ISSN 1704 - 9377
Summer 2016
Volume 41, Number 2

Law Matters

Sex, Drugs & Assisted Dying: How free should we be?

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITOR'S NOTES

By Robert Harvie, QC

Well. This issue of Law Matters, "Sex, Drugs & Assisted Dying," seeks to challenge readers and provoke personal examination of our feelings on some pretty divisive issues – basically relating to the relationship between our legal system and our personal autonomy. Can we consent to BDSM sex? Why and how should we deal with legalization of marijuana, and is the S.C.C. case in Carter a welcome breath of respect for personal autonomy, or a degradation of society's respect to "life"?

The articles in this issue, while divergent (intentionally) on the points in question, are all, in my opinion, extremely well-written and thought provoking.

And there's the point. To provoke thought. Not to preach to the converted. Not to solidify the political base, or to polarize – but, quite the opposite. To bring much needed broad and varied discussion to some very difficult issues, and I think our contributors have done an admirable job. The next part of the "job" is up to the readers.

Most of our readers are lawyers, so they might consider themselves somewhat skilled in understanding moral ambiguity: the need to consider two sides of an argument.

I would suggest, however, that we as lawyers are just as subject to "confirmation bias" as any other human being – the tendency to look for information to confirm our preconceptions. We "think" we're weighing arguments, when, in fact, we're sifting out the stuff that we disagree with, and holding onto the stuff that accords with our world view.

So – here's my challenge. Read this issue with a view to challenge your initial point of view. If you are opposed to the Carter decision on assisted dying – pay particular attention to the article from Emma Carver, "Preserving Life through Death." Feel her anguish and empathy for clients seeking to end their suffering on their own terms. And push yourself to consider why the argument you hold might just be wrong.

Read this whole issue with a view to challenge your own biases. Are you sexually assaulting your wife as you kiss her to wake her from her sleep? Ummni Khan, in the article "Hot for Kink, Bothered by the Law" suggests that, maybe, you are.

In the current climate of 140 character Twitter, entertainment masquerading as "news", and politicians selling votes like Pepsi sells soda, it is, perhaps, more important than ever that we challenge ourselves and our preconceptions on important issues. That we look at things more deeply.

With great appreciation to Joshua Sealy-Harrington and Ola Malik who managed this issue, they have brought together eight extremely well-written articles which, no doubt, will challenge you, if you have the courage to be challenged.

Here's to courageous readers.

In This Issue...

Contributing Authors

Wayne Barkauskas
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Hon. Judge A.A. Fradsham
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PRESIDENT'S REPORT

By Wayne Barkauskas

Summer in Alberta is now in full swing as I come to the end of my term as President of the CBA Alberta Branch. It has been an honour to represent and advocate for the CBA as I have travelled across the country meeting with members and other stakeholders in the legal profession. In these final weeks of the 2015-16 year, I want to recognize the work of our entire Executive Committee, particularly that of outgoing Past President Steve Mandziuk, QC. Steve worked tirelessly towards the betterment of the CBA during his time on the Executive, culminating in his work chairing the CBA Re-Think Committee. It has been a privilege to work with him, and he will be missed.

This spring, the best qualities of the legal profession were on display in the face of the wildfire in Fort McMurray. Early on, we had more than a dozen law firms come forward to offer extra office space for those lawyers displaced by the fire. The CBA then partnered with Pro Bono Law Alberta, Legal Aid Alberta and other community legal organizations and clinics to host a special Dial-a-Lawyer event, which provided free legal advice to those affected by the wildfires. When we put out the call for volunteers, the response from the profession was so outstanding that we had to begin putting interested volunteers on a waiting list. On behalf of the CBA and our partner organizations in this initiative, I want to extend our thanks to all of those who donated their time to assist those in need. We can only imagine how stressful this time is for Fort McMurray and area residents, and know that by providing services such as Dial-a-Lawyer, we are doing our part to alleviate that stress.

The month of June brought a new round of judicial appointments from the federal government. We were very happy to hear that among the appointments to the Court of Queen's Bench were CBA Alberta past president Gillian Marriott, QC, and former CBA National Magazine columnist and long-time member Doug Mah, QC. I had the opportunity to meet with federal Minister of Justice Jody Wilson-Raybould shortly after the appointments, and thanked her for taking action on the judicial shortage in Alberta. There are still vacant positions in our province that need to be filled, in addition to a number of new positions that we are hoping will be created to take the strain off of our court system. The CBA will continue to work with the courts to advocate on behalf of the legal profession in this respect.

Now is the time of year to renew your national membership and register for your chosen sections. When renewing your membership, take a moment to review the Portfolio and Portfolio Plus options available to you. Alberta has been leading the country in purchases of these two options, and our members have clearly seen the value added to their memberships. By purchasing a Portfolio or Portfolio Plus package, you will receive education credits, which can be used towards the purchase section registration, or registration in any CBA PD activity across the country, such as webinars and conferences. In addition, you will receive up to three free materials-level registrations to the sections of your choice and rebates of up to 3% on all CBA purchases. If you are active in CBA sections, regularly participate in other PD activities, or attend CBA conferences, the packages are an excellent added value to your base membership.

In Alberta, we take pride in recognizing the diversity of our membership, and consistently providing new offerings to meet the needs of our members. Accordingly, we are pleased to introduce two new south sections, which will be available to members starting this 2016-17 section year. The first of these is the Internationally Trained Lawyers Section, the goal of which is to address the diverse needs of those members of the profession trained outside of Canada. This section will provide insight into the qualification process for those members currently undergoing accreditation, as well as the opportunity for networking and mentorship. The second new section is the Food & Agribusiness Section, which will focus on the needs of those members who represent producers and companies involved in inputs, storage, trading, transportation and logistics, processing and distribution, and retail within the food and agribusiness sector. Both of these sections are available for members to attend in person in Calgary, or via webcast throughout the province. We are also proud to offer the Food & Agribusiness Section via webcast to members across Canada – a first for any Alberta Branch section.

Every member of the CBA Executive comes into the role of president with a personal list of priorities that they wish to achieve during their term. I have been overwhelmed by the support of my fellow executive in my efforts to achieve these goals. They included steering CBA Alberta to a balanced budget (which we achieved this year), and trying to get the Province of Alberta to adopt legislation to deal with the division of property when common law couples break up. I am pleased to say that the Alberta government has advised that work is now proceeding to create that legislation. I also made it a priority to press for the appointment of additional Queen's Bench judges. I can categorically state that the CBA has played a large role in raising the visibility of the issue across the country generally, and especially with the media and the federal government. The hardest part of reaching the end of my term is coming to the realization that sometimes, the best that you can accomplish in one year is to get the ball rolling in the right direction. You then have to simply hope that the ball keeps rolling.

It has been an honour to serve the members of CBA Alberta and I only hope that I have done so in a way that honours the great history and contribution of other past presidents of CBA Alberta.

Jeremiah Kowalchuk: Joy to the CBA

By Greg A. Harding, QC

Jeremiah was a bullfrog, he was good friend of mine
I never understood a single word he said
But I helped him drink his wine….

With insincere apologies to Three Dog Night/ Hoyt Axton (as well as to Jeremiah) I thus introduce Jeremiah Kowalchuk, the newest President of the Canadian Bar Association, Alberta Branch. Truth be told, however, as an introduction the oldies song snippet rather misses the mark. For one thing, amongst his many fine talents, Jeremiah happens to be an outstanding communicator, and an exceptionally forward thinker. And (any paradox aside) being the wannabe Saskatchewanian that he is (having been born in Hinton Alberta but having lived half of his life in Saskatoon) the drink he is most likely to have available for sharing happens to be a Pilsner.

By way of elaboration Jeremiah well recognizes the importance of being a contributor – and is best described as a consummate professional.

Since entering law school he has devoted extraordinary time and energy to "giving back" so as to advance the interests of both the profession and the public. Illustrations of Jeremiah's dedication to the administration of justice include: his being one of the very first pro bono volunteers at the Edmonton Community Legal Centre (continuing on to its Board of Directors where he recently completed a two year term); his CBA volunteer service prior to joining the CBA Alberta Branch Executive in 2013 – his having sat on and chaired a number of CBA committees and sections, including the Alberta Law Conference (Co-Chair in 2011 and 2013), Law Day (Co-Chair from 2008 to 2011), and the Construction Law Section (North); and his participation as both an instructor and evaluator for the Bar Admission/CPLED course.

Jeremiah is likewise a gifted advocate, familiar and experienced with many facets of the law and practice. As a student he worked at the Alberta Law Reform Institute. After articling at Field Law and being called to the bar in 2003, he practiced as an Associate and then, from 2006 to 2012 carried out a broad and successful practice as a sole practitioner. Returning to Field in 2012 as a partner, he soon began serving his current role as Chair of the Edmonton office's General Litigation Practice Group. And in perhaps the pinnacle of any challenging law management career, he is currently serving on the Space Planning Committee for the relocation of Field's Edmonton office.

To the above, Jeremiah adds a healthy complement of balance and perspective. Sources, many of whom wish to remain anonymous, confim that much of his good judgment stems from his marriage to his wife of nine (9) years Jodie Hierlmeier, also a lawyer (with Alberta Justice), and likewise a Field Law alumni. With Jodie, he shares a love of travel—their relationship has taken Jeremiah to many destinations outside of the Saskatchewan rectangle of his upbringing, starting with Jeremiah making a trek to Tanzania to visit Jodie, where she was working as a legal intern after they first started dating. They have since been eagerly covering the real estate in-between.

One of his preferred modes of travel happens to be via his trusty "Triumph" motorcycle—others who make frequent trips to Sylvan Lake may have spotted him hanging out at the Big Moo, milkshake in well-leathered hand.

Being somewhat of an unnatural athlete (i.e., having played both football and basketball and now being a recreational runner) Jeremiah is also an avid sports fan—including, I venture, as a follower of the almost famous, but now defunct in-line hockey team, the Anaheim Bullfrogs.

Some of his talents, not surprisingly, are hidden to all but his closest friends and family. I understand, for example, he enjoys both cooking and live music—not something many of us can say they have tried at the same time.

Jeremiah also comes with a sense of humour. Don't be fooled, for example [spoiler alert], by his contention that, having been abandoned by wolves and raised by his parents, his real name is Jebidiah. He is also the author of two, perhaps three, hilarious tweets.

Finally, he is both modest and ambitious. One of his goals remains to be the first construction lawyer to land a four-part bid contract maneuver (dubbed a "mod-quad"). He also has a keen ability to listen and take advice, one of his mentors being that famous Edmonton philosopher, Dave Semenko, who taught him that sometimes you just have to stop fighting for what you believe in, and instead do what is right….

All seriousness aside, this is but a brief opportunity to offer a glimpse of Jeremiah's outstanding character and integrity. But soon we will all be demonstratively benefiting from Jeremiah's dedicated, collaborative leadership at the helm of the CBA Alberta Branch (and beyond!). I thus acclaim him, and commend him to you. And as the rest of the song goes:

And he always had some mighty fine wine

Singin'
Joy to the world
All the boys and girls now
Joy to the fishes in the deep blue sea
Joy to you and me ***[and to the CBA!]***

WHAT'S HAPPENING

August

12-14: The Canadian Bar Association presents the CBA Legal Conference. Westin Ottawa, Ottawa, ON. Register online at www.cbalegalconference.org.

30: The Canadian Bar Association British Columbia Branch presents New Law, New Issues: End of Life Planning in a Changing Legal Landscape. Online. Register online at www.cbapd.org

September

13: The Ontario Bar Association presents Career Alternatives: Becoming a Freelance Lawyer. Online. Register online at www.cbapd.org.

23: The Ontario Bar Association presents the Seventh Annual Bread and Butter Issues in Family Law. Online. Register online at www.cbapd.org.

27: The Ontario Bar Association presents the Intersection Between Assisted Human Reproduction and Estates. Online. Register online at www.cbapd.org.

29-30: The Canadian Bar Association presents the CBA National Insolvency Conference. Sheraton Grand Chicago, Chicago, IL. Register online at www.cbapd.org.

30: The Ontario Bar Association presents Strategic Estate Planning Considerations. Online. Register online at www.cbapd.org.

October

6: The Ontario Bar Association presents the 15th Annual Charter Conference. Online. Register online at www.cbapd.org.

6-7: The Canadian Bar Association presents the CBA Competition Law Fall Conference. Shaw Centre (formerly the Ottawa Convention Centre), Ottawa, ON. Register online at www.cbapd.org.

20: The Ontario Bar Association presents Planning and Litigation: Financial Products and Their Implications to Your Practice. Online. Register online at www.cbapd.org.

24-25: The Canadian Corporate Counsel Association presents the 2016 World Summit - The In-House Counsel Going Global. Visit www.ccca-accje.org for further details and to register.

26-27: The Canadian Bar Association presents the CBA International Law Conference. Sheraton Hotel - Rideau Room, Ottawa, ON. Register online at www.cbapd.org.

26-30: The Canadian Bar Association presents the CBA Will, Estate and Trust Fundamentals for Estate Practitioners. Westin Prince, Toronto, ON. Register online at www.cbapd.org.

28-29: The Canadian Bar Association presents the CBA Access to Information and Privacy Law Symposium. Fairmont Chateau Laurier Hotel, Ottawa, ON. Register online at www.cbapd.org.

November

3-4: The Canadian Bar Association presents the CBA NEERLS and Department of Justice Meeting. Ottawa, ON. Details coming soon at www.cba.org.

9: The Canadian Corporate Counsel Association presents Leadership, Change and Innovation in Legal Services Delivery. Torys LLP, Calgary, AB (sessions also available in Vancouver, Toronto and Montreal). Register online at www.cbapd.org.

17: The Ontario Bar Association presents the 16th Annual Franchise Law Conference. Online. Register online at www.cbapd.org.

