* in the sense that both can justify formalism over attention to the social context and impact of a decision. In *Bedford*, a changing social context loomed large, bringing with it a somewhat revised approach to the vertical convention of precedent.

E. Canada (AG) v Bedford *(2013)*

Bedford is the watershed case, decided just a few months after *Craig*, that explicitly reassessed the contours of the vertical convention of precedent in constitutional cases. All members of the Court, including Justice Rothstein, signed on to this ground-breaking opinion striking down Canada's prostitution laws. In *Bedford*, the precedent was the 1990 decision of the Supreme Court in the *Prostitution Reference*,[57] which had upheld the prostitution-related offences in the *Criminal Code* in the face of arguments that they violated Sections 2(b) and 7 of the *Charter*. The 1990 reference opinion was framed around an economic liberty argument, as well as a commercial expression claim.[58] More than twenty years later, in *Bedford*, the legal arguments were substantially different. They focused on security of the person interests and recently developed principles of fundamental justice (arbitrariness, gross disproportionality, and overbreadth) as opposed to

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[56] Brooks & Brooks, *supra* note 50 at 271.

[57] *Reference Re Sections 193 and 195.1(1)(*c*) of the* Criminal Code *(Man)*, [1990] 1 SCR 1123, 49 Man R (2d) 1 [*Prostitution Reference*]. As Adam Dodek has noted, references are, in practice, treated as binding authority in the same way as conventional cases, despite their formal status as advisory opinions: Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117 at 129–30, citing Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf 2014 supplement) vol 1 at § 8.6(d).

[58] *Prostitution Reference*, *supra* note 57, Part VI, paras 89, 112.

vagueness and indirect criminalization which were argued in the *Prostitution Reference*. Also new in *Bedford* was a body of social science evidence, from which Justice Himel found new social and legislative facts, which were materially different from those on which the *Prostitution Reference* was decided.

Joseph Arvay, co-counsel to the plaintiffs in *Carter*, was also co-counsel to the intervenor, the David Asper Centre for Constitutional Rights (Asper Centre), in *Bedford*. *Stare decisis* was the only issue on which the Asper Centre intervened in *Bedford* and their submissions figured prominently in the Court's decision on this issue. The essence of the argument made – and accepted by the court – was articulated in a 2012 law journal article penned by Arvay and his *Carter* co-counsel, Sheila Tucker and Alison Latimer.[59] They argued that "section 52 of the Constitution Act, 1982 effectively imposes a constitutional duty on a trial court to distinguish, where appropriate, a prior *Charter* decision on the basis of a change in legislative and social fact."[60] This approach to the vertical convention of precedent is rooted in the doctrine of constitutional supremacy. Here are the key paragraphs from Chief Justice McLachlin's unanimous opinion in *Bedford*, approving of these arguments and articulating a limited exception to the vertical convention:

> In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.
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> The intervenor, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis.

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59 Joseph J Arvay, Sheila M Tucker & Alison M Latimer, "*Stare Decisis* and Constitutional Supremacy: Will Our Charter Past Become an Obstacle to Our Charter Future?" (2012) 58 SCLR (2d) 61.

60 *Ibid* at 74.

> I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.[61]

The Court in *Bedford* went on to apply this new standard to the trial decision, holding that the judge was entitled to revisit the Section 7 issue given the significant changes in the law and the very different basis of the Section 7 argument in the *Prostitution Reference*.[62] These legal issues "were not raised in the earlier case."[63] There was also a substantially different record before the trial judge in *Bedford*, including significant evidence indicating that the criminal prohibitions contributed to making sex work more dangerous, both with respect to the bawdy house and communicating offences.[64] In affirming the trial judge's jurisdiction to consider the Section 7 issue anew, the Supreme Court added that "the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[65] The Court went on to rule that the Section 2(b) analysis had not changed substantially and therefore it was binding authority.

To be clear, the first way in which a lower court may revisit an earlier precedent – where "new legal issues are raised as a consequence of significant developments in the law" – is not actually new; it is a grounded in

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61 *Bedford*, *supra* note 19 at paras 42–44, per McLachlin CJC for the Court [footnotes omitted].

62 *Ibid* at para 45.

63 *Ibid* at para 42.

64 *Bedford v Canada (AG)*, 2010 ONSC 4264 at para 365, 327 DLR (4th) 52. Justice Himel stated, "[a]s a result of the voluminous evidentiary record put before me in this case, I have found on a balance of probabilities that the impugned provisions materially contribute to the decreased personal security of the applicants."

65 *Bedford*, *supra* note 19 at para 42.

the longstanding notion that an earlier precedent is only binding for what it actually decides. Of course, determining exactly what an earlier case stands for is a significant and somewhat indeterminate part of the analysis that leaves room for principled argument. The Supreme Court in *Bedford* held that the Section 7 issue before the trial judge had not been decided in the *Prostitution Reference*, whereas the Section 2(b) issue had.

What is truly new in *Bedford* is the statement by the Court that it is open to a trial judge to reconsider otherwise binding precedents when they are presented with a new body of evidence, particularly with respect to social and legislative facts, that "fundamentally shifts the parameters of the debate."[66] In this respect, the ten pages of the Asper Centre's intervener factum loomed large. They argued for a threshold requirement of a "significant and material change" in the social and legislative facts for the revisiting of a precedent on constitutional grounds.[67] They argued that this threshold will not open the floodgates: "[r]evisiting the few cases that meet [this threshold] will not throw the system into disorder or disrepute, will not threaten the rule of law and indeed will invigorate it by ensuring that citizens of ordinary means can hold governments to the highest law at the earliest opportunity."[68] The unanimous Court agreed.

