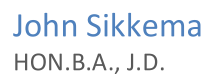
Stemming the Tide

How Parliament must mitigate the harm of assisted suicide



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Executive Summary

In *Carter v Canada (Attorney General)*, the Supreme Court of Canada (SCC) affirmed that Parliament has authority to legislate with respect to assisted suicide under the *Constitution Act, 1867*, which assigns to Parliament the power to enact criminal laws. However, the SCC also found that the existing blanket prohibition on assisted suicide in the *Criminal Code* violated the *Charter of Rights and Freedoms* in the factual circumstances of the main plaintiff in this case, namely Ms. Taylor.

The Court's finding that the complete prohibition on assisted suicide violated the *Charter* does not change the fact that assisted suicide is a "matter" on which Parliament has authority to legislate. The *Carter* ruling does not somehow turn assisted suicide into an ordinary health service to be regulated by the provinces. Assisted suicide has never been part of Canadian health care.

The outcome of this case hinged on the court's finding that the objective of the law was "to protect vulnerable people from being induced to commit suicide in a time of weakness." If the objective is limited to merely protecting vulnerable people, and there is a way to determine who is vulnerable and who is not, then an absolute prohibition is not necessary in order to achieve the law's objective. Since doctors have the expertise to determine vulnerability, the court reasoned, an absolute prohibition is unnecessary.

This case has little to do with whether or not assisted suicide is health care. However, even if assisted suicide is considered a health-related matter, health is a subject of concurrent jurisdiction, meaning that

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both levels of government (federal and provincial) can enact legislation relating to it. Given the weighty issues involved in deciding whether or not to permit assisted suicide—including the undermining of the intrinsic sanctity of human life (as recognized by the majority of the Supreme Court in *Rodriguez* in 1993), the morality of participating in another person's suicide, the risks that vulnerable people will be subtly induced to choose death, the normalization of suicide because of the participation of medical professionals, and the diminishing of the respect for the lives of the chronically sick and disabled—assisted suicide is clearly a matter falling within Parliament's criminal law power.

Parliament must enact legislation to govern assisted suicide in response to the invalidation of the existing laws in *Carter v Canada*. ***We respectfully submit that complete prohibition is both constitutionally justifiable and will be far more effective at upholding the intrinsic value of human life and dignity, protecting vulnerable people, and promoting a culture of shared responsibility and care for those needing it most.*** We have published a policy report (see ARPACanada.ca) which explains why absolute prohibition is a superior and constitutionally sound option.

If Parliament is unwilling to pursue the superior option of absolute prohibition, it must enact an exception or defence to the general prohibition on assisted suicide along with provisions that impose "strict limits that are scrupulously monitored and enforced"—the response anticipated in the *Carter* decision itself, although it is certainly not the only response available, as we explain elsewhere.

This paper explains the legitimacy, in light of both the constitutional division of powers and section 7 of the *Charter* as interpreted by the SCC in *Carter v Canada*, of comprehensive federal legislation imposing, monitoring and enforcing strict limits on assisted suicide.

If Parliament chooses to enact an exception or defence to the existing *Criminal Code* provisions which were voided in *Carter*, Parliament must also enact all necessary measures to ensure that consent is always properly obtained and recorded and that assisted suicide only takes place in strictly limited circumstances. The SCC broadly stated the kind of circumstances in which an exception must be made to the assisted suicide prohibition in the *Criminal Code*; it did not put in place the procedures and rules necessary to ensure that the introduction of an exception to sections 14 and 241(b) of the *Criminal Code* does not devalue the lives of the sick or disabled or permit vulnerable persons to be pressured to end their lives.

There is a real risk that if Parliament fails to respond, Canada will end up with a legal vacuum on assisted suicide. Given that assisted suicide is historically a concern of the criminal law, provincial jurisdiction to regulate it is limited. If Parliament leaves a gap in the criminal law by failing to respond to the *Carter* ruling, the provinces may not fill such a gap.

Even assuming the provinces also have jurisdiction to legislate on this matter, each province might come up with different conditions for allowing assisted suicide and varying systems of administration and enforcement. Interprovincial inconsistency on such a life and death matter is clearly undesirable.

If Parliament is unwilling to maintain absolute prohibitions, it must only permit assistance in committing suicide to be provided *by* approved persons, *in* approved facilities, and *to* persons who are: terminally ill, near death, experiencing severe physical suffering, of sound mind, and who clearly consent to the

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termination of life. Procedural safeguards should include thorough assessments by at least two physicians and a legal expert, informing the patient of his or her condition and care options, recording the patient's consent in advance of and contemporaneous with the provision of "aid in dying", and the presence of qualified witnesses.

The legalization of assisted suicide raises unique concerns about consent. Proving beyond a reasonable doubt that a deceased person did *not* consent to his or her own death would in most situations be impossible. This is in part why there are such grave risks with legalizing assisted suicide, risks which require the "utmost care" in "designing and managing a system which would allow [assisted suicide]," as the trial judge said in *Carter*. Evidently, enacting a simple exception to the general prohibition on assisted suicide is not a sufficient response to the *Carter* ruling. Parliament must establish a system to ensure that the legal standards and procedural safeguards are "scrupulously monitored and enforced".

Parliament has the constitutional authority to enact such a regime under section 91(27) of the *Constitution Act, 1867*. The fact that the existing *Criminal Code* prohibition violated the *Charter* does not affect Parliament's constitutional authority to legislate on the matter of assisted suicide. A criminal law may validly contain exceptions without losing its status as criminal law. Furthermore, Parliament also has the authority to design an appropriate administrative and procedural structure for bringing into operation a particular exception (or exemption or defence) to criminal liability.

Any interference with provincial jurisdiction resulting from a comprehensive federal law governing assisted suicide will be merely incidental and therefore valid. Restricting the availability of assisted suicide hardly hinders (if it hinders at all) the ability of provinces to regulate the practice of medicine. It would restrict physicians' use of this particular option when dealing with end-of-life patients, but given that assisted suicide has never before been an end-of-life option, any impact is minimal.

Even if a comprehensive federal law governing assisted suicide substantially intrudes into an area of provincial jurisdiction, it would be valid under the ancillary powers doctrine, since the administrative and enforcement provisions are essential to the operation of the legislative scheme. The objective of the law, namely to protect vulnerable persons, cannot be achieved without a thorough administrative scheme to ensure careful assessments of individuals seeking assisted suicide and to reliably obtain and record their consent. If provinces also decide to legislate with respect to assisted suicide, federal law will be paramount to the extent of any conflict with a validly enacted provincial law.

New legislation will also have to comply with the *Charter*. A unique component of the *Carter v Canada* ruling was that the SCC limited the scope of its declaration of the law's invalidity, signaling to Parliament that it may enact the strictest of limitations on access to assisted suicide. The SCC concluded that the law violated the section 7 rights of "Ms. Taylor and of persons in her position" and added that the scope of its declaration was "intended to respond to the factual circumstances in this case" only, not to "other situations where physician-assisted dying may be sought."

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1. Carter v Canada

Section 241(b) of the *Criminal Code*[1] prohibits aiding or abetting a person to commit suicide. Section 14 of the *Criminal Code* states that no person is entitled to consent to have death inflicted on him and that the consent of a person upon whom death is inflicted is no defense for the person who inflicted death upon him.

In *Carter v Canada*[2], the SCC declared that these two sections of the *Code* are void to the extent that they prohibit physician-assisted death for a competent adult person who clearly consents to the termination of life and who has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.[3]

Carter affirmed that the prohibition on assisted suicide was a valid exercise of the federal criminal law power under section 91(27) of Canada's *Constitution Act*, *1867*.[4] Such a prohibition does not impair provincial jurisdiction over health. In fact, as the SCC reiterated in *Carter*, health is an area of concurrent jurisdiction, meaning health is a matter on which both the federal and provincial governments can legislate, provided they do so for legitimate purposes connected to their constitutional powers.[5]

The SCC voided[6] sections 241(b) and 14 of the *Code* based on the Court's interpretation and application of section 7 of the *Charter*. [7] The section 7 right to life was engaged because the prohibition on assisted suicide could cause some people to take their own lives "prematurely" for fear that they would be incapable of doing so later, when their suffering became intolerable.[8] The rights to liberty and security of the person were engaged because the law interfered with "fundamental personal choices" and "control over one's bodily integrity".[9]

A law may interfere with the right to life, liberty, or security of the person only if it does so "in accordance with the principles of fundamental justice." One principle of fundamental justice developed by the SCC is that a law may not be overbroad, meaning it cannot interfere with the right to life, liberty, or security in ways not rationally connected to achieving the objective of the law.[10]

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[1] RSC 1985, c C-46.
[2] 2015 SCC 5 [*Carter*].
[3] Throughout this paper, this will be referred to as the *exception* to s. 241(b) and 14 of the *Criminal Code* that the SCC decided was required by section 7 of the *Charter*.
[4] *Supra* note 2, paras 49-53.
[5] *Supra* note 2, at para 53. For more on concurrent jurisdiction, see Parts 4 and 5 of this paper.
[6] Or voided in part. There is some debate about whether or the *Carter* ruling effectively invalidates these provisions entirely or merely restricts their application.
[7] Section 7 states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
[8] *Carter*, *supra* note 2, at paras 57-58.
[9] *Ibid*, at para 64.
[10] Overbreadth is closely related to the principle of arbitrariness. A law is arbitrary if it deprives a person of life, liberty, or security of the person in a manner that is not rationally connected to the objective of the law. A law is overbroad where its application is connected to achieving the objective in some circumstances, but not in all circumstances to which the law applies. As the SCC says in *Carter*, at para 85, "The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object […]".

The SCC characterized the objective of the criminal prohibition on assisted suicide as protecting vulnerable persons from being induced to commit suicide at a moment of weakness.[11] The objective was not, in the Court's view, to protect life broadly speaking, or even to prevent suicide.[12] Either way, the law would be validly enacted under the criminal law power, but for the *Charter* analysis, this distinction made all the difference.

Since not every person who wishes to commit suicide is vulnerable, the Court reasoned, it follows that the limitation on individual rights is, at least in some cases, not connected to the law's objective of protecting vulnerable persons. Consequently, the absolute prohibition was found to deprive some persons of their section 7 rights in a manner that did not accord with the principles of fundamental justice.[13] The prohibition was "overbroad" and therefore violated section 7.

The SCC found further that the violation of section 7 was not justified under section 1 of the *Charter*.[14] The law did not minimally impair the claimants' section 7 rights because a complete prohibition was found to be unnecessary to achieve the government's objective of protecting vulnerable people from being induced to commit suicide in a time of weakness. A complete prohibition was unnecessary, they reasoned, because the government could depend on physicians to determine whether or not someone seeking assisted suicide was actually vulnerable or subject to undue pressure to end his or her life.[15]

2. *Parliament* must respond

Assisted suicide is an issue Parliament has wrestled with repeatedly over the years. Though the question of whether any exceptions should be made to the existing *Criminal Code* prohibitions has been answered differently by the SCC than by Parliament, the "matter" of assisted suicide remains categorically within Parliament's jurisdiction. The SCC never suggests otherwise.

a) Parliament's power and responsibility

The decision in *Carter v Canada* turned on the determination of the law's objective.[16] *If* Parliament accepts that the only reason to prohibit assisted suicide is to protect vulnerable persons who might be induced to commit suicide in a time of weakness—the SCC's interpretation of the objective of the existing *Criminal Code* prohibition—then Parliament has no choice, short of invoking the notwithstanding clause, but to accept that the *Carter* ruling requires an exception to section 241(b) and section 14 of the *Criminal Code*. However, should Parliament decide that there are other reasons for prohibiting assisted suicide—such as to suppress, for moral reasons, the participation of any person in the active and deliberate putting to death of another, or to prevent suicide and preserve life, or to maintain equal respect for the lives of the sick and disabled—it could enact a prohibition on assisted suicide that makes such objects explicit.

[11] *Carter*, *supra* note 2, at para 78.
[12] *Ibid*.
[13] *Ibid*, at para 86.
[14] This is not surprising. In the history of the Charter, a law challenged before the SCC that failed a section 7 analysis has never survived a section 1 justification analysis. Section 1 of the Charter allows rights and freedoms laid out in other parts of the Charter to be limited where to do so would be "demonstrably justified in a free and democratic society."
[15] *Carter*, *supra* note 2, at paras 27, 105-106, 121.
[16] That is, its objective in the *Charter* section 7 analysis, which is distinct from the determination of its "pith and substance" under a division of powers review. In pith and substance the prohibition or regulation of assisted suicide is valid criminal law.

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If Parliament chooses to enact an exception to the existing *Criminal Code* provisions which were (partially) voided in *Carter*, Parliament must also enact all necessary measures to ensure that consent is always properly obtained and recorded and that assisted suicide is allowed to occur only in strictly limited circumstances. The purpose of enacting such measures is to protect the lives of the sick and vulnerable. There can be no real dispute that this is a valid criminal law purpose.

The SCC suspended the invalidation of the law and reaffirmed Parliament's jurisdiction to legislate on assisted suicide. "Parliament must be given the opportunity to craft an appropriate remedy," the Court stated.[17] Suspending the law's invalidation by a year gave Parliament that opportunity.

The SCC briefly articulated the kind of circumstances in which an exception must be made to the assisted suicide prohibition in the *Criminal Code*. The Court did not outline any procedures and rules necessary to ensure that an exception to sections 14 and 241(b) of the *Criminal Code* does not devalue the lives of the sick or disabled or permit vulnerable persons to be pressured to end their lives. This difficult task falls to Parliament. Parliament has a small window of time remaining in which to fulfill its responsibilities, but its Members can be confident that Parliament possesses the necessary authority.

b) Dangers of "leaving it up to the provinces"

There is a real risk that if Parliament fails to respond, Canada will end up with a legal vacuum with respect to assisted suicide. Consider that Nova Scotia's attempt to regulate abortion was struck down by the SCC on division of powers grounds in *R v. Morgentaler* (1993)[18], five years after the SCC invalidated the federal abortion law on *Charter* grounds in *R v. Morgentaler* (1988)[19]. Although there was no valid federal law in place at the time, Nova Scotia's attempt to restrict the performance of abortions to hospitals was held to be *ultra vires* (outside its jurisdiction) because the province's law was enacted, the Court concluded, in order to suppress the "perceived public harm or evil" of private abortion clinics and the "socially undesirable conduct" of abortions—matters historically considered part of the criminal law.[20] It was not enacted to uphold or advance the quality of Nova Scotia's health care system.[21]

An important principle of the division of powers in Canada is *exclusiveness*. A "matter", unless it has multiple aspects, will come within a class of subjects in only one of the two lists—that of federal subjects in section 91 of the Constitution or provincial subjects in section 92.[22] This means that by refusing to legislate to the full limit of its power on a matter falling within its jurisdiction, Parliament cannot thereby augment or expand the powers of the provinces. Moreover, provinces may not fill "gaps" in the criminal law: "The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law or to fill perceived defects or gaps therein".[23]

[17] *Carter*, *supra* note 2, at para 125.
[18] *R v Morgentaler*, [1993] 3 SCR 463 [*Morgentaler 1993*].
[19] *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler 1988*].
[20] *Morgentaler 1993*, *supra* note 18, at 512.
[21] *Ibid*, at 512: "[…] [A]ny concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary."
[22] Peter Hogg, *Constitutional Law of Canada, 5th Edition Supplemented* (December 1, 2014) at 15-38.7 [Hogg].
[23] *Morgentaler 1993*, *supra* note 18, at 498.

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Even assuming the provinces also have jurisdiction to legislate on this matter,[24] if it were left up to the provinces to "balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying"[25], a task which the SCC refers to as Parliament's responsibility, each province might come up with a different "balance". Interprovincial inconsistency on such a life and death matter is clearly undesirable. It should not be left to the provinces to define the legal standard for granting or denying a request for assisted suicide.