18-19: The Canadian Bar Association presents the CBA Administrative Law, Labour & Employment Law Conference. Fairmont Chateau Laurier, Ottawa, ON. Register online at www.cbapd.org.

21: The Ontario Bar Association presents Symposium on White Collar Crime. Online. Register online at www.cbapd.org.

22: The Ontario Bar Association presents Managing Family Conflicts in Estate Administration. Online. Register online at www.cbapd.org.

23: The Alberta Lawyers Assistance Society presents the CPA/Assist Speaker Series featuring former NHL Goaltender Clint Malarchuk. Calgary. More information available at www.albertalawyersassist.ca.

24: The Alberta Lawyers Assistance Society presents the CPA/Assist Speaker Series featuring former NHL Goaltender Clint Malarchuk. Edmonton. More information available at www.albertalawyersassist.ca.

Please send your notices to:
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Patricia (Patty) Johnston, QC, is Executive Vice President, Legal & General Counsel at the Alberta Energy Regulator and has been a regular contributor to Law Matters and its predecessor publications for over 20 years.

ALBERTA BRANCH NEWS

EDMONTON OFFICE MOVE

The Edmonton office of the Canadian Bar Association is moving effective August 3, 2016. The new address is:

1501 Scotia Place, Tower 2
10060 Jasper Avenue
Edmonton, AB T5J 3R8
P: 780-428-1230 | F: 780-426-6803

The Edmonton phone numbers, fax number and emails will all remain the same.

Please note that the location of the Calgary office has not changed.

We look forward to welcoming our members to the new office when we resume!

NATIONAL MEMBERSHIP RENEWAL

Renewals for 2016-17 National Memberships are now due. Members will have received renewal notices by mail or email already. You can also renew your membership online at www.cba.org/membership by clicking on the "Join/Renew" link.

When you renew your membership, be sure to take a moment to review the Portfolio and Portfolio Plus packages. These packages are ideal for those CBA members who regularly participate in sections, PD activities or CBA conferences. When you purchase a Portfolio or Portfolio Plus package, you will receive CBA education credits, free materials level membership in a section of your choice, rebates on all CBA purchases and more.

If you have any questions about these offerings or your CBA membership, please call your local CBA Alberta office, or the CBA National office at 1-800-267-8860.

SECTION REGISTRATION

Registration for the 2016-17 section year will open online for all members in mid-August. Keep an eye on your emails and our website at www.cba-alberta.org, as you will be receiving a notice as soon as registration is available.

New for members this year are the new South Food & Agribusiness and Internationally Trained Lawyers Sections; both of which will be available via webcast for all members. See below for more details.

If you plan on purchasing a Portfolio or Portfolio Plus package, a reminder that you should do so before you register for your section. We are not able to retroactively apply education credits or free section memberships after you have registered.

NEW CBA ALBERTA SECTIONS

The Food & Agribusiness Section will hold **6 meetings throughout the year, on the first Friday of the month**. The section will explore topics of interest to producers and companies involved in inputs, storage, handling, trading, transportation and logistics, processing and distribution, and retail within the food and agribusiness sector.

The Internationally Trained Lawyers Section will hold **5 meetings** throughout the year. The section aims to help connect legal practitioners from various backgrounds and to help facilitate integration into the Canadian legal market. The section will also provide insight into the qualification process, the requirements, the challenges and the opportunities of working in the Canadian legal marketplace and to assist in providing networking and mentorship opportunities.

NEW WEBSITE

By the time this issue of *Law Matters* is published, we will have launched the new CBA Alberta website. Our new website reflects changes to the CBA that have been made as a result of the Re-Think project, and the results of consultations with members. While our web address will remain www.cba-alberta.org, the URLs of pages on the website will change. Please remember to update any bookmarks you may have saved.

CBA ALBERTA LEGAL DIRECTORIES

Due to declining interest by our membership, CBA Alberta will no longer be producing the printed legal directories, effective immediately. The online legal directory will now be available at no charge for all CBA Alberta members. Members can access this directory online at www.cba-alberta.org.

E-FILING IS COMING TO THE COURT OF APPEAL

E-filing systems are coming on stream in many jurisdictions driven by the business need of providing more effective and cost-efficient service. Recent events, such as the wildfire emergency in Fort McMurray, have underscored the need for electronic court records. In conjunction with the call for an e-court document management system in Nancy Irving's bail review report, there are a variety of forces pushing for this modernizing initiative.

The Court of Appeal recently launched an initiative to adopt e-filing. Following a review of e-filing systems in other jurisdictions, and a robust RFP process, Journal Technologies Inc (JTI) was awarded a contract to develop a customised e-filing system for the Court. Once completed, registered users will be able to initiate an appeal and file materials electronically. The program will include comprehensive case and document management systems.

Implementing an e-filing system provides advantages for both the Court and the Bar. For the Court there will be a more efficient workflow with easier file management and storage. Members of the Bar (and the public) will be able to initiate appeals and file materials electronically without having to travel to the courthouse to do the filing. Documents filed electronically will still to have to be reviewed and accepted for filing by the Registry. All applicable fees will also be payable online.

Currently, JTI is working with the Court to develop the customized system. The work will continue over the next few months and once there is a basic platform to test, we will be consulting with and seeking input from the Bar. You will hear more about the demonstration/test sessions from the Case Management Officers, Bobbi Jo McDevitt and Jo-Anna Cowen. Donna Beaton, the Project Manager, is always available to address any questions or to receive any feedback you might have. (**donna.beaton@albertacourts.ca**)

THE COUNSEL NETWORK®
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Executive Director

Regina, SK

The Law Society of Saskatchewan is the self-governing body for Saskatchewan's lawyers. The Law Society regulates the legal profession in the public interest and maintains public confidence in Saskatchewan's 1600+ member-lawyers. The Law Society sets and enforces standards for the admission, education, professional responsibility, and competence of new and practicing lawyers.

The Law Society of Saskatchewan is seeking an Executive Director to join its dynamic team in Regina. The Executive Director is responsible for supervising the Law Society's day-to-day operations, implementing policies, and fulfilling various other leadership accountabilities. Under the policy governance direction of the Benchers, the Executive Director plays a key role in influencing the direction and regulation of Saskatchewan's legal profession.

The successful candidate is, or is eligible to become, a member of the Law Society of Saskatchewan as well as knowledgeable in local and national legal, regulatory and administrative issues. Key attributes include: strategic and visionary leadership abilities; strong financial and business acumen; superb critical thinking skills; good judgment; and excellent oral and written communication skills. Superior relationship-building and negotiation abilities are central to maintaining positive relationships with diverse and informed stakeholders, and building dynamic and committed teams of professionals.

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2015 READERS' CHOICE AWARDS CANADIAN Lawyer LEGAL RECRUITERS

Introduction

By Joshua Sealy-Harrington & Ola Malik

The boundaries of freedom are difficult to define. Indeed, arguing for "freedom" is complex because freedoms so often collide. When LGBTQ students want to freely attend any Canadian law school, and a new Christian law school wants to freely admit students who share common values, vague references to freedom fail to engage with the nuances involved in these conflicts. Freedom is tough. And tough issues, like tough cases, are best resolved through adversarial discourse.

Many of the most significant conflicts in history relate to freedom. Some of these conflicts – like freedom from slavery – were resolved long ago, though their legacies remain to this day. Other conflicts – like being free to use the washroom that aligns with your gender identity or being free to bear arms – are the most divisive conflicts in our modern society. No matter where you fall on these issues, it is undeniable that freedom is a focal point of controversy.

In the Canadian context, conflicts relating to freedom have been particularly pronounced in recent section 7 *Charter* decisions. Section 7 provides everyone with a qualified right to "liberty", and this right has, for better or worse, fundamentally changed the Canadian legal landscape in just the past few years. From sex work to medical assistance in dying, section 7 of the *Charter* has had a pronounced impact on the Canadian conception of freedom. And this impact has received both warm praise and harsh critique. In our view, both the praise and critique are essential ingredients in a robust legal discourse.

Like any complex conflict, there are many sides to the story. Our hope is that with this publication – as with our previous edition wholly devoted to the Trinity Western University debate – we can provide you, the reader, with some of those stories. Stories that make you question your assumptions and reflect on your views, thus further informing the Canadian debate on freedom – where it has come, and where it should go next.

The first section of this publication discusses whether section 7 of the *Charter* should be given a broad or narrow interpretation. As section 7 is the centre of so many legal freedom debates, these two pieces strike at the heart of the recent freedom revolution in Canadian jurisprudence.

The remaining sections discuss three topical examples where freedom is currently in conflict: alternative sexual practices (BDSM), drug regulation, and medical assistance in dying. We have gathered authors from across Canada to passionately argue about these crucial issues. We encourage readers to read all of these articles. Both the ones they agree with, and, more importantly, those that they do not agree with. It is only through challenging our views that we as a society can test the merit of the status quo, and identify opportunities for change.

Freedom is an abstract concept. But its consequences are very, painfully real. In Orlando, too much freedom killed 49 LGBTQ civilians, while too little freedom prevented many LGBTQ civilians from donating blood to mitigate this horrific tragedy. So – read these articles, join the debate, and take part in the Canadian conversation on freedom. It is a conversation worth having.

Joshua Sealy-Harrington articled at the Federal Court for the Honourable Justice Donald J. Rennie, worked as a Litigation Associate for two years at Blake, Cassels & Graydon LLP, a CBA Partner Firm, and will be clerking for the Honourable Justice Clément Gascon at the Supreme Court of Canada this fall. His publications centre on criminal law, the *Charter*, and critical theories.

Ola Malik is a Municipal Prosecutor with the City of Calgary, a CBA Partner Organization, where he writes frequently on cases involving *Charter* issues. Ola is a past co-chair of the Access to Justice Committee, a members of the Editorial Committee, and the incoming Alberta Branch Secretary for 2016-17.

Section 7: Superhero, Mere Mortal or Villain?

By Jennifer Koshan, B.Sc., LL.B., LL.M.

Many people love superheroes. My favourite was always Spider-Man – he had the most interesting back story, the coolest superpowers, and the grooviest soundtrack and visuals (at least in the cartoon of my youth). Section 7 could easily be seen as the superhero of the *Charter*. It has the power to strike down laws and government policies that increase the risk of death and bodily or psychological harm, as well as those that deprive people of the ability to make fundamental personal decisions free from state interference. Those powers have been used by the Supreme Court of Canada in ways that may make the members of the Court the actual superheroes in the eyes of many individuals and groups who are vulnerable to the effects of state (in) action (for recent examples see ***Canada (Attorney General) v PHS Community Services Society***, 2011 SCC 44, ***Canada (Attorney General) v Bedford***, 2013 SCC 72, and ***Carter v Canada (Attorney General)***, 2015 SCC 5).

But the courts do not always embrace the role of superhero. They can be timid Peter Parkers who are afraid to use their powers under section 7, especially when the use of those powers is seen as imposing positive obligations on governments. Conversely, section 7 powers may sometimes be used in ways that usurp the role of other *Charter* sections such as section 15, leaving equality rights and the individuals and groups who are the intended beneficiaries of that section in the dust. Alternatively, the courts, like Spider-Man, may be seen as villainous, fully intending to protect society but, by overextending their powers, harming society instead. Indeed, Asher Honickman in this publication (see page 12) argues that the Supreme Court has expanded section 7 beyond its proper limits.

My own view is that section 7 of the *Charter* should be given a robust interpretation by the courts that provides a strong check on government action and inaction. To use the examples I began with, in *PHS*, the Supreme Court ordered the Minister of Health to extend an exemption under the ***Controlled Drugs and Substances Act*** to Vancouver's Insite safe injection site, where the refusal to grant the extension was found to be an arbitrary and grossly disproportionate violation of the right to access lifesaving medical treatment and health-protecting services. In *Bedford*, the Court struck down three prostitution-related laws that were found to increase the risk of harm to the bodily and psychological integrity of sex workers in a manner that was overbroad and grossly disproportionate. In *Carter*, the Court declared void the ***Criminal Code*** sections prohibiting medically assisted dying, which were found to increase the threat of premature death, to deprive persons of control over their physical and psychological integrity, and to interfere with fundamental personal choices, all in ways which were overbroad.

These decisions altered the law or government policy in fundamental ways, based on strong evidence of how the underlying laws and policies impacted the marginalized individuals and groups who the *Charter* is intended to protect (although some people may disagree with the extent to which these decisions actually do promote the interests of vulnerable groups; see for example the facta of interveners representing **prostituted women** in *Bedford* and some **disability rights groups** in *Carter*).

For all their seeming breadth, however, these decisions also contain carefully crafted limits, and maintain a strong role

for legislators in responding to the Supreme Court's rulings. In this sense, the Court can be seen to abide by the wise words of Spider-Man's Uncle Ben that "with great power there must also come great responsibility." In *PHS*, the Court was very clear to indicate that its remedy did not "fetter the Minister's discretion with respect to future applications for exemptions, whether for other premises, or for Insite" (at para 151). Following *PHS*, the federal government passed Bill C-2, ***An Act to amend the Controlled Drugs and Substances Act***, which makes it much more difficult for other cities to open safe sites for drug consumption. The amendments enacted by Bill C-2 affirm the ability of the legislature to respond to section 7 rulings that it might believe to be too expansive. The same is true with the federal government's follow-up to *Bedford*. The Supreme Court's remedy delayed the striking down of the relevant sections of the *Criminal Code*, allowing the unconstitutional provisions to remain in effect for one year. According to ***Schachter v Canada***, [1992] 2 SCR 679, the suspension of a striking down remedy should be granted only in exceptional cases, as it allows the rights violation to persist for a period of time. In spite of *Schachter*, the Supreme Court has been fairly liberal in granting suspensions, thereby showing deference to government. Post-*Bedford's* one year delay, Parliament ultimately enacted a law that was more restrictive than the Court's ruling, given the continued criminalization of sex workers in some circumstances (see Bill C-36, ***An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford***). And in *Carter*, the Court was careful to restrict its decision to competent adults who clearly consent to the termination of life and have a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition (at para 127). It also declined to grant constitutional exemptions while giving the government time to develop its legislative response, until it extended, at government request, the suspended declaration of invalidity for four months in ***Carter v Canada (Attorney General)***, 2016 SCC 4. The debate over Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, shows that both chambers of Parliament have an important role to play in developing policy that responds to the Supreme Court's section 7 rulings. Like Bill C-36 post-*Bedford*, Bill C-14 also exemplifies the government's ability to narrow the scope of the Court's rulings, as Parliament added reasonable foreseeability of death to the eligibility requirements for medically assisted dying.