F. Carter v Canada (AG) *(2015)*

The new approach to the vertical convention of precedent was set out in *Bedford*, applied (with only the briefest of mention) in *Saskatchewan Federation of Labour v Saskatchewan*,[69] and then explicitly affirmed in *Carter* SCC. By the time *Carter* reached the Supreme Court of Canada, most parties and interveners proceeded on that basis that the *Bedford* approach, permitting a limited revisiting of precedent by a trial judge, was now the law. As for the horizontal convention, it seems to have been widely accepted among the parties and interveners that it was time for the Court to revisit

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66 There is no mention in *Bedford* about the potential difference between a reference and a conventional case in the sense of the more fulsome evidentiary record that might be available in the latter.

67 *Bedford, supra* note 19, Factum of the Intervener, David Asper Centre for Constitutional Rights at para 30.

68 *Ibid*.

69 Discussed below.

Rodriguez in light of the new evidence and new *Charter* doctrine. That did not mean that *Rodriguez* would necessarily be overruled, but few doubted that the Supreme Court would take a good, hard look at it. The precedential force of *Rodriguez*, an early *Charter* case, had been called into question.

Only the Attorney General of Ontario addressed the vertical *stare decisis* issue head-on, devoting its entire factum to this question and urging the Court to affirm a very strict approach to the vertical convention. The factum argues, "whether or not this Court now departs from its own prior decision in *Rodriguez*, the British Columbia courts had no power to do so. None of the factual or legal bases advanced by the trial judge justified the decision not to follow *Rodriguez*."[70] Ultimately, the unanimous Court in *Carter* SCC disagreed, affirming the *Bedford* approach to the vertical convention, at least in constitutional cases.

In an interesting move, the Ontario Attorney General attempted to flip the argument underlying the *Bedford* approach to vertical *stare decisis* in constitutional cases on its head, arguing that the doctrine of *stare decisis* is itself an unwritten constitutional principle.[71] The Ontario Attorney General drew on the recent *Reference Re Senate Reform*[72] in which the Court relied on the constitution's "internal architecture" and "basic constitutional structure" to effectively constitutionalize certain aspects of the composition of the Supreme Court of Canada.[73] The factum argued that "[v]ertical *stare decisis* is reflected, albeit implicitly, in the provision in section 101 of the *Constitution Act, 1867* for 'a General Court of Appeal for Canada', the reference in the preamble to the *Constitution Act, 1867* to 'a Constitution similar in Principle to that of the United Kingdom,' and the preamble to the *Charter*, which acknowledges that Canada is founded upon principles that recognize the 'rule of law.'"[74]

These submissions, elevating the goal of certainty and predictability in the law to dizzying constitutional heights, received a very cool reception at the Supreme Court of Canada. In its unanimous opinion, the Court rejected

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70 *Carter* SCC, *supra* note 1, Factum of the Intervener, Attorney General of Ontario at para 4 [Ontario AG factum in *Carter* SCC].

71 *Ibid* at para 7.

72 2014 SCC 32, [2014] 1 SCR 704.

73 *Ibid* at para 26.

74 Ontario AG factum in *Carter* SCC, *supra* note 70 at para 7.

the argument outright. They note that "Ontario goes so far as to argue that 'vertical *stare decisis*' is a constitutional principle that requires all lower courts to rigidly follow this Court's *Charter* precedents unless and until this Court sets them aside."[75] In the next paragraph, the Court made it clear that *stare decisis* is not a "judicial straightjacket" and went on to approve of, and apply, the *Bedford* test for a lower court revisiting a precedent.

The Supreme Court of Canada does not engage the language of "anticipatory overruling" in *Bedford* or *Carter* SCC. It is clear that they do not see this practice of revisiting precedent as overruling. The focus is not on the likelihood of a higher court changing its mind but, rather, what exactly is binding on the lower court due to changes in the law and/or evidence in the intervening years. The newly articulated *Bedford*/*Carter* SCC approach to the vertical convention is located in those decisions in proximity to the established practice of distinguishing a precedent as not binding on a new set of facts (here, new legislative and social facts) or as deciding a different point of law. Constitutional supremacy is the "hook" on which the Court's approach to the vertical convention hangs. However, it is not clear in the Court's reasoning (or, indeed, in the subsequent cases) that the revised approach to the vertical convention should apply only in constitutional cases. A substantial and material change in social and legislative facts may also fundamentally change the parameters of an issue in, for example, family law or tort law.

