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Abstract

THE SUPREME COURT OF CANADA'S (SCC) decision in Carter v Canada ("Carter") was a landmark moment in Canadian jurisprudence. In Carter, the SCC declared two sections of the Criminal Code to be of no force and effect because the "prohibition on physician assisted dying…deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irredeemable medical condition…that causes enduring suffering that is intolerable to the individual." Not only did Carter overturn an earlier decision in Rodriguez v British Columbia (Attorney General) ("Rodriguez"), which had upheld prohibitions on medical assistance in dying (MAID), but Carter was also instrumental in two other aspects of Canadian Charter of Rights and Freedoms ("Charter") jurisprudence.

Book Review

Assisted Suicide in Canada: Moral, Legal, and Policy Considerations by Travis Dumsday[1]

ANITA SINGH[2]

I. A LANDMARK RULING: *CARTER V CANADA*

THE SUPREME COURT OF CANADA'S (SCC) decision in *Carter v Canada* ("*Carter*") was a landmark moment in Canadian jurisprudence. In *Carter*, the SCC declared two sections of the *Criminal Code* to be of no force and effect because the "prohibition on physician assisted dying…deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irredeemable medical condition…that causes enduring suffering that is intolerable to the individual."[3] Not only did *Carter* overturn an earlier decision in *Rodriguez v British Columbia (Attorney General)* ("*Rodriguez*"),[4] which had upheld prohibitions on medical

1. (UBC Press, 2021).
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3. *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 4 [*Carter*].
4. [1993] 3 SCR 519.

assistance in dying (MAID), but *Carter* was also instrumental in two other aspects of *Canadian Charter of Rights and Freedoms* ("*Charter*") jurisprudence.[5]

First, the Court dissected the differences between the right to life, the right to liberty, and the right to security of the person under section 7 of the *Charter*. The SCC agreed that the right to life includes "physical integrity and autonomous decision making" when it comes to end-of-life decisions.[6] On liberty and security, the SCC concurred with the appellant that the existing prohibition in the *Criminal Code* "interferes with [a person's] ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like [the appellant] to endure intolerable suffering, it impinges on their security of the person."[7] Second, despite similar facts between the two cases, the Court confirmed that the trial judge's decision in *Carter* was correct to break with the precedent that had been established in *Rodriguez*. In particular, they noted that a new legal issue had been raised due to the significant evolution of section 7 jurisprudence around "overbreadth" and "proportionality" since *Rodriguez*.[8] They also found that there had been a significant change in the circumstances and evidence to an extent that "fundamentally shift[ed] the parameters of the debate" and, therefore, the established precedent required revisiting.[9] The SCC concluded that the trial judge was right to consider fresh evidence on MAID from Belgium, the Netherlands, Denmark, and key US states to revisit the ruling from *Rodriguez*.[10]

The decision is short by SCC standards but has had a massive legal and legislative impact. In response to the ruling, Parliament legalized MAID the following year.[11] However, instead of putting the issue of MAID to rest, *Carter* has sparked an even greater debate. Some commentators have called for an expansion of MAID, especially to expand eligibility criteria to include those that suffer from mental health illnesses such as dementia but can provide advanced

5. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
6. Dumsday, *supra* note 1 at 25.
7. *Carter*, *supra* note 3 at para 66.
8. *Ibid* at paras 72-79.
9. *Ibid* at paras 44, 46. The SCC makes the following statements about overbreadth and proportionality: "By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives.…Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate" (*ibid*).
10. *Ibid* at paras 107, 109.
11. See *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3.

directives to consent to MAID.[12] This expansionist position was supported by a 2019 Superior Court of Quebec decision in *Truchon c Procureur général du Canada* that broadened the criteria for who could apply for MAID when it struck down the "reasonably foreseeable natural death" provision in the legislation.[13] This provision had previously limited MAID availability to those at the "end of life" due to their diagnosed illness.[14] Bill C-7, which removed the "reasonably foreseeable natural death" provision, received Royal Assent on 17 March 2021. In contrast to the expansionist view of MAID and at the core of this book review, others argue that there are ethical, moral, and religious reasons why *Carter* should be overturned.