In my view, we must be mindful of the fact that while the *Charter* binds all branches and levels of government, the government sometimes fails to give adequate consideration to its *Charter* obligations when crafting laws and policies. In ***Schmidt v Canada (Attorney General)***, 2016 FC 269, the Federal Court upheld the standard of the federal Minister of Justice under which proposed legislation need not be reported to Parliament where there is a "credible argument" that it is not inconsistent with the constitution. As noted in commentary on this decision, the credible argument standard "equates to a low probability, or 'faint hope', of less than 5% confidence that the relevant legislation is consistent with the *Charter*". Given this low standard for examination and reporting of proposed laws for their constitutionality, courts must continue to act as guardians of the constitution. The courts' duty of constitutional review ensures that governments don't simply kowtow to majoritarian interests that disregard the needs and experiences of disadvantaged individuals and groups. As noted in ***Reference re Secession of Quebec***, [1998] 2 SCR 217, the fundamental constitutional principle of democracy requires more than adherence to majority rule, and includes consideration of the impact of laws and government policies on minorities. The same can be said of the rule of law, which "provides a shield for individuals from arbitrary state action" (*Reference re Secession of Quebec* at para 70). Most superheroes do use their powers for overall social good, and the Supreme Court's exercise of section 7 powers are no different in this respect.

In the context of responding to judicial decisions legislatively, governments can also invoke the ultimate superpower of the *Charter*, section 33, although much has been written on the political consequences of doing so, perhaps making section 33 the *Charter's* kryptonite rather than superpower (and I do realize that I am mixing superhero metaphors here).

As for the contention that an expansive reading of the *Charter* may lead to uncertainty in terms of legal rights and obligations, I would note that the scope of the rights to life, liberty and security of the person have been interpreted fairly consistently over the years and are relatively predictable in their application. This is especially so if one considers the breadth of these rights, even in textual terms. *PHS*, *Bedford* and *Carter* do not add much that is new to the scope of liberty and security of the person when compared to ***R v Morgentaler***, [1988] 1 SCR 30. And in *Carter*, the Court declined to rule on whether the right to life protects a more qualitative right, once again showing restraint in deciding only what was necessary for the resolution of the issues in that case. If our concern should be more focused on the uncertainty of the principles of fundamental justice, and in particular the application of arbitrariness, overbreadth and gross disproportionality, it is significant that the Court recently ruled in *Bedford* and *Carter* that violations of section 7 can be saved under section 1 where societal concerns merit such an outcome.

In addition, it must be noted that many of the laws that the Court has struck down under section 7 were themselves uncertain in ways that rendered them unconstitutional. In *Morgentaler*, for example, the unpredictable application of the "health" criterion in the *Criminal Code* abortion provisions led, in part, to their demise. The same concerns arise for the reasonable foreseeability of death requirement for access to medically assisted dying in Bill C-14. Section 7 must be interpreted broadly enough to protect against laws that violate life, liberty or security of the person by virtue of being unduly vague.

What about the Supreme Court's use of section 7 in cases involving government inaction? Although, as Honickman

notes, the Court left open the possibility of doing so in *Gosselin v Québec (Attorney General)*, 2002 SCC 84, it has not taken this path in subsequent cases. The most recent example of this reticence can be seen in *Tanudjaja v Canada (Attorney General)*, 2013 ONSC 5410, aff'd 2014 ONCA 852, where the Supreme Court denied leave to appeal on the question of whether section 7 protects a right to adequate housing (see also *Canadian Bar Association v Her Majesty the Queen in Right of the Province of British Columbia, Attorney General of Canada and Legal Services Society*, [2008] SCCA No 185 CRR 372 (note), denying leave to appeal on the scope of government obligations to provide legal aid under section 7; both cases also involved section 15 arguments). I believe the Court is not using section 7 powers to the extent that it should in these kinds of cases. Canada is bound by international human rights obligations to give effect to social and economic rights under the *International Covenant on Economic, Social and Cultural Rights*, and the Court's failure to consider so-called government inaction under section 7 does not give adequate effect to these obligations. Moreover, the distinction between action and inaction (or negative versus positive rights and obligations) is not a compelling one (see here at note 112). For example, the government's refusal to extend an exemption for Insite could be characterized as either action or inaction; the Court's order requiring the government to extend the exemption in *PHS* could be seen as imposing a positive obligation or as requiring the state to refrain from prosecuting Insite's clients, a more negative conception of its section 7 duties. To the extent that this purported distinction forestalls legitimate section 7 claims, it is itself productive of uncertainty and undermines the rule of law.

There could be a role to play for section 15 of the *Charter* in cases where section 7 is (mis)interpreted to include only exercises of state power that actively interfere with the rights of disadvantaged individuals. But the Supreme Court's reliance on section 7 at the expense of section 15 in cases such as *Carter* has deprived section 15 of some of its powers. David Lepofsky gave a persuasive presentation at Osgoode's Constitutional Cases conference in April 2016 arguing that *Carter* was a missed opportunity for the development of the disability equality guarantee under section 15. Indeed, section 7's protection against laws that are grossly disproportionate largely replicates section 15's protection against adverse effects discrimination, and the way that arbitrariness has crept in to section 15 analysis also shows the influence of section 7 on equality rights (see for example *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, where the Court repeatedly referred to discrimination as "arbitrary disadvantage"). The problem here is that the Court's restrictive interpretation of section 15 has made it harder to succeed in *Charter* claims where section 7 is not available on the facts. In *Taypotat,* for example, a residential school survivor was unsuccessful in his claim that his First Nation's requirement of a minimum level of educational attainment to run for election as Chief or band councillor amounted to discrimination under section 15. As I have argued previously, framing government (in)action as a violation of life, liberty or security of the person is a promising strategy for some *Charter* claimants, but not all government harms can be captured under section 7, and the particular harms protected against by section 15 must be given their due. To return to my metaphor, section 7's superpowers should not be used so as to undermine the power of other *Charter* sections. Real superheroes may legitimately battle for control of who gets primacy in fighting for the good (see Batman versus Superman: Dawn of Justice), but this should not be taken as a script for how the courts should interpret and apply the *Charter* in cases of social injustice.

In conclusion, I stand proudly on the side of those who argue for an expansive interpretation of section 7 of the *Charter* for the reasons articulated here. To return to my Spider-Man analogy, despite his flaws and occasional missteps, he ultimately provides for a better society, as does a broad interpretation of section 7 powers by the courts. To paraphrase another superhero, this – more so than a restrictive, originalist application of section 7 – is the path of truth, justice and the Canadian way.

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The Case for a Constrained Approach to Section 7

By Asher Honickman, B.A. (Hons), J.D.

The consensus in the academic community when it comes to interpreting the *Charter* is that more is better. There is little debate that the *Charter* is a "living tree," such that its meaning must "evolve" over time so that it "accommodates and addresses the realities of modern life."[1] This is particularly so in the context of section 7 of the *Charter,* which states that **"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."** Academics and other commentators may disagree as to what precisely the section ought to protect, but most, I suspect, would agree with Professor Jennifer Koshan's proposition set out in this publication (see page 9) that section 7 should be afforded an "expansive interpretation."

This living tree consensus remains dominant because those who oppose it are often viewed, rightly or wrongly, as being against the *Charter* in its entirety.[2] There is, however, a neglected middle-ground between the living tree and anti-*Charter* positions – one that acknowledges the legitimacy of the *Charter* and judicial review, but also seeks to place limitations on what the *Charter* protects. If *Charter* expansionists are for 'judicial supremacy' and *Charter* abolitionists are for 'legislative supremacy,' then this third way may properly be understood as advocating 'constitutional supremacy'. This viewpoint, which has deep roots in the Canadian legal tradition, accepts that the Constitution – including the *Charter* – is the supreme law of the land and that judges do and should have the power to void unconstitutional laws; but that, in exercising that power, judges must remain faithful to their constitutional role, which is "to apply the law, not to make it."[3] In short, it offers the common-sense proposition that the Constitution should be interpreted based on what it actually says, not what some might wish it would say.

In this paper, I examine section 7 of the *Charter* through the lens of constitutional supremacy. I explain that the interpretation of this section is no longer constrained by the text or coherent legal doctrine. I then argue that the only approach to *Charter* interpretation consistent with the values of democracy, the rule of law and a predictable legal order is one that is wedded to the text and settled legal doctrine. In closing, I offer a basic framework for interpreting section 7 in future cases.

A Brief History of Section 7

The evidence is clear that the framers of the *Charter* wanted to limit the application of section 7 to issues of procedural fairness – essentially (and at the risk of oversimplifying) to ensure that no one's life, liberty or security of the person

[1] However, this may be changing slowly but surely. See here, here and here for example.

[2] See for example F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party*. Toronto, University of Toronto Press, 2000, which is generally taken as being an anti-*Charter* text.

[3] *Severn v Ontario*, (1878), 2 S.C.R. 70 at 103 (dissent); *Currie v Harris Lithographing Co.*, [1917] O.J. No. 52 (C.A.); *R v Crosstown Motors Ltd*, [1974] A.J. No. 132, para. 31 (Ct. Jus).

was taken away without the benefit of a fair hearing.[4] They did not want it to incorporate *substantive* rights – which would allow section 7 to be used to invalidate legislation. The 'intent' of the framers should not be relevant in and of itself, but the language with which that intent was expressed in law most certainly is. The heading over this section reads "Legal Rights" and section 7 is followed by seven further sections that each provide other procedural protections.

Perhaps most importantly, section 7 states that individuals shall not be deprived of life, liberty or security of the person except in accordance with the **"principles of fundamental justice."** Section 7 incorporated much of the language from section 1(a) of the 1960 ***Canadian Bill of Rights***, the legislative precursor to the *Charter*, but substituted the phrase "due process of law" with "principles of fundamental justice." The reason is clear. The framers were understandably concerned that 'due process of law' would be interpreted by the courts to include *substantive* guarantees, having witnessed the development of "substantive due process" jurisprudence in the United States.[5] The substitution of "principles of fundamental justice" seemed to be a safe bet. This phrase came directly from section 2(e) of the *Canadian Bill of Rights* and had **been interpreted by the Supreme Court of Canada** just ten years earlier to mean a fair hearing before an impartial tribunal – in other words, a procedural, not substantive, right.

In the first three years following the *Charter's* enactment, a number of decisions considered the meaning of 'principles of fundamental justice' and generally agreed that it provided procedural protections only.[6] However, this early jurisprudence was quickly swept aside following the Supreme Court of Canada's decision in the 1985 ***Re B.C. Motor Vehicles Act***,[1985] 2 SCR 486, which held that the principles of fundamental justice could also include substantive protections – in that case, that offences which provide for a prison sentence must require some degree of fault or intent on the part of the defendant.

There can be little doubt that *B.C. Motor Vehicles* and other early *Charter* decisions such as ***R v Morgentaler***, [1988] 2 SCR 486 expanded the original meaning and intended application of section 7. On the other hand, these decisions seem tame from the perspective of 2016. They concerned real deprivations of liberty or security of the person, and the Supreme Court limited the meaning of principles of fundamental justice to include only the "basic tenets and principles" of the legal system.

The same cannot be said for the Court's more recent section 7 jurisprudence. In ***Canada (Attorney General) v Bedford***, 2013 SCC 72, for example, the Court struck down three provisions of the Criminal Code dealing with prostitution. *Bedford* is problematic for four reasons. First, unlike *B.C. Motor Vehicles*, there was nothing on the face of these laws that deprived prostitutes of their security of the person. The Court based its decision instead on the lower court judge's findings concerning the indirect effects of the law, findings which the judge had made based on contentious social science evidence.

Second, there was no evidence that the indirect effects of the law actually deprived prostitutes of their security of the person. Despite the clear wording of section 7, the Court looked only to whether the laws "negatively impact or limit" security of the person, not whether there had been a deprivation.

Third, the Court found that the laws violated the principles of fundamental justice as they were either "overbroad" – meaning that the law interferes with *some* conduct that bears no connection to its objective – or "grossly disproportionate" – meaning that the effect of the law on individual rights is grossly disproportionate to the law's objective. Suffice it to say, neither principle was considered "fundamental" at the time of the *Charter's* enactment and it is far from clear that either enjoys "significant societal consensus," which is the Supreme Court's own requirement for affirming new principles of fundamental justice. And unlike the fault requirement in *B.C. Motor Vehicles*, neither is "capable of being identified with sufficient precision to yield a manageable standard." Both are inherently value-laden concepts that provide judges with a wide platform to impose their own policy preferences.

Fourth, just as it did in the more recent ***Carter v Canada (Attorney General)***, 2015 SCC 5, decision dealing with physician-assisted dying, the Court in *Bedford* overturned its own precedent from just two decades earlier. It did so, not because Canadian society had fundamentally changed in the last 20 years, but because the "social, political and economic assumptions underlying" the previous decision were no longer valid. The takeaway message is that if litigants are able to marshal new social science evidence not accounted for in an earlier decision, the previous decision may be overruled. This will naturally encourage the re-litigation of any and every issue that was thought to have been decided, will leave litigants in an unpredictable legal morass, and will transform *Charter* applications into battles of the experts.

Bedford does not stand alone. It is representative of the direction in which the Supreme Court has taken section 7 - and indeed the *Charter* as a whole – a direction that appears to be unencumbered by the Court's own precedents and is increasingly divorced from the constitutional text.