Beyond applying the new test to the facts of *Carter* and concluding that it was clearly met by the changes in Section 7 doctrine and the very substantial changes in the social and legislative facts, the Court in *Carter* SCC provided limited guidance to lower courts in deciding whether a change in the law or evidence fundamentally changed the parameters of the debate. It did not, for example, suggest factors to consider in deciding whether the threshold for revisiting was met. In *Bedford*, the Asper Centre had suggested the following non-exhaustive list to assist in determining whether a change in social and legislative facts is significant and material: (1) the length of time that has passed since the earlier decision; (2) the breadth of the new evidence that was not available to the court in the earlier decision; (3) evidence that the social, political, or economic assumptions underlying the earlier decision are no longer valid; (4) evidence of a shift internationally in approaching the problem; (5) any difference in adjudicative facts between

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[75] *Carter* SCC, *supra* note 1 at para 43.

the two cases; and (6) and difference in the perspective of the claimants in the two cases.[76]

In *Carter* SCC, the Court clearly affirmed the *Bedford* approach to lower courts revisiting (constitutional) precedents of higher courts. It is significant for its pointed rejection of the Ontario Attorney General's attempts to shore up the vertical convention as strictly binding. Outside the constitutional context, *Craig* suggests that the vertical convention remains strict. However, it is not entirely clear that the reasoning in *Bedford* (and later *Carter* SCC) does or should only apply to constitutional cases.

G. *The new labour trilogy:* United Food and Commercial Workers, Local 503 v Wal-Mart *(2014),* Mounted Police Association of Canada v Canada (AG) *(2015), and* Saskatchewan Federation of Labour v Saskatchewan *(2015)*

During the approximately year and a half between *Bedford* and *Carter* SCC the Supreme Court decided three contentious cases about labour rights, all of which involved the Court revisiting its earlier precedents and addressing issues of *stare decisis*: *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp* (*Wal-Mart*) (allowing unionized Wal-Mart workers to use a particular provision of the Québec *Labour Code* to challenge the store closure following certification);[77] *Mounted Police Association of Canada v Canada (AG)* (*Mounted Police*) (holding that the right to bargain collectively requires that workplace associations be structurally independent from the employer);[78] and *Saskatchewan Federation of Labour* (holding that Section 2(d) protects a right to strike).[79] The latter case involved both the vertical and the horizontal convention; whereas the other two cases were solely about the horizontal convention.

In finding a constitutionally protected right to strike in Section 2(d), thereby overruling the Court's decision in the 1987 *Alberta Reference*,[80] the

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[76] *Ibid* at para 34.

[77] 2014 SCC 45, [2014] 2 SCR 323 [*Wal-Mart*].

[78] 2015 SCC 1, [2015] 1 SCR 3 [*Mounted Police*].

[79] *Saskatchewan Federation of Labour* SCC, *supra* note 13.

[80] *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161.

majority opinion in *Saskatchewan Federation of Labour*, penned by Justice Abella, dealt with the *stare decisis* issue in one sentence:

> Given the fundamental shift in the scope of s. 2(d) since the *Alberta Reference* was decided, the trial judge was entitled to depart from precedent and consider the issue in accordance with this Court's revitalized interpretation of s. 2(d): *Canada (Attorney General) v. Bedford*.[81]

However, the dissenting justices addressed it at length, asserting that the majority was running roughshod over principles of *stare decisis*. Justice Rothstein co-wrote the dissent which echoed and expanded upon his dissenting opinions in *Wal-Mart* and *Mounted Police*.

In *Wal-Mart*, the majority opinion held that section 59 of the Québec *Labour Code*, which bars the employer from changing conditions of employment during the period of negotiating a collective agreement, applied to the situation at bar, in which Wal-Mart had dismissed all employees and closed the business before a first contract could be negotiated. In their dissent, Justices Rothstein and Wagner said that the majority's "approach undermines the principle of *stare decisis*, whose importance this Court so recently emphasized in *Canada v Craig*."[82] They took the view that an earlier case, *Plourde v Wal-Mart Canada Corp* (*Plourde*),[83] dealing with this very store closure but relying on a different section of the *Labour Code*, foreclosed the approach taken by the majority.[84] However, section 59 was not before the Court in *Plourde* and the majority held that it was open to the arbitrator to apply that section as she had in this case.[85] Justice Rothstein's approach to *stare decisis* in *Wal-Mart* is a decidedly strict one.

In *Mounted Police*, a majority of the Court held that Section 2(d), guaranteeing freedom of association, which since *British Columbia Health Services* has included a right to bargain collectively, entails a level of independence, and choice of bargaining unit and representative to be effective. In so holding, the majority overruled its 1999 decision in *Delisle v Canada*

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[81] *Saskatchewan Federation of Labour* SCC, *supra* note 13 [footnotes omitted].

[82] *Wal-Mart*, *supra* note 77 at para 122.

[83] 2009 SCC 54 at para 1, [2009] 3 SCR 465.

[84] *Ibid* at paras 121–22.

[85] *Wal-Mart*, *supra* note 77 at para 84.

(Deputy AG),[86] which had found no right to bargain collectively for Royal Canadian Mounted Police officers. Justice Rothstein, in a lone dissent in *Mounted Police*, framed his substantive disagreement with the majority in the language of *stare decisis* and certainty. He disagreed that the "structural independence" of workplace associations (unions) was a requirement of the right to bargain collectively, arguing that the majority approach "constitutionalizes an adversarial model of labour relations and effectively excludes collaborative models."[87]

Justice Rothstein sees this as an expansion of associational rights and as effectively reversing a key holding of *British Columbia Health Services* and *Fraser*, namely that Section 2(d) does not guarantee a particular model of collective bargaining nor a particular outcome of that process. He goes on to cite *Bedford* for the importance of certainty in the law. He says:

> It is open to this Court to depart from its previous jurisprudence in some circumstances, but the importance and value of certainty demand that such departures be made infrequently and only where they have been carefully and explicitly considered to ensure that the departure is justified and that the implications of such a deviation from the normal rule of *stare decisis* have been fully and carefully analyzed. The majority has failed to do so and its departure from authoritative precedents does not satisfy this high standard.[88]