Moreover, in light of *Morgentaler 1993*, the result of leaving it up to the provinces could be that more stringent provincial statutes are found to be *ultra vires* as being designed to suppress a "public evil" or "socially undesirable conduct", as was the case in *Morgentaler 1993*, while permissive provincial statutes are found to be *intra vires* because they are designed to regulate the provision of a health care service. The end result would be either a permissive regime or nothing governing assisted suicide in every province.

If Parliament were to enact a general prohibition with a limited exception in accordance with the standard articulated by the SCC in *Carter*, but delegate to the provinces only the responsibility to determine the persons and facilities which may provide assisted suicide, the results could still be legally problematic in light of the *Charter*. As Chief Justice Dickson explained with respect to the *Criminal Code* defence to the prohibition on procuring an abortion, "the defence should not be illusory or so difficult to attain as to be practically illusory."[26] In the abortion context, the disparate access to therapeutic abortion committees and the varying standards applied by individual therapeutic abortion committees made the defence illusory and the law therefore violated the *Charter*.[27] Access to therapeutic abortion committees (TACs), the approval of which was needed in order to avoid criminal liability for procuring an abortion, varied greatly by province and region. A major source of the disparity was that the *Criminal Code* left it up to provincial governments to approve or not approve hospitals for providing abortions.[28] The result was a random patchwork of hospitals and TACs where legal abortions could be obtained. This meant that some Canadians in effect could not utilize the *Criminal Code* defence to the offence of procuring an abortion or would have great difficulty doing so, whereas other Canadians in similar personal circumstances could, simply because they lived in another province or region. A majority of the SCC Justices concluded that there was no rational justification for such a scheme.[29]

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[24] See explanation of concurrent jurisdiction of both levels of government to legislate with respect to a particular matter in parts 4 and 5.
[25] *Carter*, *supra* note 2, at para 98.
[26] *Morgentaler 1988*, *supra* note 19, Dickson C.J. at 70.
[27] *Ibid*, Dickson C.J. at 72-73.
[28] *Ibid*, Dickson C.J. at 66.
[29] There were four separate opinions in *Morgentaler 1988*. Chief Justice Dickson was joined by Justice Lamer. Justice Beetz, joined by Justice Estey, decided for reasons similar to those given by Chief Justice Dickson that in its real-world outworking s. 251 infringed on the right to security of the person in a way that was inconsistent with the principles of fundamental justice—this made up a majority of four out of seven judges who ruled on that case. Two of the remaining three judges, Justices McIntyre and La Forest, dissented. The remaining judge, Justice Wilson, took a novel approach to the principles of fundamental justice analysis, holding that freedom of conscience in s. 2(a) of the *Charter* is a principle of fundamental justice, an approach which was unequivocally rejected by the Supreme Court two years later (in *Reference re ss. 193 & 195 of Criminal Code (Canada)*, [1990] 1 SCR 1123) and which has never been accepted since.

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3. Parliament's options

Parliament has essentially three options. One option is to enact a new, complete prohibition on assisted suicide that explicitly states a purpose broader than protecting vulnerable persons. A second option is to simply invoke the notwithstanding clause[30] to maintain the existing absolute criminal prohibitions despite the *Carter* ruling. The third option is to enact a legislative regime that creates an exception to the general prohibition on assisted suicide and "imposes strict limits that are scrupulously monitored and enforced" in order to protect vulnerable persons. Some might consider a fourth option to be doing nothing or leaving it to the provinces, but for reasons explained above, this is untenable.

a) Complete ban is best

The best option, and a constitutionally sound option, is that Parliament will re-enact a complete ban on assisted suicide. We agree in principle with the following point made by the Attorney General of Canada:

> […] [I]t is the very regulatory scheme proposed by the trial judge that, by defining which kinds of lives may be taken, sends the message which is antithetical to Parliament's objective of confirming the value of every life. Allowing for defined exceptions to the prohibitions results in some people who say that they want to die receiving suicide intervention, while others receive suicide assistance. Those who fall into the latter category will be defined by their health or disability status, sending the message that such lives are less worthy of protection.[31]

We defend the first two options mentioned above in other publications. This paper explains the constitutional legitimacy of the third option only. It is the most complex option, and raises division of powers questions. We do so assuming the reader has duly considered the other options.

b) Conditional exception and regulatory regime

Should Parliament select the third option, it is essential that it enact strict, uniform standards and protections throughout Canada. The existing prohibition in the *Code* was voided because the SCC was persuaded that "a properly administered regulatory regime"[32] that "imposes strict limits that are scrupulously monitored and enforced"[33] is capable of achieving the objective of protecting the vulnerable from abuse and error.[34] Without an absolute prohibition, such a regime is absolutely necessary. The SCC neither implemented nor designed such a regime, nor did it intend to do so. Rather, the SCC affirmed, "Complex regulatory regimes are better created by Parliament than by the courts."[35]

If permitted at all, Parliament should permit assistance in committing suicide to be provided only *by* approved persons, *in* approved facilities, and to persons who:

- experience severe and enduring suffering;
- are terminally ill;

[30] The notwithstanding clause being section 33 of the *Canadian Charter of Rights and Freedoms*, which states, in subsection 1: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15."
[31] *Carter*, *supra* note 2 (Factum of Respondent at para 156).
[32] *Carter*, *supra* note 2, at para 3.
[33] *Ibid*, at para 27.
[34] See also *ibid*, at paras 29, 105, 125.
[35] *Ibid*, at para 125.

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- are physically incapacitated;
- have no reasonable chance of recovery;
- are near death;
- are of sound mind;
- are not suffering from a psychiatric or psychological disorder causing impaired judgement; and
- clearly consent to the termination of life.

In addition, procedural requirements should include measures to ensure:

- the thorough assessment of the individual by at least two independent physicians acting independently;
- a psychiatric assessment of the individual by a qualified psychiatrist;
- the reliable recording of the results of the physicians' assessments;
- that the patient is adequately informed of his or her condition and prognosis;
- that alternative options, including palliative care, are adequately explained to the patient;
- that judicial approval in the form of a court order is obtained[36]
- the reliable recording of the patient's consent, both two weeks in advance of and contemporaneous with the provision of aid in dying; and
- the presence of witnesses who are unrelated to the patient and have no interest in their estate, who can attest that the patient is capable, acting voluntarily, and is not being coerced.

The conditions and procedural measures listed above are a basic outline only. For a more detailed list and explanation of the conditions and measures that will be necessary to ensure the protection of vulnerable persons, please see the Appendix. Parts 4 to 10 of this paper address questions relating to Parliament's jurisdiction to enact such a regime under section 91 of the *Constitution Act, 1867*. Parts 11 and 12 address questions relating to how stringent the limits on assisted suicide may be in light of the Supreme Court of Canada's *Carter v Canada* ruling.

The requirement that only approved persons may provide assisted suicide is necessary in order to detect and protect vulnerable people. Only those persons may provide assisted suicide who are qualified as provincially licensed physicians and further qualified as federal legislation requires. Further licensing requirements can help to ensure that compliance does not gradually worsen as the medical profession grows used to providing assisted suicide. In order to be permitted to provide assisted suicide, a physician must apply for a license from the federal government. The licensing process will ensure that physicians are knowledgeable about the law and alert to the risks of providing assisted suicide.

Approved facilities are necessary to ensure sufficient government oversight. Should assisted suicide take place outside of approved facilities, there is a risk lethal prescriptions could fall into the wrong hands. Limiting assisted suicide to approved facilities also enables the reliable witnessing and recording of

[36] As McLaclin J. proposed in her dissenting opinion in *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, at 627 [*Rodriguez*]:

> [The relevant *Criminal Code*] provisions may be supplemented, by way of a remedy on this appeal, by a further stipulation requiring court orders to permit the assistance of suicide in a particular case. The judge must be satisfied that the consent is freely given with a full appreciation of all the circumstances. This will ensure that only those who truly desire to bring their lives to an end obtain assistance.

consent. It helps create a buffer between the patient and those who might be subtly pressuring the patient to commit suicide, since the only witnesses present are unrelated to the patient.

The conditions listed above serve to limit the availability of the exception to the prohibition on assisted suicide, while the procedural safeguards ensure that those limits are actually effective.

c) Unique concerns regarding consent

We see several examples of general prohibitions with limited exceptions in the *Criminal Code* and the *Controlled Drugs and Substances Act*, both criminal law statutes. One example in the *Code* involving medical professionals is section 268, which makes female genital mutilation (known in some cultures as female circumcision) an offence. The section makes it an offence to "excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person", except where "a surgical procedure is performed, by a person duly qualified by provincial law to practice medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function". Section 268 also states that no consent to such excision, infibulation, or mutilation is valid except in cases described in the exceptions.

Section 268 is part of the law of assault. In order to convict a person of assault, the Crown must prove that the victim did not consent to the accused's actions. The alleged victim of the assault is obviously a key witness with respect to whether or not consent was given. However, the law does not give persons complete autonomy to consent to having harm done to them, the *Criminal Code* and common law limit the circumstances in which consent is valid. The onus is on the Crown to show that no consent was obtained or, if there was apparent consent, that it was not validly obtained.

The legalization of assisted suicide raises unique concerns when it comes to consent. Section 14 of the *Criminal Code* states: "No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given." This provision makes it unnecessary for the Crown to prove, in any homicide case, that the deceased did not consent to being killed. Indeed, proving beyond a reasonable doubt that a deceased person did not consent to his or her own death would in most situations be impossible.[37] This is why the legislative regime must guarantee the reliable obtaining and recording of consent.

Creating an exception to the prohibition on assisted suicide and implementing it effectively is no simple matter. As the trial judge commented, "This review of the evidence permits no conclusion other than that there are risks inherent in permitting physician-assisted death, and that the utmost care would be needed in designing and managing a system which would allow it, in order to avoid those risks."[38] In Part 9, below, we explain that Parliament has jurisdiction, under its criminal law power, to enact a comprehensive regulatory regime to govern assisted suicide.

[37] The accused may be the only witness to what occurred and has a right against self-incrimination. The Crown would be left with no way to prove that the deceased did not consent.

[38] *Carter v Canada*, 2012 BCSC 886, at para 854.

4. Division of powers review

In order to be valid, an assisted suicide law must fall within Parliament's jurisdiction to enact (under s. 91 of the *Constitution Act, 1867*) and it must not violate the *Charter*. Logically, the question of jurisdiction to pass a law regulating a given "matter" comes first and compliance with the *Charter* comes second.[39] In parts 5 to 10 we evaluate Parliament's jurisdiction to legislate with respect to assisted suicide. In parts 11 and 12, we discuss the *Charter* considerations involved in regulating assisted suicide.

a) Presumption of constitutionality

There is a presumption of constitutionality in division of powers review. The onus of proving that a statute is *ultra vires* lies with the party challenging the legislation. The presumption of constitutionality also means that, in choosing between competing, plausible characterizations of a law, the court should choose the one that would support the validity of the law.[40] A related principle is that where a law is open to both a narrow and a wide interpretation and the latter would extend beyond the powers of the enacting legislative body, the court should interpret the legislation in such a matter that the application is confined to the lawful powers of the enacting body.[41] In contrast, the presumption of constitutionality does not apply in *Charter* review of legislation.[42]

b) Identifying the "matter" of the law

The first step in judicial review of a law on division of powers grounds is to identify the "matter" of the challenged law. The "matter" of a law has been described as its "true meaning", "content or subject matter", "leading feature", "true nature and character", "main thrust", or "pith and substance".[43]

Difficulties can arise where a law has more than one feature and one or more of those features come within the other level of government's jurisdiction. A court can resolve such a dilemma by selecting one feature to be the pith and substance of the statute. Where there are potentially numerous subject-matters inherent within the statute, the court will decide which is the most important or dominant aspect of the statute and characterize that aspect as its pith and substance. The other features within the statute then become merely incidental or ancillary.[44]

To determine a law's pith and substance, courts examine its purpose and effect. In assessing the purpose of an impugned statute, the courts may consider intrinsic evidence such as the statute's preamble or purpose clauses and extrinsic evidence such as legislative history, Hansard transcripts and minutes of parliamentary debates. The court looks for the "mischief" that the law aims to address. Courts also examine a law's legal and practical effects—how a law changes the rights and liabilities of those who are

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[39] If the body enacting the law did not have jurisdiction to pass the law, then the law is *ultra vires* and there is no law to subject to *Charter* review.
[40] *Halsbury's Laws of Canada – Constitutional Law (Division of Powers)*, at HCL-87 (online) [*Halsbury's*]. See also Hogg, *supra* note 22, at 15-23.
[41] *Ibid*.
[42] Hogg, *supra* note 22, at 15-23.
[43] *Ibid*, at 15-7.
[44] *Halsbury's*, *supra* note 40, at HCL-89; the terms "incidental" and "ancillary" are important. See Part 4(d) of this paper, below.

subject to it (legal effects) and what effects flow from the application of a statute that are not direct effects of the provisions of the statute itself (practical effects).[45]

For example, in *Morgentaler 1993*, Dr. Morgentaler challenged the province of Nova Scotia's law which mandated that abortions, along with a list of other procedures, could only be performed in hospitals. The SCC considered the legislation's practical effect, explaining, "In the majority of cases the only relevance of practical effect is to demonstrate an *ultra vires* purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of *intra vires* or confirming an impression of *ultra vires*."[46]

The SCC commented that bans on private abortion clinics can have the effect of restricting abortions in practice and the consolidation of abortions in the hands of one provincially controlled institution (hospitals) may render abortion access "vulnerable to administrative erosion". The SCC thus concluded that the law was aimed primarily at suppressing the perceived public harm or evil of private abortion clinics.[47] In the SCC's view, this was evident from the legislation and the background facts leading up to its enactment. Since this "matter"—restricting abortions as socially undesirable—was historically considered to be part of the criminal law, the provincial statute was struck down as *ultra vires*.[48]

c) Assigning the "matter" to a federal or provincial head of power

The purpose of identifying the matter of a law is to determine which head of power in section 91 and 92 of the *Constitution Act, 1867* it falls under.[49] Formally, assigning the "matter" of a law to a head of power is the second step of division of powers review. However, the courts often identify the "matter" of the law with the constitutional heads of power in mind, meaning the identification of the "matter" is determinative of the law's constitutionality.[50] For example, if the court identifies the "matter" of the law as being the regulation of insurance, the second step of assigning this matter to a head of power becomes a mere formality since it is well established that insurance is a matter of provincial jurisdiction under section 92(13). In other cases, however, the "matter" of the law will be such that it does not fall exclusively within the jurisdiction of one level of government. This is known as the double aspect doctrine: matters or subjects which in one aspect and for one purpose fall within provincial jurisdiction may in another aspect and for another purpose fall within federal jurisdiction.[51] An example is the regulation of highways, which is governed by both federal (criminal) and provincial laws.

d) Incidental effects and ancillary powers

The "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction, provided that the impact on the other level of government's jurisdiction is incidental and not the pith and substance of the law.[52] Many statutes will have features or

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[45] *Ibid*, at HCL-90; Hogg, *supra* note 22, at 15-16.
[46] *Morgentaler 1993*, *supra* note 18, at 486.
[47] *Ibid*.
[48] *Ibid*. As explained in Part 6, the components of criminal law are prohibition, penalty, and criminal law purpose.
[49] Hogg, *supra* note 22, at 15-8.
[50] *Ibid*, at 15-7.
[51] *Hodge v The Queen*, (1883) 9 App. Cas. 117, at 130.
[52] Hogg, *supra* note 22, at 15-9.