II. ASSISTED SUICIDE IN CANADA

To support the latter, *Assisted Suicide in Canada: Legal, Moral, and Policy Considerations* by Travis Dumsday, attempts to "explor[e] the moral, legal and policy issues arising from the Supreme Court of Canada's ruling in *Carter v Canada*."[15] While Dumsday's goal is to "offer an accurate and fair presentation of the range of competing legal and moral arguments" surrounding the MAID debate, his central thesis seeks to show that the "Supreme Court of Canada made errors, both legal and moral, in *Carter v Canada* and that assisted suicide and active euthanasia are morally impermissible acts that ought to be recriminalized."[16]

To meet this goal, the book is divided into two parts. In the first three quarters of the book, Dumsday traverses a complicated road to establish a theoretical framework through which he can demonstrate the moral and ethical impermissibility of MAID. To do this, the author reviews four theories associated with the philosophy of "human well-being"—hedonism, desire satisfaction

12. See *e.g.* Dying with Dignity, "2020 Poll: Support for medically-assisted dying in Canada" (2021), online: <dyingwithdignity.ca/media-center/poll-support-for-medically-assisted-dying-in-canada> [perma.cc/U3HY-UJGT]; Daryl Pullman, "In a Familiar Voice: The Dominant Role of Women in Shaping Canadian Policy on Medical Assistance in Dying" (2020) 3 Can J Bioethics 11; Jocelyn Downie & Udo Schuklenk. "Social Determinants of Health and Slippery Slopes in Assisted Dying Debates: Lessons from Canada" (2021) 47 J Medical Ethics 662.
13. 2019 QCCS 3792.
14. Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2020 (assented to 17 March 2021), SC 2021, c 2. Future amendments that include mental illness as eligibility criteria for MAID will come into effect in March 2023.
15. Dumsday, *supra* note 1 at 11.
16. *Ibid* at 6.

theory, objective list theory, and perfectionism.[17] To apply these theories to MAID, he posits that a "basic moral principle" of *non-harm* should underlie each theory as guidance for his conclusions.[18] Dumsday does not end up applying any single theory but concludes that if we apply this basic moral principle of non-harm, all ethical and moral standpoints lead to the conclusion that MAID is morally and ethically impermissible. By the end of chapter four, he concludes—through "*the inscrutability proviso*"—that where "reasonable doubt persists concerning the moral permissibility [of MAID]….[T]he law should refrain from permitting deliberate killing in that sort of case."[19] In the last four chapters of the book, having come to this conclusion, the author then provides examples of how governments should create policy and legislation to reverse the *Carter* decision, including canceling funding for MAID, using the notwithstanding clause, and applying sanctions to indirectly criminalize those that participate in MAID.

III. CRITICAL ANALYSIS OF DUMSDAY'S *ASSISTED SUICIDE IN CANADA*

Unfortunately, this book does not nearly meet its own promise of being a systematic and balanced investigation of the arguments for and against MAID. Although the author does touch on all three—moral, legal, and policy questions—it reads more like a draft of several loosely gathered and unfinished ideas rather than a comprehensive examination of MAID. There are three central critiques at the core of this book review, addressed below.

A. CHALLENGE ONE: SELECTIVE ARGUMENTATION

The central issue with this book is the author's use of selective argumentation: defining terms in a way that leads to a pre-determined conclusion, misleadingly applying analogies, and changing his logical position throughout the book to always be able to conclude that MAID is morally impermissible. The following examples highlight this problem in the book.

In chapter four, Dumsday employs moral and ethical theory to suggest that "MAID will [only] be permissible in any situation in which these practices maximize the lifetime pleasure-over-pain ratio of those affected."[20] He acknowledges that it is hard to predict or quantify a person's pain and suffering, but insists that the

17. *Ibid*, chs 3, 4.
18. *Ibid* at 63-64.
19. *Ibid* at 120.
20. *Ibid* at 79.

"pain-pleasure" calculation must include the impact of early death on the family, caregivers, and medical practitioners, including the opportunity for others to "exercis[e]…and develop…virtues themselves in the love, respect, and patience that they show" the patient.[21] In other words, Dumsday raises the benchmark for "pleasure over pain" beyond the terminally ill patient themselves to consider the virtue gains of family, friends, and caregivers. Yet, Dumsday does not engage with the opposite consideration, even those he has previously introduced. Previously, in chapter two, he cites testimony from *Carter* where neurologist Sharon Cohen explains that a family who has to witness a terminally ill patient's slow death is "extremely painful for both the patient and the family."[22] In that chapter, Dumsday feels comfortable rejecting the premise of Cohen's testimony, stating that "perhaps the court should have noted the potential complications… associated with taking *someone else's* suffering as justification for euthanasia," but then flips his own argument in chapter four, stating that the "pain-pleasure" calculation should consider *someone else's* virtue as an argument against MAID.[23] To this end, his position is self-contradictory and selective.