In the Supreme Court's most recent decision to address *stare decisis*, *Saskatchewan Federation of Labour*, a majority of the Court considered *Bedford* and *Carter* to have clearly established that it was open to the trial judge to revisit the 1989 *Alberta Reference* which had held that there was no right to strike protected by Section 2(d) of the *Charter*. The interpretation of Section 2(d) on which that decision was based – namely an "individual analogy" approach to Section 2(d) which had limited its application to activities done in a group that could be lawfully done individually – had been rejected in a series of decisions beginning with *Dunmore* in 2002, through *British Columbia Health Services* in 2007, *Fraser* in 2011, and *Mounted Police* in 2014. Arguably, there is no other *Charter* right that has gone through such

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[86] [1999] 2 SCR 989, 176 DLR (4th) 513.

[87] *Mounted Police*, *supra* note 78 at para 211.

[88] *Ibid* at para 212.

a profound transformation as has the freedom of association.[89] As Justice Abella notes for the majority in *Saskatchewan Federation of Labour*, there has been a "fundamental shift" in the interpretation of Section 2(d). The majority opinion in *Mounted Police*, penned by Chief Justice McLachlin and Justice Lebel had already described the shift as follows:

> The jurisprudence on freedom of association under s. 2 (d) of the *Charter*. . . falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.[90]

They go on to say that this "generous and purposive approach"[91] seeks to protect "employee autonomy against the superior power of management"[92] to facilitate a meaningful process of collective bargaining. Justices Rothstein and Wagner dissent, disagreeing fundamentally with this shift and again framing their disagreement in relation to principles of *stare decisis*.

Recall that previously, in *Fraser*,[93] Justice Rothstein wrote a separate opinion from the majority, urging the Court to overturn its very recent precedent, *British Columbia Health Services*,[94] which had established that Section 2(d) of the *Charter* protects a right of workers to bargain collectively.[95] Justice Rothstein also signed onto the unanimous majority opinions

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89 See generally Judy Fudge, "Freedom of Association" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham, Ontario: LexisNexis, 2013) 527 (chronicling, as the author puts it at 528, "[t]he deep jurisprudential divisions amongst members of the Supreme Court of Canada over the interpretation of freedom of association in the labour relations context."). For a thoughtful discussion of Justice LeBel's contribution to these significant jurisprudential changes, see Jula Hughes, "Like Oil on Troubled Water: A Labour Perspective on the Charter Labour Juriprudence of Justice Louis LeBel" (2015) 70 SCLR (2d) 221.

90 *Mounted Police*, *supra* note 78 at para 30.

91 *Ibid* at paras 46–47, 77.

92 *Ibid* at para 82, cited with approval in *Saskatchewan Federation of Labour* SCC, *supra* note 13 at para 31, Abella J.

93 *Fraser*, *supra* note 40.

94 See *Fraser*, *supra* note 40 at paras 129–51, Rothstein J.

95 *British Columbia Health Services*, *supra* note 42.

in *Bedford* and *Carter* SCC, which explicitly take a more flexible approach to the vertical and horizontal conventions of *stare decisis*. His lengthy dissenting opinion in *Saskatchewan Federation of Labour* takes issue with the majority's reasons for overruling the *Alberta Reference*, articulating again his deferential approach to judicial review in the labour relations context. If anything, there had been more judicial activity directly undermining the authority of the precedent at issue in *Saskatchewan Federation of Labour* than there was in either *Bedford* or *Carter* SCC. It is clear from Justice Rothstein's opinions in the intervening cases (*Mounted Police* and *Wal-Mart*) that he disagreed in substance with the majority opinion expanding workers' rights. This is fundamentally a substantive, ideological disagreement, not a methodological one, particularly given Justice Rothstein's agreement with the *stare decisis* analysis in *Bedford* and *Carter* SCC, but not with the majority in *Saskatchewan Federation of Labour*.

Tracing the Supreme Court of Canada's contemporary approach to *stare decisis* doctrine through Justice Rothstein's recent opinions tells us something about the malleability of the doctrine and the extent to which disputes about its operation are often fundamentally disputes about the merits of the substantive issues before the court. I do not point out these various appeals to, or descriptions of, *stare decisis* in Justice Rothstein's rulings to single him out for criticism. Rather, I suggest that they illustrate the reality that *stare decisis* – and its alleged capacity to achieve certainty in the law – is simply one of the "working ingredients" of judicial decision-making.[96] In all the cases, it was Justice Rothstein's sense of justice, his view of the "correct" legal answer, that animated his decisions, rather than a particular approach to the doctrine of precedent. The extent to which he was prepared to depart from precedent or defend it depended on the substance of the precedent and, with respect, whether he agreed with it or not. Substantively, his labour opinions are all linked. Justice Rothstein's position with respect to a restrained role for the state in regulating the labour market is consistent across all of these cases.

A basic insight of legal realism is that judicial decisions are influenced by extra-legal considerations, including the experiences and beliefs of judges.[97] As I read the cases, Justice Rothstein's approach to *stare decisis* is

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96 Parkes, *supra* note 8 at 161, citing Don Stuart, *Canadian Criminal Law: A Treatise*, 4th ed (Toronto: Carswell, 2001) at 12.