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aspects that permissibly come within the other level of government's head of power. There is no exact test for determining the extent to which features touching on the other government's jurisdiction are permissible.[53]

The "incidental effects rule" is said to apply where the legislative provisions in question are, in pith and substance, within the jurisdiction of the enacting body, but touch on a subject assigned to the other level of government. Such incidental effects do not affect the law's validity. If, however, the legislative provisions in question do intrude on the powers of the other level of government, those provisions may be justified under the "ancillary powers doctrine" if they play an important role in an otherwise valid legislative scheme. In cases where the intrusion is less severe, it may be sufficient for the impugned provision to be "functionally related" to the regulatory scheme. If the intrusion is more significant, the test for validity may be the stricter test of whether the provision in question is truly necessary to the regulatory scheme as a whole.[54]

e) Challenging a law on division of powers grounds

There are three ways to attack a law in division of powers review. First, one can argue that the law is invalid because the matter of the law comes within a class of subjects outside the jurisdiction of the enacting legislative body.[55] This line of attack succeeded against the provincial abortion law in *Morgentaler 1993*. If it is not an entire statute that is under attack as being *ultra vires*, but only certain provisions, the court will determine the role those provisions play within the otherwise valid statute. The *Firearms Reference*[56] and the *Reference re Assisted Human Reproduction Act*[57], discussed in Part 9, provide examples of such an analysis.

A second way of attacking a law is to acknowledge that the law is not *ultra vires*, and therefore valid in most of its applications, but to argue that the law should be interpreted so as not to apply to a matter that is outside the jurisdiction of the enacting body. This is known as interjurisdictional immunity. It is premised on the idea that there is a "core" or "basic, minimum and unassailable content" to the heads of powers in section 91 and 92 of the *Constitution Act, 1867* that must be protected from impairment by the other level of government. If a law enacted by one level of government is valid but touches on the "core" of a matter within the other level of government's jurisdiction, interjurisdictional immunity may be used to read down the law so as not to apply to that matter. This line of attack was used unsuccessfully in *Canada v PHS Community Services Society*[58], discussed in Part 7.

A third way of attacking a law is to argue that the law is inoperative through the doctrine of paramountcy.[59] That both levels of government can have concurrent powers over some matters or issues

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[53] *Ibid*, at 15-12.
[54] *Ibid*, at 15-39 to 15-44. See also *Halsbury's*, *supra* note 40, at HCL-97. See also Patrick J Monahan and Byron Shaw, *Constitutional Law, 4th Edition*, 2013, at 128-130 [Monahan and Shaw].
[55] Hogg, *supra* note 22, at 15-28.
[56] 2000 SCC 31, [2000] 1 SCR 783.
[57] 2010 SCC 61, [2010] 3 SCR 457.
[58] 2011 SCC 44 [*PHS*]; It was argued in *PHS* that the federal law prohibiting drug possession should not apply to a safe injection clinic established by the province of British Columbia.
[59] Hogg, *supra* note 22, 15-28.

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gives rise to the possibility of conflict between a valid federal law and a valid provincial law.[60] The doctrine of paramountcy states that where provincial and federal laws conflict, such that compliance with both is impossible or where compliance with the provincial law frustrates the purpose of the federal law, the federal law prevails. Paramountcy renders the provincial law inoperative to the extent of the inconsistency. Paramountcy is rarely invoked, as courts favour interpreting laws in a manner, if reasonable to do so, that makes compliance with both laws possible.

A general prohibition on assisted suicide with a limited exception implemented through a comprehensive administrative and enforcement regime is within Parliament's power to enact and is capable of withstanding division of powers review. If some intrusion into provincial jurisdiction results from the administrative and enforcement provisions necessary to make a limited exception workable, such intrusion is justified under the ancillary powers doctrine. And if conflicts arise between federal and provincial laws relating to assisted suicide, federal law is paramount. *Carter v Canada* has raised some important questions about federal and provincial jurisdiction with respect to assisted suicide. The SCC affirmed Parliament's jurisdiction, but also contemplated a potential role for the provinces to play regulating assisted suicide as well. What role the provinces may have depends on how Parliament responds to this ruling.[61]

5. SCC did not make assisted suicide a health care service

Sections 14 and 241(b) of the *Criminal Code* were within Parliament's criminal law power to enact and do not interfere with the "core" of any provincial head of power.[62] The SCC decided that the existing absolute prohibition violated the *Charter*. The Court's requirement of a limited exception to the existing general criminal prohibition does not turn assisted suicide into "health care".

It is true that the only "aid in dying" which the Court contemplates is that provided by physicians. In fact, the SCC finds that the prohibition on assisted suicide is *only* void insofar as it applies to *physician*-assisted suicide. Why should that be? The SCC offers little explanation. To many people, the idea of assisted suicide as health care is perverse and contrary to medical ethics.

The reason can be found in the trial judge's decision. The SCC said it was open to the trial judge to find that vulnerability can be assessed on an individual basis using the procedures that physicians apply in their

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[60] *Ibid*, 15-13 and 15-46.

[61] Parliament can neither expand nor narrow the provinces' jurisdiction to legislate on a matter by how Parliament legislates with respect to it. Federal and provincial jurisdiction are determined by the *Constitution Act, 1867*. However, on a practical level, highly stringent and detailed federal legislation would mean that the provinces' role is less important. A province could still legislate, for example, with respect to how doctors are to assess patients who are seeking assisted suicide, provided it does so not for a criminal law purpose but for some other legitimate purpose within its jurisdiction. But by doing so a province cannot make assisted suicide easier to obtain than valid federal law allows. By contrast, if the federal government simply enacted an exemption for assisted suicide where, in a physician's view, that person is of sound mind, is suffering, and consents to his or her own death, provincial laws would have a more significant practical role since it is provincial laws that govern health care consent, professional qualifications, and so on. What the provinces could not do is single out assisted suicide and try to make it harder to access—to suppress it as dangerous or socially undesirable conduct, which is a criminal law purpose. In Part 2 we reviewed the dangers of an inadequate response from Parliament.

[62] *Carter*, at paras 49-53.

assessment of informed consent and capacity in the context of medical decision-making more generally.[63] The trial judge was satisfied that the expertise necessary to determine whether a person is seeking assisted suicide of their own volition in order to end unbearable suffering or because they are in some way vulnerable to other pressures can be found in the medical profession.[64]

The SCC accepted this reasoning.[65] Since physicians regularly have to assess individual capacity to make all kinds of health care decisions, and ensure that their patient's choices are not coerced, the court considered physicians capable of acting as gatekeepers for assisted suicide. In other words, the expertise of medical professionals makes an absolute prohibition on assisted suicide unnecessary as a means of protecting vulnerable persons, in the Court's view.

The SCC's exception to the prohibition on assisted suicide enters through section 7 of the *Charter*, not through the division of powers analysis. Physicians' involvement in assisted suicide also enters through the *Charter* analysis only. The SCC does not create a limited exception for *physician*-assisted suicide because it sees assisted suicide as a "health care option" that provinces should be allowed to provide and to regulate in a similar manner to most treatments. Rather, an absolute prohibition is unnecessary for protecting the vulnerable *only* where physicians are involved, because physicians (unlike other persons) are supposedly capable of deciphering who is vulnerable, thus ensuring their protection.[66]

When it comes to assessing capacity for consent to health care treatments generally, provincial law ordinarily applies. Ontario's *Health Care Consent Act*[67] is an example of such a law. Does this mean that Parliament must allow an exemption to its assisted suicide prohibition, but leave it up to each province to decide how to assess and obtain and record the consent of persons seeking assisted suicide and to determine the conditions under which "aid in dying" may be provided? In short, no.

Just because an individual's physical and mental condition and the nature, cause, and treatability of their suffering all relate to health, and assessing these factors is necessary in order to determine whether a person is exempt from the assisted suicide prohibition does not mean that regulating physician-assisted suicide falls within provincial jurisdiction. Even if assisted suicide can be said to be a matter related to health (which is debatable), health is an area of concurrent jurisdiction. Both levels of government can enact legislation relating to health, provided the law is legitimately enacted under a head of power assigned to the legislature under the *Constitution Act, 1867*.

[63] *Ibid*, paras 47 and 115.
[64] *Carter v Canada*, 2012 BCSC 886, at para 1240, 1243-1244.
[65] *Carter*, supra note 2, at paras 115 and 121.
[66] Had the SCC lacked confidence in the availability of professionals who can reliably assess the vulnerability and capacity of sick people, it would have had to uphold the general criminal law prohibition. The general prohibition would have been justified under s. 1 if there were no reliable way to assess individuals. The SCC leaves until s. 1 the question of whether or not the government objective can be achieved without an absolute prohibition. At the s. 7 stage, the SCC finds the law overbroad without even answering that question. See *Carter, supra* note 2, at paras 87-88, and 103-104.
[67] 1996, SO 1996, c 2, Sched A.

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6. Concurrent jurisdiction over health matters

Health care professionals, hospitals, and clinics are all bound by legitimately enacted federal laws. The criminal law restricts what these persons and institutions may do as health care service providers. Health is an amorphous matter which is distributed to Parliament or provincial Legislatures depending on the purpose and effect of the particular health-related legislative measure in issue.[68]

Provincial power over health comes from sections 92(7), (13) and (16) of the *Constitution Act, 1867*. Section 92(7) authorizes the provinces to make laws in relation to "the establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals. Section 92(13) confers on the provinces jurisdiction over "property and civil rights in the province", which has been interpreted to cover contract, tort, property, and insurance, including health insurance. It also covers regulation of the professions, including the health care professions.[69] Section 92(16) gives provinces the power to make laws in relation to "all matters of a merely local or private nature in the province". Of these, section 92(13) is the broadest.

Federal power over health is rooted primarily in section 91(27) of the *Constitution Act, 1867*, which gives the federal government exclusive jurisdiction over criminal law.

To be constitutionally valid, criminal law must possess three elements: (1) a prohibition, (2) backed by a penalty, (3) which advances a criminal law purpose such as public peace, safety, order, security, morality, health, environmental protection, or "some similar purpose."[70] The classic and continually cited definition of a crime comes from the *Margarine Reference* (1948):

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.[71]

The criminal law power authorizes federal laws that punish or regulate conduct that is dangerous to health or that raises issues of public morality. Examples include federal laws regulating narcotics, tobacco, and other harmful products, and in the past, federal regulation of abortion.[72] In each of these areas, federal laws have passed constitutional challenges on division of powers grounds, each being a legitimate exercise of Parliament's criminal law power.[73] In *PHS*, the SCC, citing its *Morgentaler 1975*[74]*, 1988*[75]*,* and *1993*[76] decisions, reiterated that Parliament "has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as 'socially undesirable' behavior".[77]

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[68] Hogg, *supra* note 22, at 32-1.
[69] *Ibid*, at 32-2.
[70] *AHRA Reference*, *supra* note 57, at para 43.
[71] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1, at 49.
[72] Hogg, *supra* note #, at 32-4.
[73] See *ibid*, at 32-3 to 32-4.
[74] *Infra* note 120.
[75] *Supra* note 19.
[76] *Supra* note 18.
[77] *PHS*, *supra* note 58, at para 68.

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Abortion, for example, used to be prohibited outright in Canada. The fact that Parliament introduced an exception allowing abortion for health reasons—an exception which required a certificate of approval from a panel of three doctors in provincially approved hospitals—did not mean that Parliament gave up or narrowed its jurisdiction to regulate abortion. In some cases an abortion may be necessary for health reasons,[78] yet the SCC has repeatedly (and recently) affirmed Parliament's jurisdiction in this area.[79]

Where a controversial practice such as abortion is legalized, provincial health care systems may become involved in providing it to the extent that the criminal law allows. Therefore it is not surprising that in *Carter*, the SCC—while repeatedly referring to Parliament's authority and Parliament's objectives and Parliament's capacity to enact a complex regulatory regime—also indicates that provincial legislatures may have a role to play. "What follows", the Court says towards the close of its judgement, "is in the hands of physicians' colleges, Parliament, and the provincial legislatures."[80] This is an affirmation of concurrent jurisdiction, which cannot be understood as limiting Parliamentary authority so as to leave room for the provinces to decide whether and how to allow assisted suicide. As noted in Part 4(e) what role the provinces may have depends on how Parliament responds to this ruling.[81]

The plaintiffs in *Carter* acknowledged that the criminal prohibition on assisted suicide is, in general, a valid exercise of Parliament's criminal law power. However, they argued that the prohibition cannot apply to physician-assisted dying because it lies at the "protected core" of provincial jurisdiction over health under section 92(7), (13), and (16) of the *Constitution Act, 1867*. The plaintiffs were trying to invoke the doctrine of interjurisdictional immunity (explained in more detail in the next part), which essentially makes certain matters or undertakings immune from the application of an otherwise valid law because that matter or undertaking falls within the core of the other level of government's exclusive head of power. The plaintiff's argument failed, however, because the federal role in the domain of health makes a supposed "protected core" of provincial jurisdiction over health non-existent or at least impossible to define.[82] In short, there is no provincial head of power over "health".

The SCC summed up its reasoning on the division of powers issue in *Carter*:

> In our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *[citations omitted]*. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. <u>We are not satisfied on the</u>

[78] Issues regarding the protection of the unborn child aside, abortion may serve to protect the mother's life or health. Assisted suicide, of course, does neither. Consequently it is doubtful that assisted suicide can be considered health care. However, the SCC concluded that the prohibition on assisted suicide does affect the life, liberty, and security of the person interests under section 7 of the *Charter*. Even if, for the sake of argument, we assume it is a "health" matter—this in no way lessens Parliament's authority to regulate it.
[79] *Morgentaler 1975*, *infra* note 120; *Morgentaler 1988, supra* note 19, *Morgentaler 1993, supra* note 18. Abortion is referred to as an example of Parliament's authority to regulate controversial medical practices in both *AHRA Reference* (2010), *supra* note 68, and *PHS* (2011), *supra* note 58.
[80] *Carter*, *supra* note 2, at para 132.
[81] See note 59, *supra*.
[82] *Carter*, *supra* note 2, at paras 51-53.

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> record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying.[83]

It is normally possible to comply with both federal and provincial law, even in areas where laws may overlap. Should there be a conflict between legitimately enacted federal and provincial laws, which occurs where compliance with one law makes compliance with the other impossible or where the provincial law frustrates the purpose of the federal law, the federal law is paramount.[84]

7. Where provincial and federal jurisdiction over health intersect

In *Canada v PHS Community Services Society*, a key precedent for resolving the division of powers issue in *Carter*, the SCC confirmed that provinces have a "broad and extensive" power over health stemming from sections 92(7), (13) and (16) of the *Constitution Act, 1867*.[85] *Canada v PHS* concerned the application of criminal law to a safe-injection clinic called Insite, which was established by the province of British Columbia and which provided clean needles and trained staff supervision to enable drug addicts to inject narcotics while minimizing the likelihood of transmitting diseases or overdosing. The Court found that the province had the authority to establish such a clinic.[86]

Nevertheless, this clinic was subject to criminal prohibitions on the possession of narcotics in the *Controlled Drugs and Substances Act*[87] (CDSA). Three arguments were made in *PHS* as to why the criminal prohibitions on the possession of narcotics should not apply to Insite. First, the Attorney General of Quebec, an intervenor in the case, submitted that the federal criminal law power cannot interfere with the regulation of provincial health facilities.[88] Second, the Attorney General of B.C. argued that the CDSA should be read as avoiding interfering with provincial jurisdiction over health policy and that any institution that a province identifies as serving the public interest must be exempt.[89] Third, the Attorney General of B.C. also argued that the doctrine of interjurisdictional immunity should shield provincial decisions about medical treatments from federal interference.[90]

All three arguments failed.

As for the first argument, the SCC explained that just because the federal law has the incidental effect of regulating provincial health institutions does not mean that it is constitutionally invalid.[91] The main purpose, the "pith and substance" of the CDSA provisions, were valid exercises of the federal criminal law

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[83] *Ibid*, at para 53 (emphasis added).
[84] Hogg, *supra* note 22, at 16-3.
[85] *Supra* note 58, at para 68.
[86] *Ibid*, at para 81: "No one argues that the provision of the health services offered by Insite is not within the provincial health power. The claimants seek a federal exemption […] not because this is necessary to validate the Province's decision to operate Insite as a health service, but because it is necessary as practical matter to implement the decision."
[87] SC 1996, c 19.
[88] *PHS*, *supra* note 58, para 46.
[89] *Ibid*, at para 48.
[90] *Ibid*, at para 49.
[91] *Ibid*, at para 51.

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power, concerned with suppressing the availability of harmful drugs.[92] The effects on provincial matters were incidental to the law's main purpose.