Throughout the book, Dumsday argues that MAID will always be impermissible because there are health care alternatives to MAID for the terminally ill. In particular, Dumsday relies on the argument that, because Canada has extensive access to palliative care, "the morality of many instances of MAID [is] heavily contingent on the quality of care received by people" that are suffering.[24] Even when the only palliative care available to minimize pain and suffering is persistent sedation (*e.g.*, induced coma), he sees an ethical balance that would "decide against assisted death" because the calculation must consider all alternative options.[25] This is a perfect example of how the author actively sets up specious arguments without engaging with the requisite data or evidence to draw these conclusions. In this scenario, the author assumes an idealized and privileged version of the quality of health care in Canada. He suggests that because of Canada's ability to provide palliative care, even to the point of persistent sedation, there should be a blanket reversal of the decision in *Carter* across Canada. This recommendation ignores the fact that health care is not a universally available good in Canada. Rural and remote, Indigenous, poor, racialized, and new immigrant communities are notoriously unable to access the same health care

21. *Ibid* at 81, 83.
22. *Ibid* at 23.
23. *Ibid* [emphasis in original].
24. *Ibid* at 81.
25. *Ibid* at 83.

services as white, middle-class, or upper-middle-class urbanites.[26] His argument that MAID should not be available where alternatives exist would lead to an unworkable conclusion in an unequal health care system such as Canada's.

B. CHALLENGE TWO: SLIPPERY SLOPES

A second challenge is that the book is stuck in a conceptual loop that focuses on refuting the permissibility of MAID but does not consider recent judicial developments or findings from the implementation of MAID in the last seven years. Given that MAID has effectively been decriminalized since 2015, Canada now has seven years of experience, stories, and data on MAID. One of Dumsday's arguments relies heavily on the contention that the *Carter* decision and subsequent legislation does not allow medical staff who are conscientious objectors to opt out of providing MAID.[27] Yet, he does not point to any developments that suggest that this criticism has been actualized in the last seven years. It would have made for an excellent contribution to the literature if the author had provided evidence from physicians, caregivers, and other experts on their experiences providing medically assisted dying.

His treatment of authorities raises questions about the actual balance of his assessments. In chapter four, Dumsday takes issue with the Court's consideration that the right to life under section 7 of the *Charter* includes personal autonomy over an individual's end-of-life medical decisions.[28] To refute the SCC's position, Dumsday relies on ethicists Kevin Yuill and Neil Gorsuch who liken MAID to consensual homicide.[29] Yuill and Gorsuch argue that "the autonomy argument may only truly honour autonomy [if it] approv[es] of all suicides."[30] In relying on these authors, Dumsday does not differentiate MAID from other forms of suicide by examining its restricted eligibility conditions or built-in safeguards. Instead, he doubles down on this slippery slope argument, asking "[w]hy is there a tendency to think (rightly or wrongly) that where possible we should intervene to stop the suicide of the recently divorced, or the recently unemployed, or the cult member but not (perhaps) the terminally ill?"[31] He then concludes that—

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26. See *e.g.* David May, "Rural–urban Inequities In Palliative Care" (2021) 63 BC Medical J 255; Kavita Algu, "Denied the Right to Comfort: Racial Inequities in Palliative Care Provision" (2021) 34 EClinicalMedicine 1.
27. Dumsday, *supra* note 1, ch 7.
28. *Ibid* at 25.
29. *Ibid* at 91.
30. *Ibid*, citing Kevin Yuill, *Assisted Suicide: The Liberal, Humanist Case Against Legalization* (Palgrave Macmillan, 2015).
31. *Ibid* at 92.

as with the recently divorced or the unemployed—because there are rational alternatives for the terminally ill that could alleviate their suffering, MAID should be considered morally repugnant.[32]

In other parts of the book, Dumsday uses analogies and slippery slope arguments with abandon, suggesting that to accept the moral permissibility of MAID is the equivalent of accepting capital punishment,[33] honour killings,[34] and suicide cults[35] as morally permissible.[36] For example, in chapter four, he questions the morality of physicians that choose to administer MAID and asks the reader to consider the moral grounds for "killing innocent people" (perhaps as a contrast to killing guilty people).[37] This fluidity between analogies creates three separate arguments, made without delineation: (1) creating a false equivocation between MAID and state-sponsored murder, (2) questioning the morality of medical professionals that provide MAID, while (3) ignoring any discussion about the choice of the person that chooses to exercise the option of MAID. In this way, the book feels dated because it continues to reflect on old and tired hypotheticals, rather than providing a contemporary critique of MAID.