97 Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence" (1997) 76 Texas L Rev 267 at 278.

not fundamentally different or more (or less) principled than that of other members of the Court. His substantive disagreement with Justice Abella's majority opinion in *Saskatcehwan Federation of Labour* is about the government's role in regulating labour relations. However, it is framed as a different approach to *stare decisis*.

II. Evaluating the Contemporary Judicial Practice of Precedent

Critics of the Supreme Court's contemporary approach to precedent, and particularly the new *Bedford*/*Carter* SCC approach to the vertical convention, cite both principled and practical concerns. The principled concern is that voiced by Newman that the approach to precedent is "shockingly standardless" and the practical concern can be seen in the Attorney General of Ontario's factum in *Carter* SCC, citing the need for a strict vertical convention to prevent a deluge of claims seeking to revisit settled law. Similarly, the Ontario Court of Appeal in *Bedford* raised the spectre of the "living tree" doctrine of progressive constitutionalism being replaced with a "garden of annuals to be regularly uprooted."[98]

With respect to the objection based on a lack of standards and consistent judicial method, I have discussed above the extent to which particular justices' stated doctrinal approach to *stare decisis*, and its application in a particular case, is very much influenced by the subject matter of the case and the judges' own views about the correctness of the precedent. The stated goal of achieving certainty in the law through *stare decisis* thus promises too much.

Justices Rothstein and Wagner open their dissent in *Saskatchewan Federation of Labour* with these words: "In our legal system, certainty in the law is achieved through the application of precedents"[99] and that the judge's task is one of "balanc[ing] certainty against correctness."[100] In fact, throughout the case law and commentary on *stare decisis*, it is repeatedly stated that the doctrine balances the core principles of certainty and correctness. While this is an appealing formulation, the language of certainty promises

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98 *Canada (AG) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1 at para 84 [*Bedford* ONCA].

99 *Saskatchewan Federation of Labour* SCC, *supra* note 13 at para 137.

100 *Ibid* at para 138.

too much and is at odds with what judges actually do. Edmund Thomas,[101] a former justice of the New Zealand High Court, has argued that calls for strict adherence to precedent can actually undermine the elusive goal of certainty, noting that the doctrine can be manipulated politically[102] and can compel courts "to distinguish on inadequate grounds decisions of which they disapprove." He suggests a more pragmatic approach to judicial decision-making that sees certainty as a relevant consideration, rather than as a primary goal of adjudication. He says this of certainty:

> Those who pursue certainty as if it were a general, abstract goal of judicial adjudication do the law a disservice. Assume for a moment that complete certainty was achieved, individual justice would be sacrificed and, because it would be static, the law would cease to serve the needs and expectations of the community. The law would forfeit the concept of justice and abandon its social utility. Certainty is not therefore an ideal, as justice is an ideal. Nor is it a justification, as social utility is a justification. Rather, it is a concept designed to serve these ends. Its rationale lies in its ability to promote justice and to serve the needs and expectations of the community.[103]

It is clear that we have seen a difference in the articulated approach to *stare decisis* in recent years, a new orthodoxy. There is arguably a greater, more explicit emphasis on correctness over certainty. This is welcome, particularly in the *Charter* era. An openness to revisiting early decisions is consistent with the rate of social change in the *Charter* era (think of changing attitudes toward same-sex relationships and marriage, for example). The fact that appellate judges may be more explicit about their interest in getting it "right" is commendable. Our appellate process contemplates, and indeed relies on, multiple minds being turned to challenging interpretive questions.[104]

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101 EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge: Cambridge University Press, 2005).

102 *Ibid* at 133.

103 Thomas, *supra* note 101 at 136.

104 Occasionally appellate review does not occur in important cases, such as the recent, unusual *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96, leading to the undesirable situation of a single judge's views carrying the day on a controversial matter.

Similarly, the practical floodgates objection is not warranted.[105] As further discussed below, since *Bedford*, parties in a handful of cases have attempted to revisit *Charter* precedents with little success. The spectre of lower courts refusing to follow precedents "every time a litigant came upon new evidence or a fresh perspective from which to view the problem"[106] has not materialized. This is not surprising. The practice of following precedent is deeply entrenched in Canadian common law culture and courts are fundamentally conservative institutions. The barriers to bringing *Charter* claims are many, as evidenced by the recent treatment of a *Charter* challenge, *Tanudjaja v Canada (AG)* (*Tanudjaja*),[107] to provincial and federal action (and inaction) that the claimants argued exacerbated homelessness and inadequate housing in violation of Sections 7 and 15. The claim in *Tanudjaja* was struck out at the pleadings stage and that decision was upheld by a majority of the Ontario Court of Appeal, with the Supreme Court of Canada recently denying leave to appeal.[108]

While the approach to the vertical convention in *Bedford* and *Carter* SCC is a positive move for access to justice,[109] the difficulties litigants face in seeking constitutional justice in the courts remain immense. The Supreme Court has demonstrated some awareness of this problem as, for example, access to justice issues figured prominently in the 2014 decision of the Supreme Court in *Canada (AG) v Confédération des syndicats nationaux* (*Confédération* 2014).[110] In that case, Justices LeBel and Wagner wrote for the Court that the jurisdiction to strike an action on the basis of *stare decisis* should be exercised sparingly so as not to defeat access to justice:

> Although the proper administration of justice requires that courts' resources not be expended on actions that are bound to

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105 Arvay, Tucker & Latimer, *supra* note 59 at 80.