As for the second argument, there was simply no basis in law for finding that federal laws cease to apply if their application is inconsistent with a province's definition of the public interest.[93]

Finally, the SCC rejected British Columbia's plea for inter-jurisdictional immunity. The SCC noted that recent jurisprudence has confined the application of inter-jurisdictional immunity.[94] The doctrine is in tension with the dominant approach of cooperative federalism, which recognizes that there is significant overlap between federal and provincial areas of jurisdiction and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap.[95] There is also a concern that applying the doctrine may create "legal vacuums" where neither level of government regulates.[96] In *PHS*, the SCC articulated this concern:

> Excluding the federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures, such as human cloning or euthanasia. The provinces might choose not to legislate in these areas, and indeed might not have the power to do so. The result might be a legislative vacuum, inimical to the very concept of the division of powers.[97]

Insite was not exempt from the application of the CDSA provisions in question. Rather, "the federal law constrains operation at Insite and trumps any provincial legislation or policies that conflict with it."[98]

It may be that the province has jurisdiction to offer assisted suicide as a health care service, just as British Columbia had jurisdiction to offer safe injection of narcotics as a health care service. However, just as British Columbia's safe injection clinic was bound by federal law governing narcotics, so any provincial assisted suicide clinic (or hospital, or any institution that would offer such a service) would be bound by federal law governing assisted suicide.

The SCC was careful in *PHS*, as in earlier cases, not to restrict Parliament's ability to legislate in areas where health care services overlapped with broader concerns that are the legitimate subject matter of criminal law, including public health, safety, and morality.

8. Division of powers and the *Charter of Rights and Freedoms*

Those familiar with the outcome of *PHS* will know that the SCC, in the end, ruled in Insite's favour. It is noteworthy that the SCC reached this outcome without invalidating any part of the CDSA, either on division of powers or *Charter* grounds. The CDSA contained a provision according to which the Minister of Health could, at his or her discretion, exempt from any or all provisions of the CDSA any person or class of

[92] *Ibid*, at para 52.
[93] *Ibid*, at paras 53-56.
[94] *Ibid*, at para 61.
[95] *Ibid*, at paras 61-62.
[96] *Ibid*, at para 63.
[97] *Ibid*, at para 69.
[98] *Ibid*, at para 72.

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persons or any controlled substance "if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest."[99]

The Minister was required to exercise his discretion in accordance with the requirements of the *Charter*. The SCC found that denying an exemption for Insite violated section 7 of the *Charter*.[100]

a) The *Charter* does not alter the division of powers

The fact that the CDSA allowed for exemptions to be granted by the Minister for medical, scientific, or public interest purposes did not make the statute *ultra vires* Parliament. The fact that the *Charter* required the Minister to grant an exemption to Insite did not mean that narcotics, including the possession and use of narcotics in a clinic, fell outside Parliament's jurisdiction.

In *Carter*, the SCC found that in certain limited circumstances, section 7 of the *Charter* requires an exemption from the *Criminal Code* prohibition on assisted suicide. Exceptions to criminal law prohibitions may be stated in federal legislation or mandated by the judiciary in applying the *Charter*. Either way, exceptions or exemptions do not oust Parliament's jurisdiction to legislate on such matters.

As Chief Justice McLachlin wrote for a unanimous Court in *PHS*:

> There is no conflict between saying a federal law is validly adopted under s. 91[27] and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter.* […] Indeed, if the *CDSA* were *ultra vires* the federal government, there would be no law to which the *Charter* could apply. Laws must conform to the constitutional division of powers and the *Charter*.[101]

Similarly, in *Carter v Canada* the SCC found that the prohibition on assisted suicide was a valid exercise of Parliament's criminal law power. By effectively reading in an exception to that prohibition as a requirement of section 7 of the *Charter*, the Court was not turning assisted suicide—including physician-assisted suicide—into a non-criminal matter, just as in *PHS* it did not turn narcotic possession in a clinical setting into a non-criminal matter. Rather, the SCC found in both cases that *Charter* rights will in certain limited circumstances, in individual cases, require exceptions to be made to criminal law prohibitions.[102]

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[99] Section 56.

[100] The liberty interests of health professionals who provide services at Insite were engaged because of the risk of imprisonment and the life, liberty and security of the clients of Insite were engaged. Since the law contained an a provision allowing for an exemption, the law itself did not violate section 7 of the *Charter*, but the Minister's refusal to grant an exemption must be in accordance with the principles of fundamental justice under section 7 of the *Charter*. The Court ruled that the refusal was arbitrary and therefore not in accordance with the principles of fundamental justice because the refusal was not rationally connected to the purpose of the *Controlled Drugs and Substances Act*, namely the protection of health and public safety (a legitimate criminal law purpose). It was also "grossly disproportionate" to refuse the exemption, thus breaching another principle of fundamental justice, because Insite has been proven to save lives without any negative impact on public health or safety. See *PHS, supra* note 58.

[101] *PHS*, *supra* note 58, at para 82.

[102] *Carter*, *supra* note 2, at para 127.

b) Prohibitions with exceptions are valid criminal law

General prohibitions with limited and conditional exceptions or defences are a common feature of criminal law.[103] Sometimes the Court may find that an absolute prohibition violates the *Charter*, but in doing so it does not remove or restrict Parliament's jurisdiction to legislate with respect to a matter.

In *RJR-Macdonald v Canada (Attorney General)*[104], two large tobacco companies challenged a federal statute that broadly prohibited, with certain exceptions, all advertising and promotion of tobacco products and required health warnings and a list of toxic substances on packaging. The tobacco companies argued that the law was *ultra vires* Parliament and that it violated their *Charter* right to freedom of expression. The former argument failed. The law was directed at the detrimental health effects caused by tobacco consumption, a legitimate criminal law purpose. Moreover, the existence of exemptions did not make the law *ultra vires*, because "*the criminal law may validly contain exemptions for certain conduct without losing its status as criminal law*."[105]

The tobacco companies succeeded on the freedom of expression argument. Parliament's response was not to leave it up to the provinces to legislate with respect to tobacco advertising, but to enact a new, only slightly less restrictive law, which was upheld in a subsequent constitutional challenge.[106]

c) The concept of harm in division of powers review

One element of *Charter* review that some judges have attempted to integrate into division of powers review is the concept of harm.[107] In the *AHRA Reference*, the two groups of four judges articulated different conceptions of the nature and scope of the substantive component of criminal laws directed at matters related to health. The four judges led by LeBel and Deschamps decided that Parliament's action must be based on a "reasoned apprehension of harm":

> Rand J.'s reference [in the *Margarine Reference*] to an evil to be suppressed or a threatened interest to be safeguarded necessarily implied that the evil or threat must be real. In the context of the *Charter*, the recognized threshold is that of the reasoned apprehension of harm. The reasoned apprehension of harm, […] must be real and must relate to conduct or facts that can be identified and established. Although the instant case does not involve the application of the *Charter*, referring to a threshold illustrates what form a substantive component might take and helps give concrete form to the

[103] Examples from the *Criminal Code* include: section 238 makes it an offence to cause the death of a child in the act of birth, except where the child's death is caused by a person acting in good faith to preserve the life of the child's mother; section 265 sets out the offence of assault, which, in short, is touching another person in a forceful or sexual manner without that person's consent, but also includes a defence based on the accused's reasonable belief that consent was obtained; sections 280 to 283 set out abduction offences, while sections 284 and 285 offer defences where a young person is taken with the consent of the person having lawful charge of the child or because it was necessary to protect the young person from imminent danger; section 233 makes an exception to the offence of murder where a woman willfully causes the death of her own child if at the time she was suffering from postpartum effects, in which case it is the lesser offence of infanticide; the *Criminal Code* also contains general defences (that is, defences that apply generally and not only to a specific offence) for self-defence (s. 34), and defence of property (s. 35).

[104] [1995] 3 SCR 199 [*RJR-MacDonald*].

[105] *Ibid*, at para 53.

[106] *Canada (Attorney General) v. JTI-Macdonald Corp*., 2007 SCC 30, [2007] 2 SCR 610.

[107] Mark Carter, "Federalism Analysis and the Charter", (2011), 74 Sask L Rev 5-20, at paras 7-10 [Mark Carter].

> substantive component of the criminal law. It is therefore helpful for the purpose of determining whether this component cited to justify Parliament's action is present or is simply absent […].[108]

In requiring a reasoned apprehension of harm in the division of powers analysis, Justices LeBel and Deschamps added to the test for valid criminal law in the *Margarine Reference* a new, fourth element, borrowed from jurisprudence under section 1 of the *Charter*. Chief Justice McLachlin disagreed with this approach. Justice Cromwell did not comment on this point.[109]

A year later, Chief Justice McLachlin, for a unanimous Court in *PHS,* did not mention a real, reasoned apprehension of harm as a substantive component of the criminal law. This is in keeping with precedent,[110] particularly *R v Malmo-Levine*, in which the Court recognized that "[m]orality has traditionally been identified as a legitimate concern of the criminal law"[111] and that "[s]everal instances of crimes that do not cause harm to others are found in the *Criminal Code*"[112].

Even if the SCC someday changes course and adopts the reasoned apprehension of harm as a requirement for Parliament's exercise of its criminal law power, it is obvious from the *Carter* judgement that the Court believed that there were real harms to be addressed when it comes to assisted suicide.[113] The Court identified the "harm" being addressed as the inducing of vulnerable people to commit suicide—a harm sufficient to justify enacting a comprehensive regime to govern assisted suicide under Parliament's criminal law power.

Criminal law may also aim at moral harms.[114] The SCC's narrow formulation of the objective of the existing *Criminal Code* prohibition on assisted suicide does not capture these moral harms, which stem from the fact that assisted suicide is an inherently social act. As discussed in part 3(a), Parliament is not limited to enacting a law for the purpose of protecting the vulnerable only.

9. Parliament has power to enact a *comprehensive* regime

So far we have argued that Parliament must respond to the *Carter* decision and that it has the power to do so. A legislative response is needed because the SCC gives bare guidance on when section 7 of the

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[108] *AHRA Reference*, *supra* note 68, LeBel J. and Deschamps J. at para 236.

[109] *Ibid*, McLachlin C.J. at para 56. Justice Cromwell did not take a position on this issue, but only signaled (at para 287) his agreement with Lebel J. and Deschamps J. that the provisions viewed as a whole are best classified as being in relation to provincial legislative competence. Cromwell J. refers approvingly to paragraph 244 of Lebel J. and Deschamp J.'s opinion for the point that administrative efficiency alone cannot justify legislative action by Parliament, but he does not cite any of paragraphs 236 to 243 of their opinion, in which they discuss the standard of "reasonable apprehension of harm" as part of the division of powers analysis.

[110] See Mark Carter, *supra* note 107, at paras 20-21.

[111] 2003 SCC 74, at para 77: "The protection of vulnerable groups from self-inflicted harms [drug use in this case] does not [...] amount to no more than 'legal moralism'. Morality has traditionally been identified as a legitimate concern of the criminal law […] although today this does not include mere 'conventional standards of propriety' but must be understood as referring to societal values beyond the simply prurient or prudish [citations omitted]." [*Malmo-Levine*].

[112] *Ibid*, at para 117, the Court uses cannibalism as an example of an offence that does not harm another sentient being, but which is prohibited "on the basis of fundamental social and ethical considerations."

[113] The first and most obvious harm is the death of a person. Another potential harm is the inducing of vulnerable persons to seek suicide. Yet another is the social and moral harm resulting from permitting someone to deliberately participate in the death of another person.

[114] *Malmo-Levine*, *supra* note 111, at paras 77, 117; *PHS*, *supra* note 58 at para 68.

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Charter requires an exception to the general prohibition on assisted suicide. Leaving it to provincial legislatures—should they have jurisdiction and choose to act—is inappropriate for a matter such as this. Should Parliament decide to enact an exception to the general prohibition on assisted suicide, adequate procedural safeguards and enforcement mechanisms must also be enacted.

Would federal legislation, at least in certain parts, risk overflowing into areas of provincial jurisdiction if it enacts not only a prohibition with a limited exception, but also a comprehensive administrative and enforcement structure? The answer depends on the pith and substance of the law and the integration of parts that may impact an area under provincial jurisdiction. As a general rule, however, Parliament may create administrative and enforcement schemes under its criminal law power.[115] The SCC has rarely struck down federal legislation enacted in reliance on the criminal law power and Parliament's criminal law jurisdiction has been used to justify a wide range of federal enactments.[116]

With respect to physician-assisted suicide in particular, the SCC acknowledged in *Carter* that Parliament faces a difficult task in addressing physician-assisted suicide because it "involves complex issues of social policy and a number of competing social values" and Parliament must therefore "weigh the risks of a permissive regime with the rights of those who seek assistance in dying".[117]

The SCC found that the evidence supported the trial judge's finding that "a properly administered regulatory regime" could accomplish Parliament's objective of protecting the vulnerable from abuse and error.[118] In its *Charter* section 1 analysis, examining the question of whether an absolute ban was minimally impairing of the plaintiff's rights, the SCC cites approvingly the trial judge's finding: "My review of the evidence […] leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a *carefully-designed system imposing stringent limits that are scrupulously monitored and enforced*."[119]

If the Court believed that a complex legislative and regulatory framework governing assisted suicide were outside Parliament's jurisdiction to enact, the language about the difficult choices Parliament must make in dealing with this issue would be strange indeed. This and other parts of the *Carter* judgement referred to earlier indicate that the SCC recognizes and respects Parliament's authority on this matter. The following examples of complex legislative solutions to certain issues enacted under Parliament's criminal law power illustrate the breadth this head of power.

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[115] *Morgentaler 1988*, *supra* note 19, at 135; *Firearms Reference* (2000), *supra* note 56; *R v* Furtney, *infra* note 132; *R v Hydro-Quebec*, [1997] 3 SCR 213. As Hogg, *supra* note 22, comments on the latter case, at 18-30, "In the end, the [Canadian Environmental Protection] Act was upheld as a criminal law, and the trend of the modern cases to permit an extensive degree of regulation under the criminal-law power was emphatically reinforced."

[116] Monahan and Shaw, *supra* note 54, at 351-365.

[117] *Carter*, *supra* note 2, at para 98. In this part of its *Carter* judgement, the SCC is addressing *Charter* issues rather than division of powers issues. Yet by acknowledging the difficult task Parliament faces and by saying that a "complex regulatory response" is an alternative option to an absolute prohibition (and one that would attract more deference under a *Charter* analysis), the SCC indicates that Parliament has the constitutional authority to address the social ill of assisted suicide through a complex regulatory regime.

[118] *Ibid*, at para 3.

[119] *Ibid*, at para 105—quoting para 883 of the trial judgement (emphasis added).

a) Abortion

"Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation," Justice Laskin stated in *Morgentaler* (1975), in response to the argument that the criminal law regime on abortion was *ultra vires* Parliament.[120] Chief Justice Dickson affirmed Parliament's jurisdiction to enact such a regime governing abortion again in 1988, explaining that "Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability."[121]

The SCC held in 1975 and again in 1988 that the federal abortion law regime was a valid exercise of Parliament's criminal law power.[122] The abortion provisions in the *Criminal Code* prohibited all abortions except those performed by qualified medical practitioners in approved hospitals, with a written certificate of approval from a committee of three doctors stating that, in the committee's opinion, the continuation of the woman's pregnancy would likely endanger her life or health.[123]

The SCC invalidated the federal abortion law in 1988 as a violation of section 7 of the *Charter*.[124] It was not the enactment of a general prohibition on abortion with a limited exception and an administrative and procedural structure that was the problem in this case. As an exercise of Parliament's criminal law power, it was legitimate. This was reinforced by *Morgentaler 1993*, discussed earlier, in which a provincial attempt to restrict abortions to hospitals was struck down as being in pith and substance criminal and therefore *ultra vires*. Rather, it was the practical outworking of the administrative and procedural structure set up by the federal law that made it fail to pass *Charter* review.[125]

In some ways, section 251 of the *Criminal Code* governing abortions was not comprehensive enough. The law did not define health and gave no standard for the degree of endangerment of health that would make abortion permissible.[126] It also delegated to provinces the authority to approve or not approve hospitals to perform abortions and, further, the law left it up to approved hospitals to form or not form a TAC.[127] Chief Justice Dickson affirmed Parliament's authority to design an administrative structure under its criminal law power, but added that such a structure cannot be "so manifestly unfair" that it violates the principles of fundamental justice in section 7 of the *Charter*.[128] A criminal defence should not apply differently depending on the province or region in which you live.

