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What a missed deadline says about the assisted dying debate

“I love deadlines. I love the whooshing noise they make as they go by,” English writer Douglas Adams once said. On June 6 – the deadline given to Parliament to create new legislation on assisted death – there was a pretty big whoosh. Some say this was because the Canadian government’s proposed legislation, Bill C-14, is not broad enough to comply with the Supreme Court’s Carter decision. It seems to me, however, that the missed deadline is the result of a seemingly widespread indifference to the rule of law.

On a social policy issue as serious as giving criminal immunity to someone who intentionally causes the death of another, the appropriate law-making authority is Parliament, not the court. Consistent with other courts around the world, the Canadian Supreme Court in Carter acknowledged the law-making authority of Parliament on this controversial subject. Unlike these other courts, however, the Supreme Court found the prohibition on assisted death unconstitutional and created no end of mischief in doing so, proving the old legal maxim that “hard cases make bad law.”

The Supreme Court did not provide a definition of physician-assisted death or dying (PAD), causing much disagreement as to what termination of life acts were actually legalized in Carter. Should taking a lethal drug (a form of suicide) be treated differently from having a doctor administer the drug (a form of homicide)?

The court decided that the Criminal Code prohibition against aiding or abetting suicide was overbroad because safeguards could be put in place to protect vulnerable people from being induced to commit suicide at times of weakness. Yet, when it comes to euthanasia by lethal injection, it is the homicide section of the Code — rather than the assisting suicide one — that is relevant.

If the Carter judges had analyzed the homicide section of the Code, they might have upheld the ban on euthanasia by lethal injection. Indeed, four U.S. states that have legalized physician-assisted death restrict it to people who can administer their own life-ending medication.

The Supreme Court declared of no force or effect the prohibition of PAD for a competent, consenting adult person who has a “grievous and irremediable medical condition” and is enduring intolerable suffering. However, the court properly acknowledged that the scope of its declaration responds “to the factual circumstances of the case” and that it made “no pronouncement on other situations where physician-assisted dying may be sought.”

Yet we continue to see ongoing disagreement as to the interpretation of Carter. “All in” proponents of assisted death want to include mature minors, incompetent or unconscious persons pursuant to advance directives, and persons with mental suffering – none of which was
at issue in *Carter*. These proponents argue that anything less than “all-in” will be found unconstitutional, either by relying on the declaration outside *Carter*’s factual context or by projecting possible future Charter arguments. This is advocacy, not legal interpretation.

The Supreme Court stated in the *Carter* case that “complex regulatory regimes are better created by Parliament than by the courts.” The creation of such a regime is now in the democratically elected hands of Parliament and deference is owed. While Parliament has the option of crafting a response solely based on *Carter*, the constitutionality of any new Criminal Code amendments will depend on their compliance with the *Charter of Rights and Freedoms*.

Future evaluation may show that state-sanctioned lethal injection as a response to suffering is a mistake. Recent cases from European countries that permit euthanasia are providing evidence in that regard. In the meantime, Canada’s Parliament is suggesting a limit similar to that imposed in four U.S. states: that criminal immunity only be granted to certain health-care practitioners who give medical aid in dying to adults whose deaths “have become reasonably foreseeable.”

As stated by the Supreme Court in *Carter*, “The sanctity of life is one of our most fundamental societal values.” In addition to respecting both the values of life and autonomy, the proposed limit provides room to encourage life-affirming responses to the wide range of circumstances that shape the individual experience of suffering. Although assisted death may now be a legal option for those who are dying, it must never be promoted as the solution. Everyone deserves equal protection and respect under the law and it is incumbent on us to continue in our efforts to maximize quality of life, participation and inclusion in our society.

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