106 *Bedford* ONCA, *supra* note 98 at para 84.

107 2014 ONCA 852, 123 OR (3d) 161, leave to appeal to SCC refused, 57714 (December 1 2014).

108 *Ibid*.

109 Some other recent decisions can also be seen as promoting access to justice. See *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 (expanding the scope of public interest standing); *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 (on administrative tribunals granting *Charter* remedies).

110 2014 SCC 49, [2014] 2 SCR 477.

> fail, the cardinal principle of access to justice requires that the power be used sparingly, where it is clear that an action has no reasonable chance of success.[111]

In *Confédération* 2014, the unanimous Supreme Court held that the unions' claim was bound to fail; it had no reasonable chance of success given the decision of the Court involving the same parties, decided four years earlier.[112]

Recently, the Newfoundland Court of Appeal had occasion to consider *Confédération* 2014 at length. In *Andrews v Canada (AG)*,[113] a majority of the Court allowed a claim to proceed in the face of a challenge that *stare decisis* and an earlier decision of that Court had rendered it "bound to fail" as in *Confédération* 2014: "the policy of husbanding scarce resources for true matters of dispute may have to give way in some cases to the importance of providing access to justice to enable advocacy of change in and refinement of the law."[114] The majority applied the *Bedford* test for revisiting a legal issue to modify the test for striking out a claim, holding that "a litigant may have a 'reasonable chance of success' within the test if based on reasonable argument there is a reasonable possibility that the law might change."[115]

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111 *Ibid* at para 1.

112 *Confédération des syndicats nationaux v Canada (AG)*, 2008 SCC 68, [2008] 3 SCR 511. Both the 2008 and 2014 decisions involved the union challenging provisions of the federal employment insurance regime as constitutionally invalid. For critical commentary on the decisions, see Mary Thibodeau, "Balancing the Budget with EI Premiums? *Stare Decisis* and *Canada v Confédération des syndicats nationaux*" (19 December 2014), theCourt.ca (blog), online: <http://www.thecourt.ca/2014/12/balancing-the-budget-with-ei-premiums-stare-decisis-and-canada-v-confederation-des-syndicats-nationaux/>.

113 2014 NLCA 32, 376 DLR (4th) 719.

114 *Ibid* at para 18.

115 *Ibid* at para 19. Justice Welsh dissented, stating that "[a]pplying *stare decisis* as discussed in *Confédération des syndicats nationaux*, the conclusion follows that the decision in *Bert Andrews* resolves the entire dispute and provides a complete, certain and final answer to the fishers' claim in this case" (*ibid* at para 81).

III. The Future of the Vertical Convention?

A number of cases have addressed the vertical convention of precedent explicitly in the year and a half that has passed since the Supreme Court of Canada released its decision in *Carter*, setting out the parameters for revisiting a higher court precedent in the light of changed law or evidence. Have the floodgates opened to regularly revisiting settled precedents in the lower courts? In a word, no. Courts have continued to apply precedents every day and, even when faced with an opportunity to revisit, they have often rebuffed that approach. The appeal of *stare decisis* remains strong in the Canadian common law world.

How are courts interpreting and applying the *Bedford*/*Carter* SCC test? That test provides that "[t]rial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'"[116] A common refrain in decisions where the application to revisit a higher court precedent has been rejected, is the statement from the Court in *Bedford* that "a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach."[117]

One such case is *R v Hersi*,[118] in which a trial judge rejected the accused's challenge of the constitutionality of section 577 of the *Criminal Code*, which authorizes direct indictment. The constitutionality of this provision had previously been upheld by the Ontario Court of Appeal in *R v Arviv*[119] and *R v Ertel*,[120] as well as by the Supreme Court of Canada in *R v SJL*.[121] The trial judge acknowledged the new approach articulated in *Bedford*, suggesting it was "akin to the pronouncement of Professor Roscoe Pound more than ninety years ago" that "law must be stable and yet it can-

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116 *Carter* SCC, *supra* note 1 at para 44.

117 *Bedford*, *supra* note 19 at para 44.

118 2014 ONSC 1211, [2014] OJ No 3581 [*Hersi*].

119 51 OR (2d) 551, [1985] OJ No 2602.

120 20 OAC 257, [1987] OJ No 516.

121 2009 SCC 14, [2009] 1 SCR 426.

not stand still."[122] However, the judge found no new legal issues or evidence, easily rejecting the argument for revisiting the earlier cases.

Similarly, in *United States of America v Fraser* (*USA v Fraser*),[123] a judge of the British Columbia Supreme Court presiding in an extradition matter saw no basis for reconsidering the twenty-year-old Supreme Court of Canada precedent in *United States of America v Lépine*[124] which had been codified in the form of section 5 of the *Extradition Act* to authorize extradition "whether or not the conduct on which the extradition partner bases its request occurred in the territory over which it has jurisdiction; and whether or not Canada could exercise jurisdiction in similar circumstances."[125] *Lépine* held that the extradition judge should not consider the question of the requesting state's jurisdiction to prosecute the offence in question since that matter was within the exclusive domain of the Minister.[126] The judge in *USA v Fraser* was not persuaded by the applicants' argument that an intervening case, *United States of America v Ferras*,[127] had introduced a new legal issue that met the *Bedford* standard for reconsideration.[128] In *USA v Fraser*, the judge rejected the characterization of the new issue as "the articulation that meaningful judicial process [in extradition matters] is a principle of fundamental justice under section 7 of the *Charter*,"[129] saying that the only new aspect raised in *Ferras* was the approach to admissibility and sufficiency of evidence by extradition judges, a very different issue from the one being challenged by the applicants. *Ferras* was "not a broad overhaul of the law of extradition,"[130] and, as such, *Bedford* did not authorize a revisiting. To hold that *Ferras* reopened the question decided by *Lépine* would, according to the court in *USA v Fraser*, potentially call into question all of

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122 *Hersi*, *supra* note 118 at para 13, citing Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923) at 1.