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[120] *R v Morgentaler* (1975), [1976] 3 SCR 616, at 627 [*Morgentaler 1975*].
[121] *Morgentaler 1988*, *supra* note 19, at 72.
[122] *Morgentaler 1975, supra* note 120; *Morgentaler 1988, supra* note 19.
[123] Section 251 of the *Criminal Code of Canada*, as it was in 1988. Today this provision remains in the *Criminal Code* as section 287, though it is invalid.
[124] *Morgentaler 1988, supra* note 19.
[125] *Ibid*. See explanation in note 29, *supra*.
[126] *Ibid*. That the law did not define health or set standards for what counted as a health risk was considered problematic by Chief Justice Dickson and Justice Lamer, though not for Justices Beetz and Estey.
[127] *Ibid*, Justice Beetz with Justice Estey, observed, at 95: "Nothing in the *Criminal Code* obliges the board of an eligible hospital to appoint therapeutic abortion committees. […] The defect in the law is not that it does not force boards to appoint committees, but that it grants exclusive authority to those boards to make such appointments." Chief Justice Dickson, with Justice Lamer, also found this delegation of authority to be the cause of problems with respect to the *Charter*.
[128] *Ibid*, at 72.

Chief Justice Dickson ruled that the structure set up by section 251 violated the principles of fundamental justice for a number of reasons, including "the absence of any clear legal standard" for granting or not granting an abortion, which amounted to a "serious procedural flaw."[129] "One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge," Chief Justice Dickson explained, "the defence should not be illusory or so difficult to attain as to be practically illusory."[130] The disparate access to TACs and the varying standards applied by individual TACs, in Chief Justice Dickson's view, made the defence in s. 251 illusory. In practice it meant that some Canadians could not rely on the *Criminal Code* defence to the offence of procuring an abortion, whereas other Canadians in similar personal circumstances but living in a different province or region could. It was therefore unconstitutional and thus unenforceable.

Some clarification is needed here. The majority of the SCC in *Morgentaler 1988* found that the law violated the principle of fundamental justice that a criminal defence not be illusory. Both Chief Justice Dickson's opinion and Justice Beetz's opinion assessed arbitrariness as part of their section 1 analyses; since that time, rational connection and proportionality have become components of the section 7 analysis. It was not merely the fact that the administrative system set up by s. 251 of the *Criminal Code* caused difficulty and delays in accessing the defence that was the problem; the problem was that there was no rational connection between the delays and the achievement of the law's objectives. The defence was practically illusory even for those who would *prima facie* qualify to rely on it.

Morgentaler 1988 does not support the argument that an exception, exemption or defence to a criminal prohibition must be easy to invoke or broadly available. Such an interpretation would undermine any criminal law's objective. An exception can be extremely limited. Accessing the exception may also legitimately require delays in receiving a service such as abortion or assisted suicide, though where the law requires a waiting period or has the effect of creating one and that delay impacts a person's section 7 interests, the delay cannot be arbitrary. It must have a rational connection to the law's objective. With assisted suicide, any law restricting access will involve delay. Such delay is not arbitrary, as it is necessary in order for the safeguards described in Part 3(b) of this paper to be put into effect.

Had Parliament established an administrative system for the operation of the defence with clearly defined and uniform standards across Canada, its abortion law would have withstood the *Charter* challenge.

b) Gambling

The *Criminal Code* prohibits lotteries, but makes an exception for lotteries conducted by organizations licensed by the Lieutenant Governor in Council of a province.[131] The law was challenged as being *ultra vires* Parliament in *R v Furtney* (1991)[132]. The SCC found that this law was within Parliament's criminal law jurisdiction, despite the fact that it legalized lotteries by delegating authority to the provincial Lieutenant Governor in Council:

[129] *Ibid*, at 69.
[130] *Ibid*, at 70.
[131] Section 207.
[132] [1991] 3 SCR 89 [*Furtney*].

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> The appellants question whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority. In so doing they ask the question "referred to by Professor Hogg" in his *Constitutional Law of Canada* [2nd edition, 1985]. Hogg suggests that the question is really one of colourability. [...] In my view the decriminalization of lotteries licensed under prescribed conditions is not colourable. It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an invasion of provincial powers any more than the appellants were themselves able to do.[133]

"Colourability" in the above quotation refers to the attempt by one level of government to legislate on a matter that falls outside its jurisdiction in a way that attempts to disguise–or "colour"–the legislation as being in relation to a matter falling within its jurisdiction. It may be more likely that criminal legislation which creates a regulatory scheme is really a "colourable" attempt to regulate matters within provincial jurisdiction, but that is not necessarily the case.

Unlike with access to abortion, the delegation of authority to the provinces with respect to permitting lotteries was not problematic under section 7 of the *Charter*. The argument against the law in *R v Furtney* was based on section 7 and 11 of the *Charter* and it ultimately failed. The argument was simply that the content of the law was not ascertainable because the terms and conditions of lottery licenses were not published. The SCC responded, "Assuming that [*Charter*] s. 11 embraces some concept of availability, I am of the view that the most that can be said is that the law be ascertainable by those affected by it. The terms and conditions are furnished to every licensee."[134]

Assisted suicide is not a matter to leave up to the discretion of provincial Lieutenant Governors in Council, or to physicians' colleges, or to individual doctors. Given the finding in *Carter* that only a "*carefully-designed system imposing stringent limits that are scrupulously monitored and enforced*" is capable of minimizing the risks involved with permitting assisted suicide, a stringent, consistent, uniform national system—singular—is the necessary response from Parliament. Nevertheless, *Furtney* is another case supporting federal authority to enact a regulatory scheme under its criminal law power.

c) Firearms

The federal *Firearms Act*, enacted in 1995, required the holders of all firearms to obtain licences and to register their guns. In the *Firearms Reference* (2000), the SCC upheld the entire *Firearms Act* as a valid exercise of Parliament's criminal law power.[135] The Act was complex, but, as the SCC pointed out, "The fact that the Act is complex does not necessarily detract from its criminal nature."[136]

The Act's prohibition and related exception were simple: no one shall possess a firearm without a proper license and registration. The provisions establishing the licensing and registration regime, however, were

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[133] *Ibid*, at 106 (emphasis added).
[134] The same argument was made under s. 7 and s. 11 in the lower court, but s. 7 was not argued before the SCC.
[135] *Supra* note 56.
[136] *Ibid,* at para 37.

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quite complex. Alberta challenged the latter provisions on the grounds that they were *ultra vires* Parliament and intruded into provincial jurisdiction over property and civil rights.

The first issue, in the regular order of division of powers review, was the pith and substance of the *Firearms Act*. The *Firearms Act* was, the SCC held, directed in pith and substance to enhancing public safety by controlling access to firearms. Its purpose was to deter misuse of firearms, control access to guns, and control specific types of weapons. The Act was directed towards such "mischiefs" as the illegal trade in guns and the link between guns and violent crime, suicide, and accidental deaths. Its purpose also fit with the historical safety focus of federal gun control laws.

The effects of the scheme also supported the conclusion that it was, in pith and substance, a measure to protect public safety. The criteria for acquiring a license were concerned with safety rather than the regulation of property. Criminal record checks were designed to keep guns out the hands of the wrong people. Mandatory gun safety courses also furthered the goal of public safety.

The second issue was classifying the *Firearms Act* under a head of power in section 91 or 92 of the *Constitution Act*, *1867.* Alberta had three main arguments against the classification of the licensing and registration regime as criminal law.

The first argument against its criminal classification was that the licensing and registration regime was essentially regulatory rather than criminal in nature. Alberta argued that the only way Parliament could address gun control under its criminal law power would be to ban firearms outright. The argument failed. Parliament, the SCC confirmed, is permitted to use indirect means to achieve its ends and exemptions do not preclude a law from being prohibitive and therefore criminal in nature.[137]

Alberta's second argument was that the firearms scheme was indistinguishable from provincial property regulation schemes. In the Court's view, this argument overlooked the different purposes behind the federal firearms scheme and provincial regulation of other forms of property.[138] Unlike other forms of property, guns "pose a pressing safety risk in many if not all of their functions."[139] The general rule is that legislation may be classified as criminal law if it has a valid criminal law purpose backed by a prohibition and a penalty. The licensing and registration provisions themselves did not satisfy this rule, but they were tied to the prohibition. The SCC determined that the licensing and registration provisions could not be severed from the rest of the Act because both were tightly linked to Parliament's goal of promoting safety by reducing the misuse of any and all firearms. Both were necessary to the operation of the regulatory scheme and were also enacted for a criminal law purpose.

Alberta's third argument was that the Act constituted an undue intrusion into provincial powers. The argument failed. Criminal law is a broad area of federal jurisdiction. The *Firearms Act* fell within that jurisdiction and Alberta and the other intervening provinces failed to demonstrate that the effects of the Act on provincial jurisdiction over property and civil rights were more than incidental. First, the mere fact

[137] *Ibid,* at paras 39-40.
[138] *Ibid*, at para 42.
[139] *Ibid*, at para 43.

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that guns are property does not mean gun control is in pith and substance a provincial matter. Second, the Act did not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Third, the Court assumed without deciding that the provincial legislatures had jurisdiction to enact a law in relation to the property aspects of firearms and found that the double aspect doctrine permits Parliament to address the safety aspects of ordinary firearms anyway. Fourth, the *Firearms Act* did not precipitate the federal government's entry into a new field since gun control has been the subject of federal law since Confederation.

All four of the factors in the *Firearms Reference* for why the impact on provincial jurisdiction was only incidental apply to our proposed federal legislation governing assisted suicide:

- First, even if we assume that physician-assisted suicide becomes a "health care service", this fact would not make assisted suicide law a provincial matter in pith and substance.
- Second, restricting the availability of assisted suicide hardly hinders (if at all) the ability of provinces to regulate the practice of medicine. The only effect on provincial jurisdiction is to restrict physicians' use of this particular "treatment option" for end-of-life care; but given that assisted suicide has never before been available as a health service, the impact is slight at most.
- Third, even assuming provinces have jurisdiction to enact laws in relation to assisted suicide as a health care service option, the double aspect doctrine permits Parliament to address the safety and moral aspects of assisted suicide.
- Fourth, assisted suicide has historically been the subject of criminal law, meaning that a law restricting access to assisted suicide would not facilitate the federal government's entry into a new field.

Had the effects of the *Firearms Act* on provincial jurisdiction been more than incidental, however, the provisions still would have been justified given that they were *necessary to the operation of the legislative scheme*.[140] The administrative provisions of our proposed assisted suicide law would satisfy the same standard. The objective of the law cannot be achieved without an adequate administrative scheme to ensure careful assessments of individuals seeking assisted suicide and to reliably obtain and record their consent. One reason the *Criminal Code* states that nobody is entitled to consent to their own death is doubtless because it is notoriously difficult to ask the deceased whether or not he or she did, in fact, consent. With most crimes, the victim is still alive and is a primary witness. Without an adequate administrative and enforcement regime, the "strict limits" necessary to minimize the dangers of assisted suicide cannot be "scrupulously monitored and enforced."

d) Assisted human reproduction

In the *AHRA Reference*[141], a sharply divided SCC invalidated portions of the federal *Assisted Human Reproduction Act*—a comprehensive statute regulating the use of assisted human reproduction and related research—as being *ultra vires* Parliament. While a slim majority found that the federal government overstepped in some respects with the AHRA, the AHRA is clearly distinguishable from the proposal discussed in this document for federal legislation governing assisted suicide.

[140] Even if the licensing and registration provisions themselves were *ultra vires*, they could be justified under the ancillary powers doctrine. See discussion of incidental effects and ancillary powers doctrine in Part 4.
[141] *Supra* note 57.

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The *Assisted Human Reproduction Act*[142] (AHRA), enacted in 2004, had 78 sections and its structure was based on the distinction between activities that were "prohibited", some with exceptions, and those that were merely "controlled". Unlike the activities which the law governed in the previous three examples—obtaining an abortion, holding a lottery, or possessing a gun—the *Assisted Human Reproduction Act* was designed to govern not one particular activity but a wide range of activities, including sperm and ovum donation, *in vitro* fertilization, alteration of human reproductive material, maintenance of gametes and embryos, transgenic engineering, and the use of surrogates and intermediaries. The AHRA also contained provisions to administer and enforce the prohibitions and exceptions and to monitor compliance, including provisions governing the licensing of persons and facilities, as well as provisions governing privacy and access to information.

The Attorney General of Quebec challenged the constitutionality of much of the AHRA on the grounds that it was *ultra vires* the federal government. The SCC Justices divided on which of the many challenged provisions were valid federal law. Four of nine judges (Chief Justice McLachlin and Justices Binnie, Fish, and Charron) found that all of the challenged provisions of the Act were valid or *intra vires*. Four other judges (Justices Lebel, Deschamps, Abella and Rothstein) found that all of the challenged provisions were invalid or *ultra vires*, except for two that they found to be valid insofar as they related to provisions of the Act that had not been challenged. Finally, Justice Cromwell split the tie, upholding some of the challenged provisions while declaring others invalid.

Notably, the provisions upheld by a majority of the Court included general prohibitions on certain activities with conditional exceptions. Section 8 of the *AHRA* prohibited the use of human reproductive material for the purpose of creating an embryo, the removal of human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, and the use of an *in vitro* embryo for any purpose, unless the consent of the donor has been given in writing and in accordance with the regulations. Section 9 prohibited obtaining sperm or ovum from a donor under 18 years of age, "except for the purpose of preserving the sperm or ovum for the purpose of creating a human being that the person reasonably believes will be raised by the donor." Both sections were upheld. Sections 8 and 9 of the AHRA are prohibitions carrying penalties[143] but containing exceptions. Where a law structured in this way is aimed at controlling a social ill or protecting public health and safety, it is a legitimate exercise of the criminal law power.[144]

A majority of the SCC Justices also found section 12 of the AHRA to be valid. Section 12 prohibited reimbursing a sperm or ovum donor, reimbursing any person for maintenance or transport of an *in vitro* embryo, or reimbursing a surrogate mother for expenditures related to her surrogacy, except in accordance with the regulations and with a license. On its face, such regulation of remuneration for products or services might fall under provincial power under section 91(13) of the *Constitution Act, 1867*. A majority of five judges, however, found that the "pith and substance" of this section was aimed at controlling the social ills that could result from the commercialization of human reproduction—a valid

[142] SC 2004, c 2.
[143] Penalties for violating these provisions were found in section 60 of the AHRA, which was also upheld.
[144] The fact that such provisions are not part of the *Criminal Code* but part of a separate Act in this case is irrelevant. Consider the *Food Safety Act*, the *Controlled Drugs and Substances Act*, etc.

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criminal law purpose. The licensing provisions[145] of the Act were also held to be valid insofar as they related to section 12.

In light of the portions of the AHRA that were upheld, the *AHRA Reference* illustrates the breadth of the criminal law power. As for the parts of the AHRA that were struck down, they are clearly distinguishable from the proposed legislative framework to regulate assisted suicide.[146]

Unlike abortion and assisted suicide, assisted human reproduction does not have a history as a matter over which Parliament had jurisdiction, which is not surprising given that assisted human reproduction technologies are quite new.[147] Assisted human reproduction was already being widely used in Canada for years before there was any legislation. The use of new technologies and methods was rapidly expanding when Parliament decided to examine this field. New methods for treating infertility were widely celebrated. On the other hand, there were also matters of ethical concern relating to medical research and practice in this field. It is a highly complex field.