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[4] Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012), 58 S.C.L.R. (2d) 195-201, para. 2 (Q.L.).

[5] *Ibid*. See also, Mark Carter, "Fundamental Justice in Section 7 of the Charter: A Human Rights Interpretation" (2003) 52 U.N.B.L.J. 243, at 247-248.

[6] Asher Honickman, "The Living Fiction: Reclaiming Originalism for Canada" (2014), (Advocates' Quarterly, Autumn 2014), 329 – 343, at 337-338.

Still, many argue that the Court has not gone far enough – that the interpretation of section 7 should be expanded even further to impose upon government positive obligations to reduce poverty, provide adequate shelter and housing, and even ensure the quality of the environment. Such an interpretation would hammer the final nail into the original meaning of section 7, effectively obliterating the "Legal Rights" heading and undermining the long-accepted basic purpose of section 7, which is to protect individuals *from* the state. It would amount to an unprecedented transfer of economic and political power away from the people's elected representatives in favour of nine unelected judges who would essentially be granted *carte blanche* to impose their own unique and subjective socio-economic preferences upon the Canadian public.

Thankfully, the Supreme Court has rejected a positive rights reading of section 7 – for now. In the 2002 ***Gosselin v Québec (Attorney General)***, 2015 SCC 84, decision, a 7-2 majority of the Court held that a Quebec law that reduced welfare payments to persons under the age of 30 did not violate section 7. However, and crucially, the majority stated that "[o]ne day s. 7 may be interpreted to include positive obligations" evoking the metaphor of the *Charter* as a "living tree" and noting that "[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases." The future, in other words, in anyone's guess.

Far from shutting the door on a positive rights interpretation of section 7, the *Gosselin* decision actually emboldened the positive rights movement. The real world consequence is that no one can say with any certainty what the *Charter* actually protects from one day to the next.

The Case for Constraint

The previous section touched upon the various problems with an overly expansive interpretation of section 7 (or any constitutional provision for that matter). The basic case for an approach that remains anchored to and constrained by the constitutional text and settled doctrine is, as I stated earlier, that this is the only method of interpretation consistent with the fundamental values of democracy, the rule of law and a viable predictable legal order. This bears explaining in more detail.

Democracy

The "living tree" approach to *Charter* interpretation empowers the courts to create rights or obligations that are found nowhere in the democratically enacted text and, in doing so, places fundamentally moral choices in the hands of nine unelected individuals who have no special expertise in these issues and typically represent a privileged segment of society. Contrary to what Professor Koshan argues, judges are not superheroes (or villains); they are lawyers. If judges give up on merely interpreting and applying the law as written, and invade the domain of social policy, then they will no longer be viewed as neutral umpires. They will instead be treated as legislators and will be selected based on their political ideology, not their legal brilliance.

At the same time, our legislators will be discouraged from tackling politically sensitive issues, preferring instead to punt them to the unelected and unaccountable judiciary. The Court's rulings, rather than fundamental values and first principles, will define the scope of debate, as we have seen in the context of prostitution and assisted dying.

The democratic objection is not merely philosophical. Legislatures are, by their very nature, designed to be deliberative bodies. Courts, by contrast, are designed to dispense justice efficiently. They do not hold debates or committee hearings. Their mandate is not to find a compromise position that gives due regard to disparate interest groups, but to make definitive findings of fact and rule in favour of one party or another. Put succinctly, courts lack the infrastructure and the institutional competence to tackle complex social policy issues.

The typical response to this argument is that the Constitution's amending formula is onerous and so it must be left to the courts to make incremental changes where necessary. This point certainly weighs against an overly narrow interpretation of the *Charter* and may warrant some judicial "gap filling" in limited circumstances, but it falls far short of justifying the expansionist interpretation of section 7 that has taken hold in recent years. There is simply no basis to suggest that Parliament was incapable of tackling prostitution or assisted dying on its own and required judicial intervention. That Parliament had chosen to retain the laws was not evidence of legislative paralysis; it was evidence of legislative choice.

Advocates for an expansionist reading typically argue that the *Charter* was part of the universal human rights movement and should be interpreted in accordance with international human rights conventions to which Canada is a signatory.[7] With respect, this is a dubious argument. International human rights conventions do not become positive law unless and until they are incorporated into domestic legislation. There are many textual differences between international human rights documents, on the one hand, and the *Charter* on the other (most notably the absence of positive rights in the *Charter*), which cast doubt on the notion that the former should guide the interpretation of the latter.

While the *Charter* was certainly not enacted in a legal vacuum, it primarily drew its inspiration, not from international human rights documents, but from Canada's own common law history and tradition. As former Attorney General of Ontario, Roy McMurtry said in February 1982 (two months before the *Charter* was enacted), the *Charter*

[7] Margot Young, "The Other Section 7" (2013), 62 S.C.L.R. (2d) 3-48, paras. 9 - 12 (Q.L.)

is not a revolutionary document akin to the American Bill of Rights; rather, it represents a "further **evolutionary development** of a state which evolved peacefully from colony to full independence," which had already "enjoyed an enviable level of freedom."[8]

The Fathers of Canadian Confederation placed a high premium on liberty.[9] But unlike the American revolutionaries, who often spoke of liberty as an *a priori* concept found in the laws of nature itself, Canada's founders and early statesmen saw liberty as a function of political society and human experience, and thus, to be defined and limited by the people themselves through their elected representatives.[10] The *B.N.A. Act* (now the ***Constitution Act, 1867***) placed certain constraints upon legislative bodies to safeguard rights – notably, the Senate (vis a vis the House of Commons), disallowance (vis a vis provincial legislatures), and, arguably, the division of legislative powers between Parliament and the provinces – but these were limited exceptions to the general rule that democratic legislatures should craft laws as they saw fit.

Viewed in this light, the *Charter* is just one further constraint upon legislative sovereignty, albeit an important one. It does not fundamentally alter Canada's democratic character. As with other constitutional constraints, the *Charter* must be understood as a limited exception to, not a wholesale departure from, democratic choice.

The Rule of Law

The Supreme Court of Canada has, **on more than one occasion**, acknowledged the **fundamental importance** of the rule of law, which is set out in the preamble to the *Charter* itself. At base, the rule of law means that all government officials, including judges, are subject to the law, including their proper constitutional role. The Court has also affirmed **"the primacy of the written text of the Constitution."** While the *Charter* is distinct in scope from an ordinary statute, it is still a legal document and must be interpreted as such. If in interpreting the *Charter,* the Court changes the meaning of the text, it effectively amends the Constitution and thereby exceeds its own constitutional authority.

If the *Charter* must "evolve" to maintain its relevance, then why have a written constitution at all? Why not simply enact a document that reads *'This* Charter *affirms the equal dignity of all individuals and guarantees everyone's rights and freedoms as those various concepts are understood from time to time'*? The fact remains that the *Charter* says certain things and does not say others. The enumeration of some rights but not others and the incorporation of the onerous amending formula in the *Constitution Act, 1982*[11] demonstrate that our Constitution, while not meant to be interpreted in a rigidly technical manner, ought not to be transformed into a vehicle for social change. As Justice McIntyre put it in the ***Public Service Employee Relations Act Reference*** in regard to Freedom of Association under s.2(d), *"the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the* Charter, *as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society."*

Predictability

An ever expanding reading of the *Charter* makes for a fundamentally unpredictable legal order. It means continually revisiting and reopening issues, and setting aside past precedent whenever it has fallen out of fashion with what judges believe the *Charter* ought to protect. Canadian courts have **long recognized** the importance of the ancient Latin maxim *ubi jus est aut vagum aut incertum, ibi maxima servitus prevalebit* (meaning 'Where the law is either vague or uncertain, there the greatest slavery will prevail'). A body of laws that is applied predictably and with consistency is one of the hallmarks of a free society, as it allows individuals to know what the law is and to plan their lives accordingly. It also provides litigants with the foreknowledge of how their case will be decided, which reduces legal costs and ultimately provides greater access to justice.

Proponents of the living tree doctrine will argue that what is lost in predictability and certainty is more than made up for by the affirmation and protection of human rights. The fatal flaw in this reasoning is that the living tree has the potential to grow in any number of ideological directions. A living tree approach under section 7 may guarantee a right to public housing, but it may also guarantee a right to private property. Or it may guarantee none of these things, and may be "read down" to exclude certain procedural guarantees.

At a recent legal conference, Justice David Stratas of the Federal Court of Appeal framed the issue in this way: in the face of some crisis that leads to the abridgement of civil liberties, would we want the judge deciding the constitutionality of the government's actions to be able to turn to "fundamental principles, consistently applied over decades," or simply rely upon "her or his own worldview?" In the end, those who seek rights at the expense of a predictable legal order may very well end up with neither.

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[8] Quoted in *R v Hay* (No. 1) (1982), 38 O.R. (2d) 4 [Emphasis Added].

[9] Janet Ajzenstat, Paul Romney, Ian Gentles & William D. Gairdner, eds., Canada's Founding Debates. Toronto: Stoddart, 1999, pp. 13-21.

[10] RCB Risk, A History of Canadian Legal Thought: Collected Essays, eds, G Blaine Baker & Jim Phillips. Toronto: University of Toronto Press, 2006, pp. 100-103.

[11] See Grant Huscroft, "A Constitutional 'Work in Progress'? The Charter and the Limits of Progressive Interpretation" (2004) 23 S.C.L.R. (2d) 413-438, at 417: "the difficulty in amending the Charter is a compelling reason for the Court to be circumspect when it comes to interpreting its provisions, since interpretation may, in effect, change the Charter."

Conclusion: Toward a Constrained and Principled Approach

The Supreme Court of Canada has strayed far from the original meaning of section 7. Returning now to the original meaning would be impracticable, as it would mean erasing more than thirty years of *Charter* jurisprudence. On the other hand, the Court has to be able to offer a principled and consistent interpretation of section 7, one that is firmly wedded to the text and settled legal doctrine. To that end, I propose that any section 7 application must be able to meet the following criteria to be successful:

1. **The case must engage a "Legal Right":** The alleged deprivation of life, liberty or security of the person must occur in the context of the administration of justice. Where a substantive law is being challenged, that law must amount to a criminal or regulatory offence.

2. **The law must truly "deprive" an individual of life, liberty or security of the person:** Most section 7 decisions spill relatively little ink on whether the law in question actually amounts to a deprivation of section 7 rights. The Court will generally speak of section 7 rights being "infringed" or even "engaged" by the law, and devote most of its analysis to the principles of fundamental justice. The text is clear, however, that the state action must amount to a real deprivation, which is a higher hurdle to overcome than mere infringement. While the term "deprived" need not be read strictly, neither should it be read down or ignored altogether. Secondly, the Court should look at the law on its face, examining its purpose and its immediate legal effects. Where there is an indirect or tenuous causal connection that cannot be proven without voluminous social science evidence, the Court should defer to the legislative branch and uphold the law.

3. **A principle of fundamental justice must actually be "fundamental":** If the principles of fundamental justice are to include substantive principles, then they must truly comprise the "basic tenets" of the legal system. The fault principle developed in *B.C. Motor Vehicles* is capable of being applied with consistency and predictability, as is the principle that laws should not be vague. Even the principle that laws should not be arbitrary is workable if applied with consistency. Conversely, the principle that laws should not be "overbroad" lacks precision and provides judges with wide discretion to strike down laws they dislike. Reasonable people may disagree over how to characterize a law's purpose or whether the law has overshot that purpose.[12] Moreover, very few laws will be perfectly tailored to their underlying purpose, and the reasonable legislator or citizen may very well prefer a law that is somewhat overbroad to one that fails to meet its objective.

In sum, I am not arguing that the Supreme Court return to the original intended meaning of section 7, but rather to the section 7 of the early *Charter* decisions – an approach that eschews a strict construction, but "is constrained by the language, structure, and history of the constitutional text." It is this method of interpretation that views the written Constitution as supreme, and that prioritizes democratic values, the rule of law and a viable predictable legal order over the subjective preferences of judges and interest groups. As a free and democratic people, we should demand no less.

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[12] Hogg, *supra* note 4, para. 16. The principles that laws should not be "grossly disproportionate" or "shock the conscience" of Canadians are similarly imprecise and also raise practical interpretive issues.

Hot for Kink, Bothered by the Law: BDSM and The Right to Autonomy

By Ummni Khan, M.A., J.D., LL.M., S.J.D.

"The things that seem beautiful, inspiring, and life-affirming to me seem ugly, hateful and ludicrous to most other people. This may be the most painful part of being a sadomasochist: this experience of radical difference, separation at the root of perception. Our culture insists on sexual uniformity and does not acknowledge any neutral differences – only crimes, sins, diseases, and mistakes."[1]

Written almost thirty years ago, Pat Califia's diagnosis of society's sexual chauvinism still applies in Canada to the more hardcore forms of BDSM (Bondage-Discipline-Sado-Masochism, referred to broadly as "kink"), in practice and in pornography. While there are no laws that explicitly target BDSM activities or representation, Canadian courts have concluded that sex deemed too risky or rough can be criminalized under assault-related provisions,[2] and sexual representation that is deemed "violent", "degrading" or "dehumanizing" can be criminalized under obscenity provisions.[3] In both cases, consent to the activities does not immunize the practice or the porn from criminalization. The ostensible explanation for this interference with our sexual autonomy is harm reduction. And yet our culture tolerates a wide variety of risky and injurious non-sexual activities, from mixed martial arts to elective cosmetic surgery, while circulating a wide variety of brutal imagery and violent stories, from extreme horror films to depictions of genuine torture and killing.

What might account for this hypocrisy?

I'm going to suggest that the answer lies in our society's paradoxical relationship to sex.