123 *United States of America v Fraser*, 2014 BCSC 1641, 116 WCB (2d) 277 [*USA v Fraser*].

124 [1994] 1 SCR 286, 111 DLR (4th) 31 [*Lépine* cited to SCR].

125 SC 1999, c 18, s 5.

126 *Lépine*, *supra* note 124 at 301.

127 2006 SCC 33, [2006] 2 SCR 77 [*Ferras*].

128 *USA v Fraser*, *supra* note 123 at paras 64–75.

129 *Ibid* at para 60.

130 *Ibid* at para 64.

the Supreme Court's many decisions bearing on the limited jurisdiction of extradition judges. "The values of certainty and stability that underlie the principle of *stare decisis* strongly militate against that result."[131]

In *R v Junek*,[132] a judge of the Alberta Provincial Court rejected Junek's claim that his Section 10(b) *Charter* right to counsel was violated when he was not told that if he had a cellular phone with access to the internet he had the right to use the phone to access the internet as part of his exercise of those rights. The same judge had made such a finding in a previous decision, *R v Welty*.[133] However, the very next day, a justice of the Queen's Bench ruled in *R v McKay*[134] that there is no implementational duty on the police to provide internet access to detainees who may wish to exercise their Section 10(b) rights to contact legal counsel (although he suggested that police practice would likely change in the future in this regard) and therefore the informational duty was not expanded to require the police to tell detainees about their rights to access the internet to contact legal counsel. The judge in *Junek* concluded that the *Bedford* standard was not met. There was no new legal issue or new facts or evidence that significantly altered the parameters of the debate. He was bound to follow *McKay*.

In another reported case, *R v Wagner*,[135] an individual charged with breach of probation and mischief to property in relation to her actions in protesting at an abortion clinic. She attempted to raise a number of defences – defence of the person, necessity, etc. – which had been rejected in earlier case law. The question of whether a foetus was a human being was also settled law. The Ontario Superior Court found no basis for invoking the *Bedford* rule concerning the vertical convention of precedent. The judge held that "the proposed evidence filed on Ms. Wagner's part falls far, far short of, 'fundamentally [shifting] the parameters of the debate,' and there was no demonstration of any new legal issue."[136]

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131 *Ibid* at para 75.

132 2014 ABPC 199, 596 AR 397.

133 2014 ABPC 26, 582 AR 103.

134 2014 ABQB 70 at para 64, 100 Alta LR (5th) 1.

135 2015 ONCJ 66, 119 WCB (2d) 605.

136 *Ibid* at para 76.

In *R v Caron*,[137] the Alberta Court of Appeal unanimously dismissed a claim that there was a constitutional obligation for all Alberta legislation to be published in both French and English. Members of the francophone community in Alberta had successfully argued in provincial court that the provisions of the *Traffic Safety Act*[138] under which they were charged were invalid because Alberta was constitutionally required to publish its legislation in both English and French. They were successful in the Provincial Court but lost in the Queen's Bench and Court of Appeal. A majority of the Court of Appeal considered the claim on its merits while one member of the Court wrote lengthy concurring reasons holding that a 1988 decision of the Supreme Court of Canada in *R v Mercure*,[139] was binding authority for the proposition that there was no constitutional requirement for English and French publication that came with Saskatchewan and Alberta's joining confederation. Concurring in the result, Justice Slatter delved deeply into the *stare decisis* issue, opining that "stability and predictability are particularly important" in the context of the "controversial and divisive" matter of constitutional language rights.[140] He held that the *Bedford* standard of "new legal issues raised as a consequence of significant developments in the law" was not met[141] and therefore, the trial judge should not have revisited it.[142] Similarly, he was unconvinced that the more substantial historical record constituted new "evidence that fundamentally shifts that parameters of the debate."[143] Interestingly, in the Court of Appeal the Crown did not rely on the *stare decisis* argument, focusing instead on the substance of the constitutional arguments.[144] The *stare decisis* opinion was a minority one in *Mercure* but it taps into a more traditional, formalist view of *stare decisis*, stating that the *Bedford* approach "embraces to some degree the controversial doctrine of lower courts 'underruling' decisions of higher courts."[145]

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137 2014 ABCA 71, 92 Alta LR (5th) 306 [*Caron*].

138 RSA 2000, c T-6.

139 [1998] 1 SCR 234, 48 DLR (4th) 1.

140 *Caron*, *supra* note 137 at para 91.

141 *Ibid* at para 79.

142 *Ibid* at para 79.

143 *Ibid* at paras 77–88.

144 *Ibid* at para 68.

145 *Ibid* at para 70.