When it comes to assisted suicide, while the administration and enforcement regime necessary to protect the vulnerable may be complex, the matter at hand is singular and discrete: when will someone who assists a person commit suicide (or participates in any way) be guilty of a crime? This is a matter clearly falling under Parliament's criminal law jurisdiction.

10. Conducting a division of powers review of the proposed assisted suicide law

a) Pith and substance

What is the pith and substance of a law designed to restrict access to assisted suicide? As explained in Part 4(b), pith and substance is determined by examining the purpose and effect of a law.

The purpose of a federal law governing assisted suicide in line with our proposal (see Appendix) can be said to be, at a minimum, what the SCC determined the existing law's objective to be as part of its *Charter*

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[145] Ss. 40(1), (6) and (7), 41-43.

[146] Chief Justice McLachlin advocated a broader reading of the criminal law power and a more deferential approach to Parliament than Justices LeBel and Deschamps. For McLachlin, the "controlled activities" in the AHRA were carve-outs from general prohibitions, thus satisfying the formal requirements that criminal law have a prohibition and a penalty. As for the substantive component of criminal law—a criminal law purpose—McLachlin construed the Act and the impugned provisions as being concerned with morality and public health. She held that "Parliament need only have a reasonable basis to expect that its legislation will address a moral concern of fundamental importance."

Justices LeBel and Deschamps found that the impugned provisions in pith and substance dealt with the regulation of assisted human reproduction, a specific type of health service. The wording and structure of the AHRA reflected the fact that prohibited and controlled activities were distinct. They emphasized that the Baird Commission, a Parliamentary Commission which had examined issues related to assisted human reproduction and issued a report in 1994, had distinguished between beneficial activities and reprehensible activities. The legislative history revealed that the Baird Commission's Report had a major influence on the legislation. The controlled activities were not carve-outs from criminal prohibitions. Rather, these provisions were designed, in their view, to secure the benefit of and establish national standards for assisted reproductive health services.

[147] See Library of Parliament, "Legal Status at the Federal Level of Assisted Human Reproduction in Canada", Publication No. 2011-82-E, Revised April 9, 2015. In 1995, the federal Minister of Health announced a "voluntary moratorium" on a few assisted reproduction practices.

analysis, namely to protect vulnerable people from being induced to commit suicide in a moment of weakness.[148] However, the law may go beyond merely protecting the provably vulnerable. Assisted suicide does not have to be made available to all non-vulnerable persons because the SCC restricted the scope of its declaration to apply only in the factual circumstances of *Carter*, a case in which the plaintiff had a fatal neurodegenerative disease that rendered her completely incapable.[149]

The effect of the law is also relevant in determining its pith and substance under division of powers review. In examining a law's effect, a court is not concerned with how efficacious the law is in achieving its purpose, but whether its effects are in line with its law's purported purpose. The main effect of the legal framework we are proposing would be to exclude most people from receiving physician-assisted suicide, while allowing only those who meet the criteria to receive it.

b) Head of power

The assigning of the "matter" to a head of power is often the simplest stage of the division of powers analysis. The general prohibition on assisted suicide was conceded by the plaintiffs in *Carter* to be a valid exercise of Parliament's criminal law power. The matter of assisted suicide falls within Parliament's criminal law power. Under the double aspect doctrine, however, it is possible that while certain aspects of assisted suicide fall under criminal law, other aspects might fall under a provincial head of power.

The plaintiffs in *Carter* did not argue that assisted suicide falls exclusively under a provincial rather than federal head of power; they only argued that the federal law should not apply to *physician*-assisted suicide because physician-assisted suicide was part of the "protected core" of provincial jurisdiction over health. This was an argument for the application of inter-jurisdictional immunity and the Court rejected it.[150] The reason it was rejected tells us something about both the matter and the heads of power in question. The SCC rejected this argument in *Carter* for the same reason it rejected it in *PHS*—because "delivery of health care services" is not part of the protected core of the provincial power over health in s. 92(7), (13) and (16).[151]

At the very least it can be said that the moral and public safety aspects of assisted suicide fall under the criminal law power. These aspects alone require the kind of comprehensive, unified, legislative scheme contemplated by the *Carter* judgement. To the extent such a scheme overlaps with an area of provincial jurisdiction, it would likely be justified under the ancillary powers and paramountcy doctrines.

c) Jurisdictional overlap and conflict

The framework we propose might be argued to intrude on areas of provincial jurisdiction in a few ways. One argument might be that it regulates the physician-patient relationship, a matter that is governed primarily by provincial health legislation and by policies of provincial colleges of physicians. The federal

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[148] Since the plaintiffs conceded that the prohibition in section 241(b) was valid federal law, the SCC did not examine the law's purpose and effects. See *Carter*, *supra* note 2, at paras 49-53.

[149] *Ibid*, at paras 56, 57, 65, 66, 126, and 127. See also Part 12 of this paper.

[150] *Carter*, *supra* note 2, at paras 49-53. The Attorney General of Quebec AG argued, an intervenor in the case, argued the core of the provincial power over health was provincial authority to establish the kind of health care offered to patients (para 52), which the SCC rejected. It is not clear what, if any, aspects of assisted suicide fall within a provincial head of power.

[151] *Ibid*, at para 53; *PHS*, *supra* note 58, at para 68.

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law would govern which patients may receive assisted suicide as a means of relieving suffering and require patients and physicians to follow a number of steps before "aid in dying" may be given.

As noted in Part 7, above, criminal law may legitimately restrict what health care service providers and institutions may do, even if the service being limited or prohibited by criminal law relates to health. Counselling a suffering patient to commit suicide, for example, remains illegal. Prohibiting the provision of aid in dying to all but a few patients, as our proposal would, has very little if any effect on the physician-patient relationship, which ends when the patient dies. If there is any impact on provincial jurisdiction, it is merely incidental and not in violation of the division of powers. Even if assisted suicide can be considered a health care service, delivery of health care services, while a matter on which provinces legislate, is not part of the protected core of the provincial power over health, rendering even less significant any interference with the regulation of health services resulting from the comprehensive federal law we propose.

Another concern is that our proposal would require doctors to obtain special certification in order to be involved in providing assisted suicide may also have some impact on provincial jurisdiction to regulate the medical profession, but the effect is only incidental. The purpose and primary effect of the licensing requirement is to ensure that only those doctors who have acquired special training are permitted to participate in this highly controversial practice. Thus, the federal law would aim at the safety and moral aspects of assisted suicide, much like the federal law in relation to firearms addressed the safety aspect of firearms while provincial laws could simultaneously address the property aspects of firearms.

The requirement that consent be witnessed and recorded in advance and simultaneously with the administration of aid in dying is necessary in order to ensure that vulnerable people are protected and that a crime is not in fact taking place when aid in dying is provided. Administering aid in dying without consent is a crime, but it is a crime that is very difficult to prove after the fact since the person's whose consent was required is dead. Therefore, while provincial law may in general govern consent in the health care context, ensuring that consent is reliably obtained and recorded in the context of assisted suicide is necessary in order to protect vulnerable people and to ensure compliance with and give effect to the legislative scheme.

Assisted suicide is a controversial medical practice that raises serious questions of morality and safety, making it very clearly a matter on which Parliament can legislate. Given that the SCC itself acknowledged that a system of scrupulously monitored and enforced safeguards would be necessary in order to put into effect any exception to the general prohibition, the conditions, procedural safeguards, licensing requirements, and other related provisions are justified on this basis. Most of them will only have an incidental effect on matters falling under provincial jurisdiction, thus not violating the division of powers. However, even if any of these provisions could be said to be in relation to a provincial matter, provided the challenged provisions are integrated into a federal scheme designed to govern assisted suicide, they will be upheld on a division of powers review.[152]

[152] In 1989, Chief Justice Dickson for a unanimous Court in *General Motors v City National Leasing*, [1989] 1 SCR 641, said, "As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate

Quebec recently enacted *An Act Respecting End of Life Care*[153], though it has not yet come into force. Other provinces are considering how they will respond to the *Carter* ruling. As mentioned previously, it is often possible to comply with overlapping federal and provincial law.[154] For example, Quebec's law requires that a person requesting aid in dying be at least 18 years of age; if the federal law mandated that a person requesting aid in dying be at least 25 years of age, complying with the latter law would also satisfy the former.[155] However, it is also possible that provincial legislation would conflict with or frustrate the purpose of federal legislation. One way in which provincial law might frustrate the purpose of federal law is by creating overlapping procedural and reporting requirements that cause duplication, complication, and confusion. If provincial legislation frustrates federal legislation, assuming the provincial legislation is validly enacted in the first place, the doctrine of paramountcy may be invoked to render the provincial law inoperative.

It is clear from *Carter* and *PHS* that a province cannot rely on interjurisdictional immunity to shield health professionals or institutions from the application of our proposed law. Interjurisdictional would not apply because: the various attempts at defining a protected core of provincial power over health failed in *PHS* and *Carter*, Parliament has power to legislate with respect to federal matters that touch on health, and excluding the federal criminal law power from a protected provincial core would mean that Parliament could not legislate on controversial medical procedures and would therefore potentially create legal vacuums since provinces might choose not to legislate in these areas and indeed might not have the power to do so.[156]

11. Assisted suicide and the *Charter*

a) Operation of section 7

Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." These rights are guaranteed to "everyone", which is not restricted to Canadian citizens.[157] Section 7 is "*engaged*" when a person's life or liberty or security of the person—the protected "interests"—is adversely affected

constitutional balance is maintained." If the encroachment on the other government's sphere of power is minor, a rational connection with an otherwise valid legislative scheme is required. If the encroachment is major, the provision in question must be necessary or essential to an otherwise valid legislative scheme. See Hogg, *supra* note #, at 15-42 to 15-44.

[153] Chapter S-32.0001.

[154] This paragraph assumes for the sake of discussion that the provinces can enact laws governing assisted suicide, which is questionable in light of *Morgentaler 1993*. It is true that provincial legislation already governs consent in the health care context. The question is, if assisted suicide is to be offered as a health care service, why is it necessary to add conditions and procedural safeguards such as those included in Quebec's *An Act Respecting End of Life Care* on top of existing provincial health care consent laws? The purpose of such additional measures appears to be to protect vulnerable persons from being induced to commit suicide—a criminal law objective.

[155] Assuming the province can enact such a law, which is questionable in light of *Morgentaler 1993*, *supra* note 18.

[156] *PHS*, *supra* note 58, at paras 67-69; *Carter*, *supra* note 2, at paras 49-53.

[157] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177; Section 7 rights have been held to apply to non-citizens even if they have entered Canada illegally.

by the government in a manner that is not trivial or insignificant. Section 7 is *violated* where it is engaged and where the law or state action violates a principle of fundamental justice.[158]

The right to liberty guards against state-imposed physical restraint, but the Supreme Court has also interpreted it as offering protection from state interference with "fundamental personal choices."[159] The right to security of the person protects against state interference with one's physical, mental and psychological wellbeing, but it has also been interpreted as protecting "control over one's body."[160] The right to life guards against "state-imposed death or an increased risk of death on a person, either directly or indirectly."[161] It does not include considerations respecting quality of life.

State action that interferes with life, liberty and security of the person is not a violation of section 7 unless the law or state action violates a principle of fundamental justice. It is also permissible to violate a principle of fundamental justice so long as the state action does not affect one of the protection section 7 interests.[162] For example, the law can impose liability without fault[163] provided the penalty does not affect section 7 interests, which would necessarily preclude having imprisonment as a penalty.

The principles of fundamental justice include the procedural rights guaranteed by sections 8 to 14 of the *Charter*, but also include a few principles developed by the judiciary. The most prominent of the latter are the principles of arbitrariness, overbreadth, and gross disproportionality.[164] The state cannot deprive someone of life, liberty, or security in a manner that is arbitrary, overbroad, or grossly disproportionate.

A law that engages section 7 must not be arbitrary, meaning it must be, in substance and effects, rationally connected to the purpose for which it was enacted. Second, it must not be overbroad; overbreadth occurs where a law, even if clearly defined, is more sweeping than necessary. Third, it must not be grossly disproportionate, which occurs where its impact on one or more protected section 7 interests is so severe that it simply cannot be justified by any government objective. As the SCC stated in *Carter*: "Each of these potential vices involves comparison with the object of the law that is challenged. The first step is therefore to identify the object of the prohibition on assisted dying."[165]

b) How the SCC applied section 7 in *Carter v Canada*

The section 7 analysis in *Carter* hinged on the principle of overbreadth. The SCC decided that the objective of the prohibition against assisted suicide was to protect vulnerable persons from being induced to commit suicide at a time of weakness.[166] But the law did not apply exclusively in relation to vulnerable

[158] Guy Regimbald and Dwight Newman, *The Law of the Canadian Constitution, 1st edition* (Markham: LexisNexis, 2013), at 618 [Regimbald and Newman].
[159] *Blencoe v British Columbia*, [2000] 2 SCR 307, cited in Hogg at 47-9, cited in *Carter* at para 64.
[160] Extended to include "control over one's body" in *Rodriguez*, *supra* note 36; cited in Hogg, *supra* note 6 at 47-13.
[161] *Carter*, *supra* note 2, at para 62.
[162] Regimbald and Newman, *supra* note 158, at 618.
[163] Fault here referring to mental fault: *mens rea* or "guilty mind".
[164] The SCC in *Carter*, *supra* note 2, at para 72, identifies these three principles of fundamental justice as "central in recent s. 7 jurisprudence". Another principle is that laws must not be unduly vague, meaning so poorly defined or unclear that people cannot tell in advance whether the law is being complied with.
[165] *Ibid*, at para 73.
[166] *Ibid*, at para 78 and 86.

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people.[167] Since "there may be people with disabilities who have a considered, rational and persistent wish to end their own lives", the Court reasoned, the interference with the section 7 interests of such non-vulnerable persons is not connected to the law's objective.[168]

The Attorney General of Canada contended that the law's objective was broader—to preserve life. The Court disagreed: "Section 241(b) is not directed at preserving life, or even at preventing suicide—attempted suicide is no longer a crime."[169] (In Part 3(c), we examined the Court's determination of the law's objective and identified several problems with it, but our focus here is on explaining how *Carter* was decided.) The Court decided that the prohibition on assisted suicide had the narrow objective of protecting vulnerable people from committing suicide in a time of weakness and that an absolute prohibition applies to conduct "that is unrelated to the law's objective."[170]

The Attorney General of Canada argued that identifying who is vulnerable or not is difficult or impossible to do accurately and reliably and therefore the law is not broader than necessary.[171] The SCC, however, found that arguments about whether or not a less restrictive law could substantially achieve the law's objective were better dealt with under section 1 of the *Charter*.[172] Under section 7, the onus is on the person challenging the law to show that it violates section 7. Under section 1, the onus is on the government to show that a violation of section 7 is justified.

c) Section 1 limitations on section 7 rights

Section 1 of the *Charter* allows the government to limit the rights in sections 2 and 7-14 of the *Charter* provided that the limit or limits are "reasonable limits prescribed by law that are demonstrably justified in a free and democratic society." The SCC has created a framework for interpreting section 1 that requires the government to show that a law which limits a *Charter* right has a pressing and substantial object and that the means chosen are proportional to that object. The means chosen are proportionate if: (1) the means chosen are rationally connected to the law's objective, (2) the means are the minimally rights-impairing means capable of substantially achieving the law's objective, and (3) the deleterious effects of the law are not out of proportion to the law's salutary effects.

Ordinarily, it is difficult (if not impossible) to justify a violation of section 7 under section 1. In 1985, then Supreme Court of Canada Justice Lamer commented that section 1 could "save" a law or state action that violates section 7 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like."[173] The reason for this is that section 7, unlike other rights in the *Charter*, has its own internal limit—the state may limit the rights or "interests" of life, liberty, and security provided it does so without violating the principles of fundamental justice. Notice the parallels between

[167] The phrase "in relation to" is used here because the prohibition is not aimed at the person committing suicide but at anyone who might aid or abet another person in committing suicide.
[168] *Carter, supra* note 2, at para 86.
[169] *Ibid,* at para 78.
[170] *Ibid*, at para 86.
[171] *Ibid* (Factum of Respondent).
[172] *Ibid*, at para 79.
[173] *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, at para 85.