On the one hand, our society views sexual activity as special, requiring specific regulations and moral codes – an ideology that scholars have identified as sexual exceptionalism. On the other hand, sexual pleasure holds negligible worth within our culture's value-system, while sexual desire is often seen as a dangerous force – an ideology scholars have identified as sex negativity. Furthermore, feminist concern regarding violence against women and sexual objectification has unfortunately been used to effectively advance kink-phobia in our laws. This article analyzes how these intertwining ideologies -- sexual exceptionalism, sex negativity, and certain branches of feminism -- have allowed judges to single out the risks and harms of BDSM, while ignoring the pleasure interests of kinky practitioners and porn viewers. In the course of my analysis, I will review three key areas that impact BDSM rights -- rough sex, advance consent to sex while unconscious, and kinky porn -- and compare the indicted activities to analogous non-sexual activities and representations.

Sexual Exceptionalism

Sex is seen as exceptional by law and society. From a conservative religious standpoint, married heterosexual

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[1] Patrick Califia, *Macho Sluts: Erotic Fiction* (Boston: Alyson Publications, 1988)

[2] *R v Welch*, 1995 CanLII 282 (ON CA); *R v JA*, [2011] 2 SCR 440, 2011 SCC 28 (CanLII)

[3] *R v Butler*, [1992] 1 SCR 452, 1992 CanLII 124 (SCC); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120, 2000 SCC 69 (CanLII); *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2 (CanLII); *Criminal Code R.S.C.*, 1985, c. C-46 s. 161

couples should be the only ones entitled to sex, and in some faiths, only for the purposes of reproduction. Although secular society may have left such explicit strictures behind, sexuality is still seen as a rule-bound, morally-fraught activity. We can observe this in the concept of "virginity," which suggests a fundamental ontological (and usually heterosexist) difference between those who have and have not had sexual intercourse.[4] Furthermore, sexual exclusivity is constructed as the highest expression of romantic love -- it is what it means to be "true", "committed", and "faithful" to one's partner. From a legal standpoint, sexual assault has been targeted as a particularly heinous crime, and carries with it a more severe maximum penalty than non-sexual assault.[5] Accordingly, sexual harms are viewed as more traumatizing and qualitatively different than other types of harms, because of their putative political, symbolic, psychic or physiological effects.[6]

Sex Negativity

While the right kind of sex (monogamous, marital, in-the-home, in-love...) is sanctified, sex in general is regarded with suspicion in our society; it carries with it a contaminating and corrosive force, unless purified by a higher purpose. Take the example of our current criminalization of sex work, which combines sexual exceptionalism with sex negativity. First, while we can purchase intimate services like child care, cleaning, massage and pubic hair waxing, buying sexual services is a crime. Our current laws, and some branches of feminism, cast all sex workers as victims who are being violated and degraded with every transaction.[7] Regardless of any claims by sex workers to agency, job satisfaction or pragmatic choice,[8] their non-sentimental relationship to sex is unintelligible, evidence of coercion or false consciousness. Meanwhile, sex trade clients, who have the audacity to pay for sexual satisfaction without relational strings, have become a new category of criminal deviants, with some anti-prostitution extremists even analogizing them to rapists.[9] Another example of sex negativity is reflected in the current moral panic regarding youth 'hook-up' culture and sexting.[10] Young people who openly engage in casual sex without the expectation or even desire that it will lead to a relationship, or who share explicit sexual images for the pleasures of flirtation and exhibitionism, are seen to be engaging in inherently risky, self-objectifying and damaging activities. Sex for the sake of pragmatics or pleasure is thus viewed as inescapably problematic and, in some cases, justifiably criminalized.

There have been some important challenges to sexual exceptionalism and negativity, both socially and legally. In broader culture, swingers, self-identified 'sluts', and polyamorous-identified people challenge the idea that sexual activities should be the exclusive property of committed romantic couples, or that casual sex is an intrinsically harmful practice. Legal theorists have also pointed out some of the unintended consequences of treating rape as the worst form of violence, and characterizing sexual harm as an ineradicable psychic trauma. For example, Janet Halley argues that by treating rape as a violation that 'changes you forever', we instruct survivors to, in fact, never recover.[11] Finally, sex workers refuse to be objectified as brainwashed victims, demanding labour rights and empirically demonstrating that criminal laws based on sex negativity and sexual exceptionalism increase their risk of violence and social stigmatization.[12]

Rough Sex

Like sex workers, BDSM practitioners are also subject to protectionist laws that deny their agency and ignore their stated interests. The leading Canadian case that addresses the criminality of hardcore BDSM is the 1995 Ontario Court of Appeal decision, ***R. v. Welch***, [1995] OJ No 2859, 101 CCC (3d) 216 (ONCA).[13] The facts involve restraint, hitting, and penetration of the vagina and anus, which caused extensive bruising and some rectal bleeding. It is important to note that while the accused claimed all activities were consensual, the complainant maintained they were completely not. Thus the nature of the activities -- whether it was consensual BDSM, or unmitigated sexual assault -- was factually contested. However, the answer to that factual question was ultimately irrelevant. This was because, as a matter of law, the trial judge instructed the jury that, "consent is no answer to a charge of sexual assault causing bodily harm, when actual bodily

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[4] Hanne Blank, *Virgin: The Untouched History*, (Bloomsbury USA, 2007)

[5] *Criminal Code* sections 266 (Assault) v. s. 271 (Sexual Assault)

[6] Jessica Clarke, unpublished manuscript (on file with author).

[7] *Criminal Code* sections 286 (1) (purchasing offence), 286 (2) (material benefit offense), 286 (4) (advertising offence), 286(5) (immunizes from criminal liability those who sell their own sexual services regarding the part they play in purchasing, material benefit, procuring and advertising offences), 213 (1)(c) (communicating offense); **"Factum of the Intervener Women's Coalition" (Ontario: Court of Appeal for Ontario, n.d.)**

[8] Leslie Ann Jeffrey and Gayle Macdonald, "'It's the Money, Honey': The Economy of Sex Work in the Maritimes," *Canadian Review of Sociology/ Revue Canadienne de Sociologie* 43, no. 3 (August 2006): 313–27; Victoria Love et al., *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada,* Sexuality Studies Series (Vancouver: UBC Press, 2013)

[9] **Melissa Farley and Emily Butler, "Prostitution and Trafficking - Quick Facts," *Prostitution Research & Education,* 2012; Melissa Farley et al., "Men Who Buy Sex Have Much in Common with Sexually Coercive Men, New Study Shows," *Prostitution Research & Education*, 2015.**

[10] R. Danielle Egan, *Becoming Sexual: A Critical Appraisal of the Sexualization of Girls* (Malden, MA: Polity Press, 2013); Lara Karaian, "Lolita Speaks: 'Sexting,' Teenage Girls and the Law," *Crime, Media, Culture: An International Journal* 8, no. 1 (April 2012): 57–73; Amy Adele Hasinoff, *Sexting Panic: Rethinking Criminalization, Privacy, and Consent* (University of Illinois Press, 2015).

[11] Janet E. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, N.J: Princeton University Press, 2006).

[12] **Robyn Maynard, "Carceral Feminism: The Failure of Sex Work Prohibition," *Robyn Maynard,* July 15, 2012; Native Youth Sexual Health Network, "Indigenous Peoples In the Sex Trade – Speaking For Ourselves," *INCITE! Blog*, July 15, 2011**; A. Krusi et al., "Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada-a Qualitative Study," *BMJ OPEN* 4, no. 6 (2014)

[13] ***R v Welch*, 1995 (ON CA)**; **"Amnesty International Publishes Policy and Research on Protection of Sex Workers' Rights," *Amnesty International*, May 26, 2016**

harm is objectively foreseeable and caused."[14] The Court of Appeal agreed. Writing for the Court, Justice Griffiths cited ***R v Jobidon***, [1991] 2 SCR 714,[15] the precedent-setting case that established consent is not a defence to the infliction of bodily injury in the context of a fistfight, and found that the same rule should apply in the context of consensual sexual activity. At the same time, he distinguished sex that causes bodily injury from other socially-sanctioned activities that can also cause injury, like rough sports.

Justice Griffiths justifies this approach through sex negative and sexual exceptionalist reasoning. First, he essentializes the meaning of injurious BDSM sex by positing that consent will not erase "the inherently degrading and dehumanizing nature of the conduct."[16] The terms "degrading" and "dehumanizing" wield rhetorical power, but they are entirely subjective and morally-laden. First, the judicial use of these terms assumes their pejorative nature. But for submissive BDSM practitioners, feeling degraded and dehumanized may actually be the point of the sexual encounter; it's precisely what makes them hot and happy. As for dominant BDSM practitioners, providing degrading and dehumanizing treatment *that is wanted and enjoyed* will be what satisfies them. But even if we assume that these words, by definition, convey unwanted experiences, what is degrading and dehumanizing to you may be empowering and dignifying for a sadomasochist. Unfortunately, because of our prevailing sexual ideology, the law does not feel compelled to protect and foster such diverse erotic pleasures.

Furthermore, pleasures that deviate from the norm are rendered not only worthless, but dangerous. The judicial disregard of sexual rights is accordingly justified by claiming there are "compelling societal interests" that trump autonomy. The exact interests at stake are never fully articulated, except for a vague inflammatory claim that if we allow hardcore BDSM, we might end up in a society of "would-be sadists." Here Justice Griffiths betrays his ignorance of BDSM, assuming that dominants are equivalent to non-consensual sadists, and that a person who derives "sexual gratification" from bestowing *desired* pain would also derive pleasure from meting out unwanted pain. Furthermore, if Justice Griffiths actually meant consent-respecting dominants when he refers to "would-be sadists," then he suggests that BDSM desires are alluring, maybe even contagious. He wants to prevent "normal" people from being contaminated by BDSM, and he's willing to use the heavy hand of the law to do so.

It is conspicuous that this use of the criminal law to prevent people from bodily harm does not apply to sporting activities. A closer consideration suggests that sex negativity and exceptionalism are at the source of the distinction, not an empirical evaluation of the relative risks. For example, a meta-analytic review of mixed martial arts injuries found that 66.8%-78.0% of practitioners suffer head injuries, associated with concussions and degeneration in brain structures.[17] If we turn to a more "civilized" sport, like horseback riding, a study in British Columbia found that on average, three people die a year in that province alone due to equestrian activities.[18] These sporting acts are legal, even though there is evidence of substantial risk of serious injury or even death. Meanwhile, BDSM that causes relatively minor bodily harm is criminalized, in the absence of any documentation of the epidemiological risks of kink, or the number of serious injuries that ensue. While the *Welch* decision does not elaborate on why this would be so, it does cite ***R v Brown***, [1993] 2 All ER 75 (UK High Crt), a British House of Lords decision which, in its full reasoning, differentiated boxing from BDSM. The former was celebrated as a "manly" pursuit, while the latter was condemned as "perverted" and "depraved."[19] Thus we see that society tolerates bodily injury incurred in the service of upholding dominant gender norms, but not bodily injury incurred in the pursuit of sexual pleasure.

Risky Sex

In ***R v JA***, 2011 SCC 28, the SCC further circumscribed the sexual freedom of hardcore BDSM practitioners by disallowing advance consent to sex while unconscious. At trial, K.D. gave uncontested evidence that she and the accused, J.A., had engaged in erotic asphyxiation, with J.A. strangling K.D. until she lost consciousness for a few minutes, during which time J.A. inserted a dildo into her anus. K.D. maintained throughout the trial that she had consented to all aspects of these activities. However, the background facts are messy, as the couple had a history of domestic violence, along with their history of consensual kink. Furthermore, K.D. had previously given a contrary statement to the police, telling them the sex while unconscious had *not* been consensual. Feminist commentators have invariably been convinced that K.D. must have lied on the stand with regard to her consent to the anal insertion because she is cast as a "battered woman".[20] While I have argued there is some evidence that would support the truthfulness of K.D.'s trial testimony,[21] for the purposes of this discussion,

[14] ***R v Welch***, 1995 citing trial judge instructions.

[15] ***R v Jobidon***, [1991] 2 S.C.R. 714, 1991 CanLII 77 (SCC)

[16] ***Welch***, 1995 at para 88

[17] Reidar P Lystad, Kobi Gregory, and Juno Wilson, "The Epidemiology of Injuries in Mixed Martial Arts: A Systematic Review and Meta-Analysis," *Orthopaedic Journal of Sports Medicine* 2, no. 1 (January 2014)

[18] J M Sorli, "Equestrian Injuries: A Five Year Review of Hospital Admissions in British Columbia, Canada," *Injury Prevention : Journal of the International Society for Child and Adolescent Injury Prevention* 6, no. 1 (March 2000): 59–61; see also C. G. Ball, "Equestrian Injuries: Incidence, Injury Patterns, and Risk Factors for 10 Years of Major Traumatic Injuries," *Am J Surg* 193, no. 5 (May 2007): 636–40

[19] ***R v Brown***, [1992] 2 All E.R. 552 (U.K. High Court)

[20] Karen Busby, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions," *Canadian Journal of Women and the Law* 24, no. 2 (2012): 328–58; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A," *Canadian Journal of Women and the Law* 24, no. 2 (2012): 359–88; Elaine Craig, "Capacity to Consent to Sexual Risk," *New Criminal Law Review* 17, no. 1 (January 2014): 103–34; Jennifer Koshan, "Sexual Assault and Advance Consent: A Feminist Judgment in R v JA," (forthcoming)

[21] Ummni Khan, *Vicarious Kinks: S/m in the Socio-Legal Imaginary* (University of Toronto Press, 2014)

it is important to focus on the legal question, as this "hard case" has created "bad law" across the board. Indeed, at the Supreme Court of Canada level, the only issue was the legal question: can one ever provide legally valid consent to sexual activity expected to occur during a period of unconsciousness?