Again in *R v Caswell*,[146] the Alberta Court of Appeal is the site of a significant debate about *stare decisis*. Justice Veldhuis, in dissent, held that Court of Appeal should reconsider its 20-year-old precedent, *R v Mitchell*,[147] which had upheld under Section 1 the suspension of Section 10(b) rights at the roadside for sobriety tests and the use of an approved screening device. Since *Mitchell* followed the approach taken by the Supreme Court of Canada in *R v Thomsen*,[148] the vertical convention of precedent was also implicated in this decision. In concluding that it was appropriate to reconsider *Mitchell*, Justice Veldhuis cited the *Bedford* language of changes in the law and circumstance that "fundamentally shif[t] the paramaters of the debate," noting changes in technology (particularly cell phone technology) and in the legislative scheme (including immediate roadside suspensions).[149] However, the majority did not agree and their opinion expresses concern about the approach to the vertical convention taken in *Bedford*. Justice Brown states, "[t]here is little doubt that … *Bedford* represents a significant new exception to *stare decisis*"[150] and describes the *Bedford* threshold as "highly abstract – particularly when compared to the test for invoking the per incuriam exception."[151] Justice Brown, who has subsequently been appointed to the Supreme Court of Canada, articulates the view in *Caswell* that *Bedford* has not provided a "coherent and consistent normative account" of when a precedent can be revisited and that, therefore, "the best lower courts can do is take *Bedford*'s stated threshold seriously by applying it strictly."[152] He goes on to do so, finding that changes in technology and the legislative scheme did not meet that high standard. It will be interesting to see how Justice Brown approaches *stare decisis* questions at the Supreme Court, given his criticism of the *Bedford* standard in *Caswell*.

In *R v Fitts*,[153] Justice David Pacciocco of the Ontario Court of Justice ruled on a defence application for disclosure of certain information about

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146 2015 ABCA 97, 28 Alta LR (6th) 86 [*Caswell*].

147 1994 ABCA 369, 162 AR 109.

148 [1988] 1 SCR 640, 40 CCC (3d) 411.

149 *Caswell*, *supra* note 146 at para 15.

150 *Ibid* at para 36.

151 *Ibid* at para 40.

152 *Ibid* at para 40, citing Slatter JA in *Caron*, *supra* note 137 at para 70.

153 2015 ONCJ 262, [2015] OJ No 2431 [*Fitts*].

the breathalyzer instrument used to obtain an alcohol breath sample relied on by the Crown. Justice Pacciocco was faced with evidence that cast doubt on the assumption inherent in a Supreme Court of Canada precedent, *R v St-Onge Lamoureux*,[154] in which it was held that improper maintenance and historical difficulties with a breathalyzer machine can raise a reasonable doubt about the validity of individual test results. However, he held that he was nevertheless bound to follow *St-Onge Lamoureux*. Citing *Bedford*, *Carter* and other cases, Justice Pacciocco stated,

> I am uncertain whether there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate." I can have no confidence that the Supreme Court of Canada did not have evidence before it similar to that which has been presented before me, and that it did not reject the arguments before it that I accept here. Nor can I be confident that the evidence that I heard is complete.[155]

In none of these cases did the judge find the *Bedford*/*Carter* SCC threshold for revisiting a precedent to be met. At least one expressed concern about a lack of guidance provided to the lower courts in applying this new approach to precedent.[156] Obviously, these are early days and it may be that we will see more judges applying the *Bedford*/*Carter* SCC standard to revisit precedents in the future. However, it is unsurprising that the "garden of uprooted annuals" has not materialized.

Conclusion: *Stare Decisis* – Not Quite What It Claims to Be

In a recent review of Neil Duxbury's book, *The Nature and Authority of Precedent*,[157] Stephen Waddams cites Duxbury's view that "the doctrine of precedent has been an essential and beneficial part of the common law – but paradoxically, that it has served the common law best by not being in practice quite what it claims to be in theory."[158] According to Duxbury,

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154 2012 SCC 57, [2012] 3 SCR 187.

155 *Fitts*, *supra* note 153 at para 71.

156 *Caswell*, *supra* note 146.

157 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008).

158 Stephen Waddams, "Authority, Precedent, and Principle" (2009) 59 UTLJ 127

> [t]he value of the doctrine of precedent rests not in its capacity to commit decision-makers to a course of action but in its capacity simultaneously to create constraint and allow a degree of discretion. A theory capable of demonstrating that judges can never justifiably refuse to follow precedent would support a doctrine of *stare decisis* ill-suited to the common law. For the common law requires not an unassailable but a strong rebuttable presumption that earlier decisions be followed.[159]

Most commentators would agree that Canadian appellate courts have treated the horizontal convention in this way for some time. Some would argue that the presumption is not even that strong with respect to the horizontal convention in the Supreme Court of Canada. Certainly the vertical convention remains stronger, even in the wake of the *Bedford*/*Carter* SCC approach authorizing lower courts to revisit precedents in limited circumstances. It is true that the judicial practice of *stare decisis* is not quite what the doctrine claims to be. However, this awareness should not be cause for alarm or pining for a strict convention that invites formalism. The contemporary Canadian judicial practice of precedent is characterized by considerable constraint while allowing a degree of discretion to respond to changing legal norms or social context. In a case such as *Carter* SCC, that discretion can (and did) make all the difference.

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at 132.

159 Duxbury, *supra* note 157 at 183.

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