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the analysis conducted under the principles of fundamental justice in section 7 and the analysis of proportionality under section 1.

If a law is found to be arbitrary under section 7, it cannot pass the "rational connection" test under section 1. If the law is grossly disproportionate under section 7, it cannot pass the proportionality test under section 1. If the law is overbroad under section 7, it will likely have great difficulty in satisfying the "minimal impairment" component of the section 1 analysis. However, in situations where the law is overly broad for a reason—because a less broad law would not substantially achieve the government's objective—it can be justified under section 1. The SCC acknowledged this in *Carter*:

> It is difficult to justify a s. 7 violation. […] However, in some situations the state may be able to show that the public good—a matter not considered under s. 7, which looks only at the impact on the rights claimants—justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.[174]

With this framing of section 7 and section 1, the SCC places on the government the burden of showing that some other means that would be less impairing of the interests protected by section 7 would not substantially achieve the law's objective. The alternative would have been to place the burden on those challenging the law to show, under section 7, that a less broadly applicable law would achieve the government's objective. Either way, the Court would be asking a party to prove a hypothetical. The SCC has made clear in *Bedford,* and now again in *Carter,* that it will place this burden on the government. Proving a hypothetical is no easy task. Therefore, "At this [section 1] stage of the analysis, the courts must accord the legislature a measure of deference."[175]

As explained in Part 3, in its section 1 analysis the Court found that the prohibition did not minimally impair the claimants' rights because the Court accepted the trial judge's conclusion that a "carefully designed and managed system" permitting physician-assisted suicide for people in circumstances like the plaintiff would be less impairing, ye still achieve the objective of protecting vulnerable people.[176]

12. Who may receive "aid in dying"?

Who should be allowed to receive and who should be allowed to provide "aid in dying" and in what circumstances? We stated in Part 11 that the section 7 analysis in *Carter* hinged on the principle of overbreadth, but the foregoing question cannot be answered using the SCC's overbreadth analysis alone. Where the absolute prohibition applied to non-vulnerable people it was overbroad, because the object of the law was to protect vulnerable people. Does that mean that any non-vulnerable person is entitled to receive assisted suicide or "aid in dying"? No.

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[174] *Carter*, *supra* note 2, at para 95.
[175] *Ibid*, at para 97.
[176] *Ibid*, at para 105.

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The overbreadth analysis happens in the second stage of the section 7 analysis. The Court only got there after finding that the claimants in this case, and people like them, have their right to life, liberty, and security adversely affected by the law. Introducing its section 7 analysis, the SCC states, "For the reasons below, we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position, and that it does so in a manner that is overbroad and thus is not in accordance with the principles of fundamental justice."[177]

Ms. Taylor, like Ms. Rodriguez in the 1993 assisted suicide case[178], had a fatal neurodegenerative disease called amyotrophic lateral sclerosis or ALS. This disease progressively deteriorates one's muscles until one loses the ability to walk, chew, swallow, speak and, eventually, breathe.[179] Ms. Taylor was joined in her claim by Lee Carter. Lee Carter had helped her mother, Kathleen Carter, travel to Switzerland where her mother received assistance in ending her life from an assisted suicide clinic. Lee Carter had not faced prosecution, though in theory she could have. Her mother, Kathleen Carter, had spinal stenosis, a disease resulting in the progressive compression of the spinal cord. Ms. Taylor and Lee Carter were joined in their claim by Dr. Shoichet, a physician who expressed willingness to participate in assisted suicide if it were legalized and by the British Columbia Civil Liberties Association.

The only plaintiff with an illness was Ms. Taylor. The Court repeatedly refers to Ms. Taylor and people like her in the course of its *Charter* analysis.[180] At the close of its *Charter* analysis, the Court reiterates the limited scope of its ruling with two statements: "To the extent that impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by the operation of s. 52 of the *Constitution Act, 1982*."[181] And: "The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought."[182]

All references to sick and suffering people in the Court's judgement must be understood in light of Court's aforementioned introductory and concluding statements, which bookend the entire *Charter* analysis. Parliamentarians can be confident in light of this that Parliament can enact legislation permitting assisted suicide only in the late stages of egregious, debilitating, fatal diseases.

Conclusion

A side effect of *Charter* review of legislation observed by political scientists is "policy distortion", a phenomenon that occurs where lawmakers choose policies that may be less effective but which they believe will be more easily defensible against Charter challenges. Parliament may risk foregoing the best option because MPs mistakenly believe it falls outside the range of policies a court would accept under

[177] *Ibid*, at para 56 (emphasis added).
[178] *Rodriguez*, *supra* note 36.
[179] *Carter*, *supra* note 2, at para 10.
[180] See *ibid*, at paras. 56, 57, 65, 66, 126, and 127.
[181] *Ibid*, at para 126.
[182] *Ibid*, at para 127.

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Charter review. So where the Supreme Court of Canada clearly states its intent to limit the policy impact of its ruling, as it does in *Carter*,[183] MPs should take note.

The back-and-forth between courts and legislatures—in which legislatures pass a law, a court reviews and invalidates it, and the legislature enacts a new law—has famously been called an inter-institutional "*Charter* dialogue".[184] The dialogue metaphor is descriptive, not normative; it is not intended to justify judicial invalidation of laws, but to describe the sequence of judicial decisions followed by legislative amendments.[185] Judges have used the dialogue metaphor to justify both a more activist and a more deferential approach to the reviewing legislation. However, "second look" cases—cases reviewing legislation that was enacted in response to an earlier ruling invalidating prior legislation—suggest that courts are often more deferential toward new legislation that balances rights and competing societal interests in a way that takes into account the judgement invalidating the previous legislation, even if the new legislation reaches a different balance than that contemplated by the court.[186] As the SCC said in *Carter*, "physician-assisted death involves complex issues of social policy and a number of competing societal values"[187] and a complex response to resolving these issues "will garner a high degree of deference."[188]

It is often said that hard cases make bad law. The judges of Canada's highest court are doubtless acutely aware of this maxim. It is not surprising, then, that the Supreme Court would clarify the limited scope of its declaration in *Carter*. Whether or not this hard case results in bad law is up to Parliament.

We maintain that Parliament ought to uphold a general prohibition on assisted suicide by enacting a prohibition with a purpose clause stating that the object of the law is to preserve life and to prevent the participation of any person with the active, deliberate putting to death of another person. Should Parliament reject preserving the absolute ban on assisted suicide, however, Parliament must enact a very limited exception with strict conditions and a system by which these will be scrupulously monitored and enforced, prohibiting the provision of "aid in dying" to all but those who meet the conditions set out in Part 3(b) of this paper.

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183 *Ibid*.
184 Peter W Hogg and Allison A Bushell, "The Charter Dialogue between Courts and Legislatures", (1997) 35 Osgoode Hall L.J. 1.
185 Peter Hogg, Allison A Bushell Thornton, and Wade K Wright, "Charter Dialogue Revisited" (2007) 45 Osgoode Hall L.J. 1, at para 37.
186 *Ibid*, at paras 25-35. One example of a "second look" case mentioned in this paper is *Canada (Attorney General) v. JTI-Macdonald Corp*, *supra* note 106.
187 *Supra* note 2, at para 98.
188 *Ibid*, at para 97.

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Appendix – Necessary Restrictions on Assisted Suicide

What follows is a list of restrictions necessary to make any assisted suicide regime in Canada as safe and restrictive as possible. While ARPA Canada cannot emphasize enough the inherent risks to legalizing some assisted suicide (indeed, the Supreme Court of Canada itself recognized these inherent risks), we cannot silently stand by the sidelines and watch weak legislation be passed.

Necessary Restriction	Details & Policy Justification	Comments re: constitutionality
Preamble	Nothing in this act shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or euthanasia.	Mercy killing and euthanasia should be defined in the bill, in order to distinguish them from assisted suicide. The plaintiffs in *Carter* challenged several sections of the *Criminal Code*, including the homicide provisions (which effectively ban euthanasia) but the SCC only ruled on section 241(b) and section 14 because those prohibited "assistance in dying" (*Carter*, para 11).
Preamble – clarify that assisted suicide is not medical care	1. Assisted suicide is not medical care and does not fall within the jurisdiction of a province's delivery of medical care. 2. Medical care is, and must remain, devoted to upholding human life and well-being. Assisted suicide and euthanasia is a choice to end care and life. 3. Matters pertaining to the purposeful ending of human life, regardless of motivation, are subject to federal jurisdiction (Criminal Code). 4. Conflating medical care with killing undermines the entire medical profession. 5. Must use the terms "assisted suicide" and "euthanasia" where appropriate. The term "physician-assisted dying" should be rejected: it is a deceptive and vague euphemism that is dangerous when used in this type of legislation. Precision with these medical-criminal terms is literally a life and death matter.	1. Parliament has the authority to create and define criminal offences, provided its authority is exercised in the required form (must include prohibition and penalty) and directed towards a public evil. *PHS* (para 69) mentions euthanasia as an example of a "controversial medical practice" over which Parliament has jurisdiction to legislate; the point is that criminal law applies to medical professionals and facilities. The "delivery of health care services" is not part of a defined core of provincial jurisdiction over health such that federal law does not apply to it (*PHS*, *Carter*). In fact, there is no defined core of provincial jurisdiction over health; health is an amorphous topic over which both levels of government share jurisdiction. Of course, Parliament cannot oust provincial jurisdiction by statutory declaration (*PHS* Paras. 79-83), meaning a province might have jurisdiction offer AS as a health service. Still, it would be subject to criminal law, just as BC's safe injection clinic depended on a federal exception to be able to operate. Such an exception is not required by the division of powers. 2. As a statement of purpose in the preamble, it helps to make clear that in Parliament's view, deliberately induced death or cooperation in suicide is a public evil or "socially undesirable conduct" (*Morgentaler* 1993) that should be suppressed. 3. Clearly stating Parliament's purpose and the basis for its jurisdiction to pass this bill, while not authoritative, is useful in a division of powers review. Parliament is not trying to invade provincial jurisdiction, but to exercise its existing jurisdiction over euthanasia and assisted suicide. 4. Valid statement of Parliament's view. Of course, when it came to justifying the prohibition on AS under s. 1 of the

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		Charter, the trial judge in *Carter* found, and SCC accepted, that the evidence did not support the argument that AS devalues life and leads to a "slippery slope". 5. While the SCC uses the term physician-assisted death, adopting the term because the appellants prefer it (para. 40), the Court does not mandate the use of the term and there is no compelling legal or policy reason to do so.
Creation of Federal Assisted Suicide Agency	The Act shall include the establishment of an Assisted Suicide Agency (or some other name), funded by the federal government and reporting to the Minister of Justice (*not* the Minister of Health!), mandated to: - Ensure the medical and legal community is informed of the regulations and laws pertaining to assisted suicide; - Provide reports and recommendations to the Government of Canada based on the annual statistics and judicial reviews (detailed below); - Review every consent form and audio/video recording after each assisted suicide death; - Oversee the certification of approved assisted suicide facilities; - Oversee the certification of assisted suicide providers. The Assisted Suicide Agency shall be under the oversight of a non-partisan board that includes at least one lawyer, doctor, palliative care specialist, and judge.	Creation of such an agency is valid. In *AHRA Reference*, there was no issue with the creation of a federal government agency. The extent of powers that can be granted to such an agency may be limited by the division of powers. The Agency's mandate relates to the practice of medicine and requires interacting with medical professionals, but this is not problematic. Existing federal agencies also do this. (e.g. Public Health Agency of Canada, which concerns itself with infectious diseases, food safety, health promotion, etc. Its mandate: "Strengthen intergovernmental collaboration on public health and facilitate national approaches to public health policy and planning.") Also, doctors are involved in Where potential division of powers issues are foreseeable is with respect to certifying facilities and providers. If doing so is a legitimate part of a federal scheme to regulate assisted suicide, this will stand. Centralizing control over access to assisted suicide would avoid the problems of *Morgentaler 1988* in which the criminal law delegated to the provinces the authority to approve hospitals and delegated to the provincially hospitals the authority to set up a therapeutic abortion committee. Federal control over the provision of assisted suicide, while it might effect matters of provincial jurisdiction, is a necessary part of a legitimate federal legislative scheme to regulate assisted suicide, a matter over which it clearly has jurisdiction.
Preclude euthanasia	Legalizing euthanasia would result in far more deaths. One of the primary functions of law and policy in civic life is to uphold life. Parliament has recently affirmed this both through its repeated defeats of bills which would have legalized euthanasia and it's passing of Bill 300 which created a federal framework for suicide prevention. Regimes which allow euthanasia see an annual increase in the number of euthanasia deaths. Euthanasia is far more susceptible to abuse.	Enacting absolute prohibitions on euthanasia is clearly valid as an exercise of the criminal law power. *Charter* considerations are only those raised by *Carter*. Provided terms are properly defined in the bill, with *Carter* in mind, there is no need for any exceptions to a general prohibition against all forms of euthanasia. The *Carter* decision does not clearly open the door to euthanasia: - The court rejects the argument that legalization would mean "Canada will descend the slippery slope into *euthanasia* and condoned murder" (emphasis added) par. 120 - The Carter decision does not include a definition of euthanasia. The BC Supreme Court decision provides definitions and notes that euthanasia can be voluntary, non-voluntary, or involuntary depending on whether it is

		with, without, or against the consent of the person who is killed. Coupled with paragraph 120 of the Carter Supreme Court decision, this suggests that the Supreme Court of Canada decision does not allow for any form of euthanasia. - The Supreme Court of Canada provides no separate analysis or justification for euthanasia. This would be surprising if it intended to legalize euthanasia. Euthanasia is treated in law more seriously than assisted suicide, with euthanasia deaths equated with murder.
Judicial review every three years	All assisted suicide deaths must be reviewed by a panel of no less than three judges after the first year and then every three years to determine if the law is being followed consistently. If the findings show that is not the case, there must be an immediate moratorium on all assisted suicide deaths as it is not possible to guarantee the security of all persons. Peer-reviewed reports on assisted-deaths in other jurisdictions provide much evidence of euthanasia and assisted suicide occurring outside the specifications of the law, yet the deaths continue and even increase. A moratorium must not be lifted until it can be proven that the law, and regulatory regime, is amended to prevent further illegal deaths. This judicial review must be conducted every three years, in order to prevent the normalization of assisted suicide and the resultant tendency to relax oversight.	The review process itself is clearly intra vires. Were a moratorium to be imposed, *Charter* issues might arise. But it is hard to imagine a court pre-emptively invalidating a legislative provision that provides for the possibility of a moratorium if, on the evidence, the law is not being followed. An indefinite moratorium might be considered to be an overbroad response (to accomplish the goal of preventing unlawful AS), but a court can hardly tell that in advance of a moratorium being issued. The Supreme Court made it clear in para. 105 that "While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them" (then quoting with approval the trial judge) "the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced." Put another way: Only when Parliament creates a *carefully-designed system* imposing *stringent* limits that are *scrupulously monitored and enforced* can the risks inherent in permitting physician-assisted death be identified and substantially minimized. This is a very high standard.
Approved facility	The assisted suicide may only occur in a government-approved facility that is licenced to provide assisted suicide deaths. Proof of non-coerced consent, judicial approval, citizenship/residency (all detailed further below) must be present in this facility and verified by at least two physicians prior to proceeding with an assisted suicide. The physicians assisting with the suicide deaths must be licenced	Restricting assisted suicide to approved facilities is necessary in order to ensure sufficient oversight, reliably record consent of the person being put to death, and to prevent abuse. This is not an opportunity for the federal government to take over regulation of medical professions or facilities. Federal authority is being exercised only with respect to assistance in dying, for moral and public safety reasons, both of which make this a matter falling within its criminal law jurisdiction. Approval of facilities should not be delegated to the provinces, as each province might employ different standards. In this framework, assisted suicide in an approved facility (and in accordance with all the other measures set out herein) is an exception to the general prohibition against assisted suicide. It is best that the administrative elements of making an exception to a criminal law prohibition available be controlled by the federal government.