The majority decision answered "no," and thus inscribed a prohibition that now applies not only to a hardcore kinkster trained in breathplay, but equally to a sleeping spouse who kisses her beloved awake. The majority rationalized this interference with sexual autonomy in large part because of the perceived risks involved. In particular, the majority was concerned with the risk that the conscious partner will purposefully or mistakenly deviate from the agreed-upon activities, during a time when the unconscious partner will be unable to monitor compliance. This ruling exemplifies paternalism and a sex negativity that understands that *protection from* the risk of sexual assault is more important than *freedom* to engage in desired sexual activities. Furthermore, it should be noted that for many kinky people, risk itself is erotic. The lover who is to be rendered temporarily unconscious may be aroused by the anticipation, and even the fear, of the impending unconsciousness, and/or the thrill of regaining consciousness in the midst of a sexual sequence. Risk and danger may thus be at the heart of the erotic exchange, and an integral part of the kink. But because sexual pleasure is the only interest being trampled, the Court does not even acknowledge the erotic liberty cost to its ruling.

Furthermore, it is important to mention that choosing which risks to single out as legally intolerable, and which to accept as part of life, reflects sexual morality, not empirical fact.[22] For example, the law allows patients to consent to unconsciousness with their doctor without a chaperone despite the fact that the medical community has identified doctor perpetrated sexual abuse of patients as a serious problem that plagues the profession.[23] A recent example is a former New York physician facing criminal charges for sexually abusing four patients, including one he is alleged to have overly sedated before ejaculating on her face.[24] Another high-profile case involves a Toronto anesthesiologist who was sentenced to ten years in prison for sedating and then sexually abusing 21 patients.[25] A recent article published in the Annals of Internal Medicine discloses more information about everyday sexual misconduct and demeaning treatment perpetrated by doctors on unconscious patients.[26]

We can therefore see that the risks involved for patients undergoing sedation are similar to those the Supreme Court flagged in the context of BDSM breathplay. In both cases, the doctor or the conscious BDSM lover might sexually assault the patient or lover by not sticking to what has been consented to, be it a medical procedure or a specific sexual activity. Moreover, the patient or unconscious BDSM lover will be totally unaware of the violation unless they revive while the assault is ongoing, or notice physical evidence on their bodies after the fact. While one might argue that we must allow medical sedation for doctors to perform life-saving procedures, this, of course, makes a moral claim that prioritizes medical health over sexual freedom. But even if we concede that medically-necessary treatment must be allowed, why do we permit people to undergo sedation for elective cosmetic surgery, like jaw augmentation or breast enlargement, and thus risk sexual abuse by their doctors? The reason can only be that in our culture, vanity is a more legitimate excuse than sexual pleasure to consent to injury and risk complications, sexual abuse, and even death.[27]

I resent this sexual exceptionalist stance. Many of us place much greater trust in our lovers and spouses than we do in doctors. But under the current laws, we are not only prevented from engaging in planned unconscious sex after erotic breathplay, but we are not even allowed to provide advance consent to casual sexual contact while the other is asleep. While I suspect this law is violated on a regular basis across the bedrooms of the nation, the judicial interpretation that has criminalized a kiss on a sleeping lover demonstrates the sex negative ideology that pervades our caselaw.[28]

Many feminist commentators support the *Welch* and *J.A.* decisions, not because they are morally opposed to rough or risky BDSM, but because, from their perspectives, the trial judges arrived at the correct verdicts. As stated, in both cases, there is information to suggest that the complainants did not, in fact, consent. Accordingly, a legitimate concern is that if you allow the "rough sex" or "advance consent" defence, the Crown will have to prove lack of consent beyond a reasonable doubt, and it will be harder to secure

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[22] Mary Douglas, *Risk and Blame: Essays in Cultural Theory* (New York, London: Routledge, 1992).

[23] Christine E Dehlendorf and Sidney M Wolfe, "Physicians Disciplined for Sex-Related Offenses," *JAMA* 279, no. 23 (June 1998): 1883–88; Kevin Donovan, **"Task force report on medical regulatory bodies kept secret over defamation concerns,"** The Toronto Star, July 13, 2016; Laura Armstrong, **"Ontario health minister to review secrecy involving doctors,"** Toronto Star, October 10, 2014

[24] James C. Mckinley Jr, **"Former Mt. Sinai Doctor Charged With Sexually Abusing 4 Women,"** *The New York Times*, March 24, 2016

[25] Alyshah Hasham, **"Dr. George Doodnaught Sentenced to 10 Years in Prison for Sex Assaults on Women during Surgery | Toronto Star,"** *The Toronto Star*, February 25, 2014

[26] Anonymous, "Our Family Secrets," *ANNALS OF INTERNAL MEDICINE* 163, no. 4 (August 2015): 321, For example, a medical student recalls how he observed a doctor who rubbed the labia of an anesthetized patient with a cotton ball and then said, 'I bet she's enjoying this' while winking and laughing. In order to address patient vulnerability, one patient advocacy organization dedicated to addressing medical sexual misconduct suggests, "If you are going to be put under anesthesia, you should insist that you have a family member or a friend present for your procedure to protect you. Patients who are under anesthesia are very vulnerable because they have no control over what happens. Many patients are unnecessarily stripped naked for surgeries. One female hand surgery patient had her gown and underwear removed after she was put under anesthesia. The only reason she found out was because she woke up in middle of the surgery."

[27] **"Liposuction Danger -- Death,"** *MedicineNet*, 2002; Dr. Nalini Chilkov, **"25 Reasons Not To Get Breast Implants,"** *The Huffington Post*, February 1, 2011

[28] See, Joshua Sealy-Harrington, "Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent," *Canadian Criminal Law Review* 18, no. 1 (March 2014): 119

a conviction. Under the current regime, if injuries are sustained, or if the sexual contact happens while one is unconscious, the Crown will not be burdened with having to prove non-consent. At the same time, the corresponding reductions to legal autonomy are rationalized on the notion that so long as no one complains to police, consensual rough or risky BDSM practitioners will have nothing to fear. However, I believe this pragmatic approach to the law does not adequately take into account all the different ways that consensual BDSM practitioners can come to the attention of the criminal justice system. For example, BDSM lovers might have consensual sex in public, they might make recordings that are discovered by third parties, or if they do require medical treatment, a doctor may report them to the police. Furthermore, as infrequent as it might be, not all complainants are always truthful. 'Always believe' may be a great slogan for activists, but it makes a terrible legal doctrine. Ultimately, this approach is vested in securing more convictions for sex offenders, no matter if a few BDSM practitioners get thrown under the bus to achieve this goal.

Kinky Text

Sexual autonomy encompasses not only the right to engage in kinky activity, but also to access representation that affirms and arouses us. Unfortunately, ***R v Butler***, [1992] 1 SCR 452, the precedent-setting SCC decision that interprets the obscenity provisions, effectively deems BDSM text to be criminal. This is old law, but technically, it's still good law. In this case, the Court relied on a "community standard of tolerance" test, which asks if the community would tolerate others accessing the material, based on whether it is perceived to cause harm. The Court determined that representation of sex with violence, or that is perceived to exploit sex in a "degrading or dehumanizing" manner, will generally be found prima facie obscene. Obliterating the line between sexual assault and BDSM, the decision specifically states that representation of consent to activities deemed degrading or dehumanizing will not only fail to save the text, but in fact may amplify its obscene nature. Examples that the decision gives of "degrading" and "dehumanizing" themes include explicit reference to BDSM sexuality, such as domination, submission and pleasure from pain, along with some more common pornographic (and real-life) events, like women joyfully swallowing semen. Casting such a wide net, it is not surprising that the case law after *Butler* regularly deemed stories, films and even music with kinky themes to be obscene.[29]

As many have noted, criminalizing representation based on an assertion that "the community would think this is harmful" is really just a rhetorical sleight of hand that replaces morality with harm.[30] As the judges themselves admitted, there is no persuasive evidence to link porn with harm, nor any obligation for a trial judge to canvass what the "Canadian community" actually believes when determining if a text is obscene. Furthermore, if the perception is that violent text will desensitize the viewer, we must question why extreme horror films, dubbed 'torture porn' by aficionados, are not censored.[31] Even more disturbing, many mainstream horror films use camera angles to induce the viewer to take on the perspective of the killer.[32] The legality of such films demonstrates the sex negative perspective that the community is more accepting of entertainment that aims to titillate, shock or frighten, and even to invite identification with homicidal maniacs, than it is of material that aims to incite sexual arousal.

Sex negativity and exceptionalism also colour the "internal necessities" defence. Under that defence, a text that is otherwise sexually violent, degrading or dehumanizing can be saved, if it can be shown to have an artistic, literary or scientific purpose. But one might ask, why isn't a masturbatory purpose a sufficient defence? The moralistic reason lies in the Supreme Court`s decision to contrast texts that have "serious" intent and merit, and those that represent "dirt for dirt's sake." The judicial metaphor is telling. Both the representation of hardcore sexuality, and the pleasure it affords, are denigrated as "dirt." But if we understood sexual pleasure as a worthwhile right and a core aspect of our liberty, then a text that had arousal merit would be just as protected as one that has artistic merit.

It should be noted, however, that today, criminal obscenity convictions are rare, likely because the hypothesized link between porn and harm has been so thoroughly discredited. For example, the 2004 trial decision in ***R v Price***, [2004] BCJ No 814 (BCPC),[33] acknowledged that the internet affords access to an unprecedented amount of hardcore material, yet there has been no documented increase in sexual violence since the advent of online porn.[34] There is also something absurd about targeting tangible pornography when anyone can access the same or 'worse' from any computer. Nonetheless, censorship of BDSM materials persists through Canada Customs seizures, as the two Supreme Court of Canada *Little Sisters* decisions show. Unfortunately, the cases also show a continued commitment to sex negativity and exceptionalism on the part of our highest Court. In the first decision, the gay and lesbian bookstore Little Sisters

[29] See for example, ***R v Scythes***, [1993] O.J. No. 537 (Ct. J. (Prov. Div.)) (QL); ***Glad Day Bookshop v Deputy Minister of National Revenue***, [1992] O.J. No. 1466 (Ct. J. (General Div.)) (QL); ***R v Erotica Video Exchange Ltd.***; ***R v Emery (1991)***, 4 O.R. (3d) 344 (Ct. J. (Prov. Div.); ***R v Emery***, [1992] O.J. No. 640; 8 O.R. (3d) 60 (Gen. Div.).

[30] Brenda Cossman, *Bad Attitudes on Trial: Pornography, Feminism, and the Butler Decision* (Toronto, Ont: University of Toronto Press, 1997); Leslie Green, "Pornographies," *Journal of Political Philosophy* 8, no. 1 (March 2000): 27–52

[31] Mark Trammell, **"The Top 13 Torture Porn Flicks Actually Worth Seeing,"** *Film Equals*, December 6, 2012; Prominent examples include: *See Faces of Death* (1978), *Hostel* (2005), *The Human Centipede* (2009)

[32] See Bob Clark, *Black Christmas*, film (Warner Bros. Pictures, 1974); John Carpenter, *Halloween*, film (Sony Pictures Entertainment, 1978) and more recently Franck Khalfoun, *Maniac*, film (IFC Films, 2013).

[33] ***R v Price***, [2004] B.C.J. No. 814 (Prov. Ct.) (QL).

[34] Statistics Canada, **"Canada's Crime Rate: Two Decades of Decline,"** *Statistics Canada*, January 21, 2015; CBC News, **"Police-Reported Crime Rate Falls to Lowest Level since 1969, Statistics Canada Says,"** *The Canadian Press*, July 22, 2015; Sarah Boesveld, **"Sexual Assaults on the Decline but Are Still Severely under-Reported: U.S. Study,"** *National Post*, April 21, 2015; C. J. Ferguson and R. D. Hartley, "The Pleasure Is Momentary ... the Expense Damnable? The Influence of Pornography on Rape and Sexual Assault," *AGGRESSION AND VIOLENT BEHAVIOR* 14, no. 5 (September 2009): 323–29

demonstrated that Canada Customs regularly seized BDSM texts headed to their store, even when the exact same books could safely arrive at mainstream bookstores, or were on the shelves at the Vancouver Public Library. While the Court acknowledged there had been discrimination at the implementation level, it largely upheld the underlying legal regime, and reaffirmed *Butler* as a precedent based on the harm principle. Writing for the majority, Justice Binnie further demonstrates kinkphobia, when he specifically singles out the portrayal of a dominatrix "degrading" a willing "sex slave" as dehumanizing and harmful, and thereby rightfully censored. In the second *Little Sisters* decision, the bookstore demonstrated overwhelming evidence that Canada Customs had continued its discriminatory targeting of Little Sisters, despite an earlier ruling that had ordered them to cease targeting gay and lesbian texts. The bookstore applied for an award of advance costs, to permit an appeal with respect to four books with queer BDSM themes deemed obscene by Canada Customs, and a systemic review of Customs' practices.[35] A majority of the Supreme Court ruled against Little Sisters, basically finding that censorship of gay and lesbian BDSM material was not a matter of sufficient public interest. The Supreme Court thus sent a message that freedom of expression, and equality rights of gays and lesbians, are less worthy of protection in cases flowing from censorship of material produced for the purposes of sexual pleasure. Unfortunately, it appears this discriminatory sex negative censorship continues to this day. A review of the "Quarterly List of Prohibited Materials" published by Canada Customs shows that BDSM books, comics and DVDs continue to be targeted and prohibited from entry.[36]

Feminist legal interventions in these debates have evolved. Back in the early 90s, the feminist advocacy organization LEAF was firmly wedded to an anti-porn position. Its factum for *Butler* provided much of the "harm" discourse adopted by the Supreme Court, whereby kinky material was argued to violate sex equality -- particularly if women were portrayed as enjoying sexual submission or force. The LEAF factum for *Little Sisters* modified this position, perhaps in light of growing evidence that *Butler* was being used to disproportionately censor gay and lesbian material. The factum essentially argued that lesbian pornography supplied a specific affirmation and visibility function for the lesbian community, so should not be censored. As stated, the Supreme Court was not convinced. Today it seems that for most feminists, the pornography debate has been shelved for other, more contentious issues, like sex work. But the legacy of feminist anti-porn discourse unfortunately continues to provide ammunition to the claim that suppression of explicit sexuality -- specifically kinky sexuality -- will advance the equality rights of women.[37]