C. CHALLENGE THREE: UNTENABLE POLICY CONCLUSIONS

The third challenge of the book relates to the author's legal and policy conclusions. In the last four chapters, having satisfied himself that he has proven that MAID is morally repugnant, Dumsday argues that governments have a moral and ethical obligation to use their powers to undermine the Court's decision in *Carter*. He offers solutions for how governments should do this in the last three chapters. While some solutions are possible—such as asking provinces to withdraw health care funding for MAID (presumably under physician billing agreements, but it is not made clear)—other examples stand out as particularly unfounded and

32. *Ibid* at 23, 27, 40, 84, 86-87, 98, 101, 104, 139. Throughout the book, the author relies exclusively on palliative sedation as an equivalent alternative to MAID.
33. *Ibid* at 91-92.
34. *Ibid* at 144.
35. *Ibid* at 91-92.
36. In one part of his argument, he invokes an odd analogy, stating, "Imagine someone suffering from a bizarre psychiatric disorder whose emotional anguish can be relieved only by watching the torture of live kittens…his right to the alleviation of suffering is trumped by the obligation not to engage in animal cruelty" (*ibid* at 85). In another example, the author tries to explain why taxpayers should not have to pay for MAID, and says, "Let us further assume that a substantial portion of the population believes…that competitive boxing is grievously immoral…Should these individuals be compelled to pay for our Olympic boxing program? No" (*ibid* at 129-30).
37. *Ibid* at 129.

suggest the author's limited familiarity with how policy and legal decisions are made. In one example, he suggests that the model that allows taxpayers to choose to direct property taxes to the Catholic school system instead of the public school system could be employed to allow taxpayers to divert their taxes away from health care institutions that provide MAID.[38] However, Dumsday does not acknowledge the differences between education and health care funding that would make this suggestion impracticable. Catholic school funding is only supplemented via municipal property taxes, which provide the option for taxpayers to opt to send their tax dollars to a local Catholic school board (where the option exists).[39] But the bulk of Catholic school funding comes directly from the general budget. Provincial health care funding differs significantly—health care institutions are funded through the province, physicians bill their services through provincial insurance plans, and there are no local "health care boards" to which one could divert funds (in Ontario, for example, the health care system relies on provincially defined health care regions).[40]

In another example from chapter five, Dumsday argues that, given the moral turpitude of MAID, the federal government has no choice but to use the notwithstanding clause to shield the impugned provisions in the *Criminal Code* from the ruling in *Carter*. Dumsday correctly recognizes that the notwithstanding clause is not available to provinces as the *Criminal Code* is a federal statute. Instead, he advocates for provinces to use "various indirect means at their disposal via their constitutional authority over health care."[41] His solution is that provinces adopt other sanctions such as revoking medical licences or fining practitioners that offer MAID to terminally ill patients.[42] Any law student will immediately identify why this suggestion would come under legal scrutiny. In 1993, the SCC clearly stated that provinces cannot circumvent federal criminal law jurisdiction, when the Nova Scotia government created regulations to punish Doctor Henry Morgentaler with sanctions for conducting abortions.[43] As is familiar to most, the SCC concluded in *R v Morgentaler* that the legislation was not valid regulation

38. *Ibid*, ch 6.
39. Municipal Property Assessment Corporation, "Changing Your School Support" (2022), online: <www.mpac.ca/en/MakingChangesUpdates/ChangingYourSchoolSupport> [perma.cc/8XBR-LPSW].
40. Ontario, Ministry of Health, "Published Plans and Annual Reports 2020-2021: Ministry of Health" (2022), online: <www.ontario.ca/page/published-plans-and-annual-reports-2020-2021-ministry-health> [perma.cc/MQK8-48AH].
41. Dumsday, *supra* note 1 at 123.
42. *Ibid* at 122.
43. *R v Morgentaler*, [1993] 3 SCR 463.

of hospitals and medical procedures, but in pith and substance was an attempt to criminally sanction abortion contrary to section 91 of the *Constitution*.[44] In its own failure to launch, Dumsday's recommended legal option has already been shown to be unconstitutional. This is just one example of how Dumsday's book suffers from a lack of familiarity with previous jurisprudence, constitutional law, and the legal system as a whole. Largely, his recommended solutions in the concluding chapters feel like an attempt to throw all options at the wall to see what sticks, rather than a serious contemplation of legal and policy implications of alternative options.

This review does not totally discount the virtues of this book. Generally, I would commend the author's summary in the first two chapters of the book. For those unfamiliar with *Carter*'s lineage, the author provides a digestible summary of both the jurisprudence and the legislative changes made afterwards to address the court's ruling. Second, if read with a very clear understanding that the book comes from a specific moral and religious perspective, it might be a useful guide for understanding why some people in Canada still consider MAID unacceptable. Conversely, those interested in the book for its legal or political analysis will be disappointed. If future editions are going to be considered, the book must be honest about what it does and does not do. It is not a balanced investigation into the MAID debate. Instead, it is largely a think piece on the ills of MAID, written under the guise of giving space to various viewpoints.

44. *Ibid.*