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Reinforce section 241(a) – counselling to commit suicide	When the allowance for killing is legalized, it is susceptible to coercion and abuse. It is crucial that others, including the medical profession, not be permitted to offer, suggest, recommend, or encourage death as a solution; assisted suicide can only be legal on the first prompting by the patient.	*Carter* did not invalidate section 241(a) of the *Criminal Code*—it remains valid law. Whether someone is counselled to commit suicide may depend on how treatment options are communicated to a patient where those options include assisted suicide. The federal government enact safeguards to ensure that patients are not (advertently or inadvertently) counselled to choose assisted suicide.
Be limited to those with a defined terminal illness	Parliament has the freedom to precisely define the term “grievous and irremediable”. Precise terms, including a confirmed diagnosis and prognosis, is crucial for limiting assisted suicide. Failure to do so leaves it open to subjective and contradicting standards which could include thousands of Canadians who suffer from chronic illness, psychiatric illness, or terminal illness that is not short-term. Require life expectancy of less than two months. Diagnosis and prognosis must be confirmed in writing by more than one doctor.	The SCC in *Carter* encourages a Parliamentary response. The *Carter* decision noted that “Complex regulatory regimes are better created by Parliament than by the courts” (par.125). See also paras. 97-98 of *Carter*. A complex regime to control AS would be entitled to more deference on *Charter* review than an absolute prohibition. The other issue when it comes to defining health conditions that may allow for AS is division of powers, but Parliament clearly has an interest under their criminal law power in ensuring that AS is not available for a broad (and broadening) range of conditions and types of suffering. Legislating precise terms is a necessary component of a federal scheme. Its impact on provincial jurisdiction over health would only be incidental. Medical practice must conform to legitimately enacted federal law. If there is real intrusion, ancillary powers doctrine justifies detailed definitions and conditions on AS in federal law. One should not be able to acquire AS for a certain condition in one province when it is not available in others.
Be limited to Canadian citizens and residents	Canada cannot become a destination for assisted suicide tourists from throughout the world.	Section 7 protections are available to all persons in Canada including non-citizens and non-permanent residents. Making it illegal for persons who are lawfully in Canada but who are not permanent residents or citizens to obtain AS is therefore problematic. It would amount to unequal treatment under s. 15 of the Charter and have to be justified under section 1. A section 1 analysis might go as follows: First, the objective of disallowing non-citizens/residents to access AS at all is to prevent AS tourism and protect Canada’s reputation. Second, a total ban is rationally connected to achieving this purpose. However, it might not be considered minimally impairing if there are other ways to achieve the government’s goal. E.g. if people can be prevented from entering Canada for the purpose of accessing AS, then it is not necessary to ban all non-citizens/residents in Canada from access.
Preclude psychological suffering	As noted earlier, Parliament has the freedom to precisely define the term “grievous and irremediable”. The *Carter* decision noted that “Complex regulatory regimes are better created by Parliament than by the courts” (par.125). Psychological suffering is inherently subjective and	Both *Rodriguez* and *Carter* involved severe, physically degenerative diseases. The life interest under section 7 was engaged because of the risk people would commit suicide while they were still physically capable for fear of being physically unable to do so later, which is obviously not a concern with psychological suffering. That a person could completely lose control over the timing and circumstances

	difficult to measure. Permitting assisted suicide for psychological suffering will result in far more deaths and is particularly susceptible to abuse as it is difficult to determine whether truly informed consent was obtained.	and his death and lose control over his body also engaged the liberty and security interests. Again, the impact on life and security of the person interests from prohibiting assisted suicide for psychological suffering are distinguishable from the effects of prohibiting assisted suicide for those in a state of physical suffering and advanced physical debilitation. The standard in *Carter* of "grievous and irremediable" is quite vague and it may be that lower courts will decide to give it a broad reading and apply such a broad reading as the standard required by s. 7. However, given the factors explained above and given the SCC's indications of the need for greater deference to Parliament when Parliament comes up with a complex regime balancing competing interests and rights in place of an absolute prohibition, ruling out psychological suffering should stand.
Require counselling referral	"If in the opinion of the attending physician or the consulting physician a patient may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment, either physician shall refer the patient for counseling. No medication to end a patient's life in a humane and dignified manner shall be prescribed until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment" (Oregon Death with Dignity Act 127.825 s3.03)	Clearly valid as federal law as integral to the whole regime. May cause delays, thus raise *Charter* concerns (s. 7), but ensuring people do not choose death because their judgement is impaired is legitimate criminal law objective; requiring referral is connected to that objective (not arbitrary); only referring those whom physicians suspect have impaired judgment means it is not overbroad. One potential issue arises from the fact that the trial judge in *Carter* found (and SCC accepted) that ordinary physicians are capable of assessing patient competence, voluntariness, etc. (para 126 SCC). It would have to be shown that a psychiatrist is better capable of assessing whether a person is suffering from a psychiatric or psychological disorder, since AS cannot be administered until the counsellor has decided this matter. The delay in accessing AS resulting from attending counselling will be seen to have an impact on liberty and security in the SCC's articulation of those interests. Therefore, it must be in accordance with the PFJ. It would help to define the terms. E.g. Oregon's law: *"**Counseling**" means one or more consultations as necessary between a state licensed psychiatrist or psychologist and a patient for the purpose of determining that the patient is capable and not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.* **Note well**: the fact that the trial judge found that ordinary physicians are capable of assessing patient competence, voluntariness, etc., does not, *ipso facto*, preclude Parliament from also requiring, as an additional safe-guard, the independent assessment of a psychiatric evaluation. Recall that an over-riding theme of the SCC judgement is that "Complex regulatory regimes are better created by Parliament than by the courts." (para. 125).

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Judicial oversight, including adequate notice to immediate family members of judicial application	A judge must have opportunity to inquire regarding the following: - cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice, ambivalence and misdiagnosis of the patient; - that the patient is not a minor; - that the patient not experiencing a minor medical condition; Judicial authorization must occur before death. Judicial authorization is already an acceptable standard in other contexts, e.g. to hold psychiatric patients in hospital and allow child participation in some medical research. Must be done in a standard court, not a tribunal created for this purpose, as a tribunal would be ripe for politicization.	Maintaining judicial control makes it clear what the pith and substance of this regime is about. AS is a social evil and Parliament is only allowing it to the minimal extent required by s. 7. Whether characterized by judges or the provinces as health care or not, the federal government has jurisdiction to control it. Doctors are involved not because this is like any other health care matter but because their expertise are necessary for the proper administration of a regime designed to safely implement a limited exemption. This forms part of the defence of the bill on both division of powers and *Charter* grounds. Physicians' are necessarily involved in the criminal justice system for similar reasons. But this remains a life and death issue properly within federal jurisdiction and subject to judicial authority and monitoring. This was foreseen in the dissenting opinion of L'Heureux-Dubé J. and McLachlin J. in the SCC Rodriguez decision of 1993: "*The safeguards in the existing provisions of the Criminal Code largely meet the concerns about consent. The Code provisions, supplemented, by way of remedy, by a stipulation requiring a court order to permit the assistance of suicide in a particular case only when the judge is satisfied that the consent is freely given, will ensure that only those who truly desire to bring their lives to an end obtain assistance.*"
Consent: concurrent consent of competent adults, witnessed by at least two others, with the entire process audio-video recorded	Unlike most other choices in life, the choice for death is final and easily open to manipulation and as such requires an *extremely* high standard of consent. The patient must make a written request for assisted suicide and have that request signed by two witnesses who can attest that the patient is capable, acting voluntarily, and is not being coerced. One of the witnesses must not be a relative of the patient by blood, marriage, or adoption, someone who is entitled to a portion of the estate of the patient, an owner or employee of the facility where the patient is receiving medical treatment, or the patient's physician. Audio-video recording promotes objectivity and allows for review and verification, which is critical given the final nature of the decision and the reality of wide-spread abuse of consent in other jurisdictions where assisted suicide is legalized. "In order to receive a prescription for medication to end his or her life in a humane and dignified manner, a qualified patient shall have made an oral request and a written request, and reiterate the oral request to his or her attending physician no less than fifteen (15) days after making the initial	Provisions mandating that consent be obtained and recorded are necessarily part of the legislative regime. This argument is made more fully in the division of powers paper. The *Criminal Code* offers the exception/defence of consent in a number of places. For all offences besides murder/assisted suicide, it is possible to have the victim of a crime as a witness to determine whether or not there was consent. Since AS terminates the person whose consent is required, reliably ensuring and recording that person's consent leading up to and at the time of death is necessary in order to implement an effective AS regime. In no way would provisions governing the recording of such information run afoul of the division of powers as happened in *AHRA Reference*, in which the pith and substance of the invalidated provisions was found to be the regulation of health services—setting standards for quality of care rather than controlling a public evil or a threat to public health or safety.

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	oral request. At the time the qualified patient makes his or her second oral request, the attending physician shall offer the patient an opportunity to rescind the request." (Oregon Death with Dignity Act, 127.840 s.3.06) "A patient may rescind his or her request at any time and in any manner without regard to his or her mental state. No prescription for medication may be written without the attending physician offering the qualified patient an opportunity to rescind the request." (Oregon Death with Dignity Act, 127.845 s.3.07)	
Detail informed consent	The qualified patient must be fully informed by the attending physician of: - His or her medical diagnosis; - His or her prognosis; - The potential risks associated with taking the medication to be prescribed; - The probable result of taking the medication to be prescribed; and - The feasible alternatives, including comfort care, hospice care and pain control.	This does not raise *Charter* concerns; in fact, such requirements are contemplated in the *Carter* ruling as being necessary if Canada is to make any exception to the general prohibition on assisted suicide at all. This would impose certain requirements on doctors in their practice, but these are clearly tied to (and necessary for achieving) the criminal law purpose for which this entire regime is being implemented.
Waiting Period	"No less than fifteen (15) days shall elapse between the patient's initial oral request and the writing of a prescription under ORS 127.800 to 127.897. No less than 48 hours shall elapse between the patient's written request and the writing of a prescription" (Oregon Death with Dignity Act, 127.850 s.3.08)	The waiting period is common in the very few jurisdictions that allow assisted suicide. It is a necessary component in this legislative scheme to ensure that vulnerable people are not victimized. It also serves the purpose of giving the person wishing to commit suicide the time to consider other options, which this legislation should also require.
No right to physician assistance unless physically incapable of taking own life	Failure to require this will shift the onus to the medical profession to kill. Suicide is not a choice that can be promoted by the state or medical profession.	See above comments on proscribing psychological suffering as grounds for access to AS. The same considerations apply. All the examples given in the SCC's background to the case before it involved illnesses progressing towards total physical incapacity (*Carter*, paras 5-18). The eventual physical incapability of committing suicide was a reality in both *Rodriguez* and *Carter*. The SCC summarized its finding on the *Charter* issue in para 56, before getting into the details, as follows: "*…we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position…*" Whether or not the more vaguely written limited invalidation of s. 241(b) and 14 (para 127) requires a broader exception may be open to debate, but it is perfectly reasonable for Parliament to respond by enacting an exception only for people in a position like that of Ms. Taylor. The "institutional dialogue" tradition and the SCC's indications of the need for deference towards a legislative regime replacing the absolute prohibition suggest that the Court would likely respect such a limit. In any case Parliament has an easily articulable case for so restricting AS.

Conscience rights, for health workers and institutions	The conscience rights of medical workers trumps the request of an individual to have that medical worker end their life. The Hippocratic Oath has required doctors to refuse assisted suicide and euthanasia for well over 2,000 years. Forcing all medical workers to deny their conscience and kill, or refer to another to kill, another human being undermines basic human rights and will result in an exit of health care workers from the profession. Only specially licensed physicians will be permitted to provide assistance in dying. Obtaining such a license is entirely voluntary. Assisted suicide is a federally controlled activity, not a health care treatment, and nothing in this Act shall be construed to require physicians to participate directly or indirectly in providing aid in suicide.	If only licensed physicians may do AS, and becoming federally-licensed as an assisted suicide provider is completely voluntary, this may deal with the bulk of these concerns. Referrals remain a problem however. Question is on division of powers grounds whether the federal government can preclude provincial professional bodies from requiring their members to provide referrals for AS (what the CPSO requires has the most immediate impact on doctors' practice). We must emphasize that AS is not health care, but a federally-controlled, death-inducing activity which nobody, including doctors, will be forced to participate in directly or indirectly. Note that SCC in Carter notes that physicians have freedom of conscience but that patients and physicians rights will have to be balanced.
Require sessions with independent palliative care specialists	Polls continually affirm that if people are aware of palliative care options, they will choose these over assisted suicide. The options will not be immediately known and will depend on a patient's condition. As such each person who requests an assisted suicide must first be made aware of the palliative care options that exist for them. Comprehensive palliative care, the development of which has advanced considerably in the past 10 years, is always to be considered the preferred option. Informing the severely sick about comprehensive palliative care and its effectiveness in relieving suffering helps prevent suicide.	As with a mandated hiatus period and possible counselling requirement, the resulting delay of required sessions with a palliative care specialist may impact s. 7 interests. However, because such measures are not vague, arbitrary, overbroad, or grossly disproportionate, they will stand. Requiring a session with a palliative care specialist does not raise any significant division of powers concerns. How palliative care is delivered may fall under provincial authority, but merely ensuring that people seeking AS are adequately informed of palliative care fits harmoniously within the federal legislative scheme and furthers the purpose of the federal law.
Annual statistics	The law must include a requirement that an appropriate federal agency collect information pertaining to compliance and make public an annual statistical report that includes details of where and how compliance was not achieved, as well as the number of assisted suicide requests were made, how many were denied, and how many were dropped after palliative care was offered and implemented.	Any reporting requirements imposed on doctors must be for a valid federal purpose, which is not hard to justify. Existing examples of federal reporting requirements on doctors: - The *Aeronautics Act* requires physicians to report patients they believe, on reasonable grounds, to be a flight crew member, an air traffic controller (see also *Railway Safety Act* and *Canada Shipping Act*) - CDSA requires physicians to report controlled drugs believed to have been lost or stolen from a clinic - On occasion physicians will be required, by court order, to report the results of a medical and/or psychological assessment of a young person to the court - *Youth Criminal Justice Act* These reporting requirements are clearly tied to the overall federal legislative regime. As the SCC noted in *Carter*, scrupulous monitoring will be necessary in order to prevent abuse and other harmful side effects of legalizing assisted suicide.

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Liabilities / Penalties	The following four paragraphs are based on the Oregon model, which assumes a prescription of a lethal dose as the method of PAS. Every one who, without authorization of the patient, willfully alters or forges a request for prescribed lethal drug or conceals or destroys a rescission of that request with the intent or effect of causing the patient's death shall be guilty of an indictable offense and liable to imprisonment for life. Every one who coerces or exerts undue influence on a patient to request a prescribed lethal drug for the purpose of ending the patient's life, or to destroy a rescission of such a request, shall be guilty of an indictable offense and liable to imprisonment for life. Every one who, without authorization of the patient, with intent to alter, forge, conceal or destroy an instrument, the reinstatement or revocation of an instrument or any other evidence or document reflecting the patient's desires and interests, with the intent and effect of causing a withholding or withdrawal of life-sustaining procedures or of artificially administered nutrition and hydration which hastens the death of the patient, is guilty of an indictable offence and liable to imprisonment for life. Everyone who, without authorization of the patient, with intent to alter, forge, conceal or destroy an instrument, the reinstatement or revocation of an instrument, or any other evidence or document reflecting the patient's desires and interests with the intent or effect of affecting a health care decision, is guilty of an indictable offence and liable to imprisonment not exceeding 14 years.	Each of these penalties is tied to criminal law purpose of the legislative scheme. The penalties also give the legislative scheme the requisite criminal law form (prohibition + penalties + criminal law purpose).