[35] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, 2007 SCC 2

[36] Canada Customs does not publicly publish the list, but one can get an email with the list. See, for example, Prohibited Importations Unit, HQ, **"Quarterly List of Admissible and Prohibited Titles"** (Canada Border Services Agency, 2011)

Fifty Shades of Sexual Autonomy

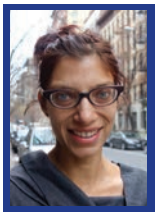
The criminalization and censorship of rough sex, risky sex and kinky text exposes how moralism infects our jurisprudence. In each case, we see that the law tolerates comparable rough activities, risky procedures and violent texts, so long as sexual pleasure is not the primary goal. Furthermore, the pragmatic policy approach, which assumes existing criminal laws will not capture consensual rough and risky lovers in practice, is not only unprincipled, but does not accord with my experience. Since my book on BDSM in Canada was published in 2014[38], I have been contacted every few months by a lawyer trying to assist a kinky client who is facing employment sanctions, the loss of child custody, or criminal charges, all because of BDSM activity said to be consensual. Most of these cases will conclude without being reported in a legal database, either because the type of case is confidential, or because the civil matters settle, or the accused accepts a plea bargain. As a result, it is hard to track the true discriminatory impact of our current legal regime. We need to also realize that kinkphobic discourse has far-reaching consequences on our cultural imagery that go beyond the specific issues addressed in the case law. For example, we might consider how anti-BDSM sentiment contributed to the vicious and misogynistic persecution of former Manitoba Justice Lori Douglas, simply because she had posed for kinky pictures for her husband.[39]

While the reaction to that incident may demonstrate that sex negative ideology is pervasive in our culture, surely our laws should not serve to further entrench it. Instead, we need to recognize that sexual autonomy includes not just protection from violation, or equality on the basis of gay, lesbian and bisexual orientation, but freedom to explore different sexual practices, either directly or through pornography. As with sports, or elective surgery, we should be granted the right to choose our own levels of sexual risk and injury. As with extreme horror films, we should be granted the right to choose what sexual media to consume. Indeed, for many of us, sexual pleasure is just as important as sporting activities, artistic appreciation or intellectual advancement -- if not more so! And if this sexual pleasure appears degrading, dehumanizing, too risky, or too rough for you, as Califia stated in the opening quote, it may be "beautiful, inspiring, and life-affirming" for me. It's time the law understood that there are many different shades of autonomy.

[37] See for example, MP Joy Smith calling for a boycott of the film, *Fifty Shades of Grey* based on feminist objections to the film: Michael Woods et al., **"Conservative MP Calls for Fifty Shades of Grey Boycott,"** *Ottawa Citizen*, February 14, 2015.

[38] *Supra* note 21.

[39] Chinta Puxley, **"Former Manitoba Judge Compares Disciplinary Hearing to 'Torture,'"** *CBC News*, January 5, 2016



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Tied Up in K/nots: The Criminalization of BDSM in Canada

By Karen Busby, J.D., LL.M.[1]

Many people are interested in bondage and discipline, domination and submission, or sadism and masochism (BDSM). A 1993 study found that 12.5% of American adults had engaged in BDSM at some point in their lives.[2] In 2014, researchers in Quebec found that 47% of women and 60% of men had fantasies of dominating someone sexually, 65% of women and 53% of men had fantasies of being dominated sexually, 42% of women and 48% of men had fantasies of tying someone up, and 36% of women and 28% of men had fantasies of being spanked or whipped for sexual pleasure.

Those who prefer a vicarious experience of BDSM's potent mix of risk, transgression, sex and power have countless options. Film classics include *9 ½ Weeks* and *The Piano Teacher*. The Showtime 2016 hit series, *Billions*, normalizes and mainstreams a married couple's BDSM practices. Canadian police have, since the late 1990s, pretty much stopped laying obscenity charges against distributors of adult porn, so even the raunchiest X-rated material is easy to access with a few mouse clicks. The curious can also seek out the *Fifty Shades of Grey* trilogy. Readers don't hide these novels with plain book covers. They carry them into lunchrooms and onto subways. References to BDSM sexual practices have also been appropriated in fashion, advertising and music. Think of fashion designer Jean Paul Gaultier's dominatrix-inspired clothing, Helmut Lang's iconic fashion photography and Rihanna's hit song *S&M*. BDSM, or at least the idea of it, seems to thrive without shame in popular culture.

While BDSM fantasies may be common, the controversies swirling around legal proceedings against Lori Douglas and Jian Ghomeshi make it clear that engagement in BDSM practices is still on the margins of social acceptability. Lori Douglas, then an Associate Chief Justice of the Manitoba Court of Queen's Bench, faced a Canadian Judicial Council investigation flowing from an allegation that public confidence in the justice system could be undermined because BDSM-themed sexual photos of her had been posted online without her consent. (The nonconsensual distribution of intimate images only became a criminal offence in 2015). Douglas retired from the bench in late 2014, shortly after the inquiry panel ruled that they could view the photos, so the public confidence question was never adjudicated. The CBC's star host, Jian Ghomeshi, was fired in 2014 shortly after he Facebooked a passionate defence of his interest in consensual "rough sex" in an attempt to meet head-on allegations of violent sexual encounters with women. He was acquitted in early 2016 of sexual assault and choking charges because three complainants failed to tell the whole truth about their post-event contact with

[1] Professor of Law & Director, Centre for Human Rights Research. I would like to acknowledge the excellent work of Katie Kidder, currently a law student at the University of Manitoba, Helen Fallding, manager at the Centre for Human Rights Research for their work on this paper. Dayna Steinfeld, now a lawyer at Filmore Riley in Winnipeg, worked on an earlier iteration of the systematic case law review. The research was supported by the University of Manitoba Under Graduate Research Award program and a grant from the University of Manitoba Legal Research Institute. While I have worked on many interventions with the Women's Legal Education and Action Fund (LEAF) in sexual violence cases, the views expressed in this paper should not be attributed to LEAF.

[2] Samuel S. Janus, Cynthia L. Janus, *The Janus Report on Sexual Behavior* (New York: John Wiley and Sons, 1993).

Ghomeshi. The trial judge found that these omissions so deeply compromised the complainants' credibility that he had no option but to acquit. Thus the question of capacity to consent to potentially life-threatening sexual activity—such as erotic asphyxiation—was not one upon which the court had to adjudicate. Thus the *Douglas* and *Ghomeshi* proceedings left important legal questions unanswered. While no legal sanctions were imposed in either case, being publicly associated with BDSM practices had career-ending consequences for both Douglas and Ghomeshi.

In this paper, I consider whether Canadians who practice consensual BDSM have reason to fear criminal prosecution for offences against the person. Some case law suggests that the answer to this question is "yes" if bodily harm ensues. In its 1995 decision in ***R v Welch***, [1995] OJ No 2859, 101 CCC (3d) 216 (ONCA), the Ontario Court of Appeal stated:

> …a victim cannot consent to the infliction of bodily harm upon himself or herself unless the accused is acting in the course of a generally approved social purpose when inflicting the harm. The consent of the complainant in this case, assuming that it was given, could not detract from the inherently degrading and dehumanizing nature of the conduct. Although the law must recognize individual freedom and autonomy, when the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, then the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour.

The complainant in *Welch* denied having consented to rough sex. As the Ontario Court of Appeal affirmed the trial judge's factual finding that she did not consent, the Court's determination that, as a matter of law, one cannot consent to rough sex was answered in obiter only. However in the two decades since the *Welch* decision, commentators, such as Brenda Cossman, have expressed concern that BDSM practitioners in Canada risked violence against the person charges even where the participants were clearly consenting. In an attempt to determine whether Canadian kinksters need fear criminal prosecutions, we analyzed all cases reported on online databases in the last 20 years (that is, since *Welch*) where defendants claimed present or past consent to BDSM, "rough" or "kinky" sex in answer to a homicide or sexual assault charge. Any case where a decision was rendered between November 1995 and May 2016 was included in this study, and multiple decisions flowing from the same charges were counted as one case. Thirty-six cases were found.

BDSM and Homicide

In the last 20 years, there have been five reported cases (***R v Mcilwaine***, [1996] RJQ 2529, 111 CCC (3d) 426 (QCCA), ***R v Hancock***, 2000 BCSC 1581; ***R v Viner***, 2010 MBQB 108; ***R v Deschâtelets***, 2013 QCCQ 1948; ***R v Barton***, 2015 ABQB 159) in Canada where a victim died as a consequence of allegedly consensual kinky sex and, in all but one case, a homicide conviction ensued. In ***Deschâtelets***, for example, the deceased had written an outline of the activities the couple would engage in over a weekend, so factual consent was not an issue. At one point, Deschatelets stepped out for 20 minutes to buy groceries. He left his partner bound in a metal collar around her neck that was secured to the ceiling. He returned to find her unconscious and non-responsive, having suffered asphyxia by hanging. In convicting Deschatelets of manslaughter and criminal negligence causing death, the trial judge explicitly noted the importance of safety in BDSM practices, stating that most practitioners do not recommend leaving their partners in precarious situations where they are unable to free themselves. The message from the *Deschatelets* Court is clear: homicide convictions may ensue if the dominant party fails to respect the basic rules of safety or is reckless or negligent.

However, the death of a partner does not inevitably attract a conviction. Bradley Barton was found not guilty of either murder or the included offence of manslaughter in 2015 by a jury after his sexual partner bled to death in the bathtub in their hotel room from a blunt trauma wound inflicted to her vagina during manual penetration. The Crown pathologist had testified that "quite a significant degree of force" would be required to cause the wound that lead to her death. The *Barton* appeal, which will be heard in late 2016, raises questions about the kind of evidence necessary to establish whether the defendant took reasonable steps to ascertain the complainant's consent to both rough sex and the degree of force used. Two feminist organizations have intervened in the case to argue (para 53) that the prejudicial portrayal by the defence of the victim as a "Native" "prostitute" invited the application of sexist and racist stereotypes that may have tainted the jury's evaluation of the evidence. However, as the issue of legal capacity to consent to bodily harm is not before the appeal court, these interveners do not take a position on this issue.

Legal Capacity to Consent

Other than the cases where a submissive partner died, there is not a single reported case in the last 20 years in which a dominant BDSM participant has been convicted of a personal harm offence unless the evidence raised a reasonable doubt as to factual consent. In other words, the obiter from *Welch* cited above has never been followed. Indeed, in only one case is the decision cited *in obiter* with approval. In ***R v Vandermeulen***, 2013 MBQB 118 (currently pending appeal on procedural grounds). the court accepted the complainant's claim of non-consent, but stated that even if the complainant had consented to the harm against her (what the defendant described as consensual "adventurous sex"), her consent would have been vitiated. In all other cases, the only question asked is the factual question "did they consent?" Courts do not ask the legal question "can they consent?"

Some relatively recent cases explicitly repudiate *Welch*. In ***R v Zhao,*** 2013 ONCA 293, the Ontario Court of Appeal observed that "in light of how the law has developed, it is doubtful that *Welch* remains good law even in cases involving sado-masochism" (para 98). Following an earlier Ontario Court of Appeal decision (***R v Quashie***, [2005] OJ No 2694, 198 CCC (3d) 337 (ONCA)), the *Zhao* court confirmed that consent is only vitiated where bodily harm was (subjectively) intended by the defendant and in fact caused. If the trier of fact is satisfied beyond a reasonable doubt that the defendant did not intend to cause bodily harm, they must consider whether the complainant did not consent to the intentional application of force. Although this additional step has generally been treated as an alternative path to conviction (as stated in the Ontario Court of Appeal decision in ***R v Nelson***, 2014 ONCA 853 at para 25), it also supports the possibility of consent to BDSM practices that may cause bodily harm, providing the submissive partner has consented to each act and the degree of force used.[3]

What have courts said on reasonable doubt about factual consent? Consent to sexual activity must be active (not based on assumptions), contemporaneous (not based on past acts) and continuous (and therefore revocable). While BDSM activity may appear on the surface to be non-consensual, practitioners need not worry about criminal prosecution if they have negotiated what will happen, have an agreed-upon signal whereby one of the parties can unequivocally withdraw consent, and follow the "safe, sane and consensual" credo. However, if any of these elements are missing, the dominant party risks a conviction if the submissive party makes a police complaint.

Idealizing Agency and Autonomy

In every case during the 20 year period surveyed, except obviously the cases where the complainant died, it appears that the complainant made the police report. The charges did not result from police raids or third-party complaints, nor were they tacked onto other charges such as keeping a bawdy house.[4] In other words, in every case the complainant asserted non-consent and, in only one case (***R v JA***, 2011 SCC 28), did the complainant change her story between initial complaint and trial to later assert that the acts were, in fact, consensual.

Some commentators, including **Ummni Khan** and **Rosie DiManno**, point to the *JA* case as an example of judicial denial of kinksters' agency. The complainant had initially told the police that after being strangled by J.A., she passed out; when she came to, he was anally penetrating her. But even though she swore at trial that all activities, including erotic asphyxiation, were consensual, J.A. was convicted. The Supreme Court of Canada upheld J.A.'s sexual assault conviction, ruling that a sexual partner could not consent in advance to sexual activity. Thus, for example, if she was asleep before contact started or became unconscious during the activity, the element of ongoing continuous consent was missing, which transformed the sexual activity into a sexual assault. However, as there was no evidence that the consequences for the complainant of having been strangled into unconsciousness were more than fleeting, the issue of capacity to consent to bodily harm was not before the Court. In fact, the Court expressly declined to rule on the issue of whether one could consent to sexual activity such as erotic asphyxiation that could result in bodily harm and, remarkably, noted that it would like to hear from interested groups before adjudicating this question.

The very limited information available about the relationship between J.A. and the complainant in this case suggests that the police and Crown pursued this charge because they were concerned about the complainant and her toddler's safety. As the sentencing report revealed, the defendant had a long list of convictions for violence against the complainant and other women. He had only recently been released from prison for charges related to assaulting the same complainant and, in addition to the sexual assault conviction, he was also convicted of violating a probation order to stay away from the complainant.

One troubling trend observed in the case law is that defence counsel idealize sexual autonomy and appropriate BDSM notions in order to mask their clients' violence. Evidence of close-in-time negotiation between the parties was only present in three of the 36 BDSM cases reviewed, and in all of these cases, the submissive party died. A safe word had been agreed upon in only one case (*JA*). As already noted, a conviction ensued there because the submissive party had passed out and therefore was incapable of consenting to the sexual acts that occurred while she was unconscious. Immoderate alcohol use was present in most of these cases, belying a claim of a safe practice. Yet judges, who may know little about scene negotiation, safe word use or the "safe, sane and consensual" credo, are sometimes willing to believe that violence against partners is, in fact, consensual pleasure. Either more has to be done to educate judges about BDSM or expert evidence on BDSM practices should be presented in court.

Sexual History Evidence

A complainant's sexual history is frequently relied on in cases where a defendant raises consensual BDSM as a defence and, as often as not, no formal sexual history admissibility application is made before the defence questions the complainant. Moreover the probative value of sexual history evidence is questionable: previous consent is not perpetual consent, so it shouldn't matter

[3] See the intervenor **factum** filed by the Women's Education and Action Fund (LEAF) and the Institute for the Advancement of Aboriginal Women in the Barton appeal for a more detailed analysis.

[4] We did not systematically review laws impacting sex clubs such as criminal charges related to the performance of indecent acts in a bawdy house or administrative offences other liquor code or public health regulation violations. However criminal charges are unlikely following two SCC decisions in 2005 (***Kouri*** and ***Labaye*** (2005 SCC)) and I am unaware of any administrative charges against sex clubs in Canada in the last decade.

whether the complainant has consented on a previous occasion to participating in BDSM. What matters is whether the parties have negotiated and agreed upon what will happen on this occasion and whether there is a clear way for the parties to indicate withdrawal of consent. Yet in some cases, judges seem to infer that past consent was enough to support current consent. For instance, in ***R v Ross*** 2015 SKQB 150, the defendant, who was charged with assault and sexual assault against his former girlfriend, was able to cross-examine the complainant on their "unconventional" sex life—rough sex, role playing, and acts of dominance/submission. The trial judge characterized the circumstances of this case as "unique," agreeing with defence counsel that to disallow this evidence would essentially "handcuff the accused" (para 38). He stated: "the acts forming the subject matter of the charge could be argued to be a part of the overall sexual activity of this couple, or to be the next logical step in a progression of expression of their sexuality" (para 39). How the "next logical step" of sexual activity relates to contemporaneous consent is troubling, especially in the absence of any evidence of explicit agreement on what will happen or how consent can be withdrawn.

In contrast, the Crown rarely tries to raise a defendant's propensity to violence. For example, according to **media reports**, the police searched Barton's computer and found he had visited websites depicting non-consensual extreme penetration and torture. The Crown did not tender this evidence at trial. Some reports indicate the search might have been illegal and, therefore, the evidence obtained from it was not admissible. As well, evidence of propensity to engage in certain behaviour is rarely admissible unless it is highly unusual and very fact-specific. For example, evidence that Barton had caused bodily harm to another woman in circumstances similar to those in this case might have been admissible. But evidence that he might enjoy depictions of such behaviour likely would not support the inference he would engage in such behavior had such an application been made.

Taking Strangulation Seriously

Strangulation is not taken seriously by judges in many of the cases reviewed, even though it carries with it the danger of life-threatening or permanent injury and is a known precursor to homicide. (It should be noted that while strangulation and erotic asphyxiation might spring from different intentions—violence versus heightened sexual intensity—the method, neck compression to prevent blood flow to the brain, is the same.) This trend may be because, overwhelmingly, the charge is sexual assault *simpliciter* rather than aggravated sexual assault or choking to overcome resistance, and therefore there is no need for judges to comment on the added violence other than to note such acts are inconsistent with either consent or mistaken belief in consent. Moreover, defendants often suggest they were participating in consensual erotic asphyxiation even though in no case, other the homicide cases, is there any evidence that the complainant had agreed to participate in this practice at the time of the events giving rise to the charges. (In *JA* there was no evidence that the complainant had agreed to erotic asphyxiation at the time of the events giving rise to the charges, although she had agreed at a prior time.) Judges rarely note that this practice is inherently and unacceptably dangerous or make the observation that if someone is being strangled, it is well-nigh impossible for them to use a safe word to withdraw consent.

R v Lavergne-Bowkett, 2013 BCSC 1737 demonstrates how difficult it can be to establish the required intent for a choking to overcome resistance charge. L.B. denied engaging in rough sex and claimed the acts were consensual, although his counsel later asserted the harm induced was from rough sex—a claim discredited by the defendant's own testimony. The judge accepted the complainant's testimony (supported by expert medical evidence) of strangulation, finding that that the defendant had "applied a strong force to A.B.'s neck" and had left bruises. However the judge acquitted the defendant of the choking charge, stating (para 109) that, "I have accepted the complainant's evidence that this [application of strong force] was part of the reason she did not resist the sexual touching by the accused. There is no evidence, however, that [L.B.] had the intention of choking her to render her unconscious or incapable of resistance." This reasoning raises the question: with the defendant's outright denial of rough sex, what other purpose does choking serve in the context of a sexual assault?

Conclusion

Even in consensual BDSM, strangulation/erotic asphyxiation should be a no-go zone for good reason: it is just too dangerous. Asphyxiation was the cause of death in three of the five reported cases in the last 20 years where the submissive party died; another went into shock after experiencing high voltage jolts and, as already noted, Barton's partner bled to death from a vaginal wound. Otherwise twenty years of jurisprudence strongly suggests Canadians who are interested in exploring BDSM are free to do so without fear of criminal prosecution, as long as contemporaneous and continuous consent is clearly established and no one dies. At the same time, police, prosecutors and judges, as well as academic and media commentators, must recognize that sexual history evidence is still pervasively relied upon and idealized visions of sexual agency and autonomy and appropriated notions of BDSM can mask potentially deadly violence and vicious sexual assaults.

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The Fight for Cannabis

By Paul Lewin, LL.B.

The fight for cannabis has begun. It began the night the Trudeau Liberals won an unexpected majority. That was the moment we all realized Canada would become the second country in the world to legalize cannabis. Uruguay was the first. Eventually every country in the world will do it and we did it second. Pretty good. What happens next? In April 2017 the Liberals will introduce, not pass, legislation that will contain few details. In 2018 or 2019 the Liberals will officially ruin legalization with punitive, elitist, and unmanageable rules which will be followed by years of conflict, litigation, and legal confusion.

Circumstances will conspire to make bad regulation the easy road. The easy road to bad rules will be paved with bad advice. The police forces, fire chiefs, medical associations, hydro companies, and municipalities will tell the Liberals that cannabis should be regulated like uranium with only elite super companies or possibly provincial governments responsible enough to grow and sell this supposedly dangerous plant. Big cannabis, the deep-pocketed licensed producers, will agree that extensive regulations that only super companies have the means to implement will be good policy. Public health professionals will recommend onerous regulation more suitable for a more dangerous substance. Even jurisdictional considerations will point the Liberals the wrong way. The fact that cannabis has been grown and consumed for thousands of years without incident will not be noted.

Law enforcement authorities will be closely consulted providing plenty of bad advice that will be turned into law. Law enforcement enjoyed cannabis prohibition. It was good to them. It got them into a lot of pockets, trunks and homes.[1] It got them a lot of money.[2] They will tell the Liberals ridiculous things such as the justice system must be educated as to the dangers of cannabis gardens.[3] They will give "expert" advice to the government such as that given by RCMP Corporal Shane Holmquist in ***Allard v Canada***, 2016 FC 236 who said that home growers invite home invasions and are conduits to the black market. Mr. Justice Phelan said this about RCMP expert evidence,

> He was shown, in cross-examination, to be philosophically against marihuana in any form or use that his Report lacked balance and objectivity. He possessed none of the qualifications of the usual expert witness. His assumptions and analysis were shown to be flawed. His methodologies were not shown to be accepted by those working in the field. The factual basis of his various opinions was uncovered as inaccurate. I can give this evidence little or no weight.[4]

The police have not studied cannabis. They have not grown it, sold it, or consumed it. What the police know about cannabis would not fill a joint. They know how to arrest the people who use it. That is not helpful. We do not need to know how to do that anymore. The police will have a disproportionate say in this process. We can see that already with Bill Blair as cannabis czar. Embracing the police and all their backward-thinking suggestions will give the Liberals political cover in the next federal election against allegations that they are soft on crime.

The police will advise against dispensaries and home

[1] Senate Committee on Illegal Drugs, September 2002, *Cannabis: Our Position for Canadian Public Policy*, pp. 334-347.

[2] *Ibid*, pp. 328-33.

[3] Ontario Association of Police Chiefs, 2003, *Green Tide – Indoor Marihuana Cultivation and Its Impact on Ontario*, p. 39.

[4] *Allard v HMTQ* 2016 FC 236 at paras. 123-126.

growing. They will favour a distribution model that is hard to access. They will say that anyone who has ever been involved with cannabis should be disqualified from participating in the new regime. They will press for criminal sanctions for non-compliance. They will oppose pardons for non-violent cannabis offences and support tough criminal sanctions for non-compliance. They will say the current market is dominated by criminal organizations. It is not. It is dominated by mom and pop cannabis enthusiasts. They will say that only rich guys in suits should be trusted to run this thing.

The licensed producers (or LPs) are the rich guys in suits who will second that idea. The LPs will say, as the police did, we need tough rules to keep us safe. The LPs are the wealthy investors who sunk millions of dollars into a license to grow and sell medical cannabis. These poor rich investors are all losing money because medical cannabis patients do not want to buy their cannabis. It is too expensive. The federal court in *Allard* recently found that cannabis patients cannot afford the LP cannabis and that for a fraction of the cost the patients can access their medical cannabis by growing their own which has the added advantage of giving them control over their medicine.[5] In *Allard* the government was given six months from February 24, 2016 to fix the broken system. The obvious and likely fix is bringing back home growing which will probably mean that, in the future, medical patients can grow at home, but everybody else is prohibited. That is a model that will definitely fail. The root problem for the LPs is that their cannabis is too expensive to compete with home growing, cooperative growing, or dispensary cannabis.

Legalization offers hope that their once bad investment will be transformed into something more lucrative. The recently renamed LP industry association Cannabis Canada lobbied the City of Toronto for the Toronto dispensary crackdown.[6] Cam Battley, chair of the advocacy committee of Cannabis Canada, said, "If the city fines dispensaries and shuts them down, the approach is obviously strong-armed, but I think it stems the growth and impact (on licensed producers) more than just letting them proliferate."[7] The LPs intend to make money. I expect they will lobby the Liberals for a distribution model that permits only LPs to sell and grow cannabis. They will want the current dispensaries shut down so that they may be replaced by dispensaries run by the LPs. They will seek tough criminal sanctions for non-compliance. They will oppose home growing. They will say that anyone who has ever been involved with cannabis should be disqualified from participating in the new regime. They will also seek greater freedom to advertise, market, and sponsor. The LPs have an intimate relationship with the Liberals.[8] The LPs have a lot of money. They are organized. There are currently 32 of these big companies[9] with several hundred more in queue. The LPs are big cannabis. They will be hard to resist.

The public health professionals will seek onerous rules in which cannabis is hard to access with high prices so as to curb demand.[10] The Liberals will see this as aligning with the law enforcement/LP model in which only high-priced super companies are responsible enough to grow/sell while the moms and pops of cannabis will be aggressively sanctioned for non-compliance. The public health model does not fit nearly as neatly into the law enforcement/LP model as the Liberals will claim. There are many aspects to the public health approach that will clash with the Liberal narrative. For example, public health is concerned about the threat of big cannabis.[11] The Liberals should be as well. The public health approach sees the potential for big cannabis to manipulate the marketplace through marketing, advertising, sponsorship, and adulterants. The public health model also would like to see a government monopoly, limited hours, limited purchasing, plain packaging, restricted potency, extensive treatment options, ongoing monitoring, and investment in more public health research, of course.[12]

The public health model holds positive public health outcomes as the most important consideration. This approach makes sense when regulating hard drugs, such as heroin and cocaine, as these drugs have significant public health consequences. Cannabis, unlike heroin and cocaine, is a mild substance of low toxicity. When the health consequences for society are more modest, public health becomes less of a consideration and other factors such as respect for personal autonomy must play a larger role.[13] Respect for personal autonomy discourages paternalistic interventions because they involve a judgment that the person is not able to decide for herself how best to pursue

[5] *Allard, supra* note 4, at paras 165-171.

[6] Quito Maggi, "**The Simple Reason Behind Toronto's Marijuana Dispensary Crackdown**", *Huffington Post* (May 24, 2016); Daniel Leblanc, "**Medical pot growers lobby Ottawa to shut down pot dispensaries**", *The Globe & Mail* (January 21, 2016).

[7] Peter Koven, "**Toronto's marijuana crackdown follows heavy lobbying by legal pot producers**", *National Post* (May 19, 2016).

[8] Daniel Leblanc, "**Ex colleague will lobby MP Bill Blair to restrict field of pot growers**", *The Globe & Mail* (January 10, 2016); Marc Emery, "**Marc Emery: Why did Justin Trudeau put a past kingpin in charge of marijuana task force**", *Georgia Straight (*June 17, 2016); Precedent, December 3, 2014, Daniel Fish.The Globe & Mail (January 21, 2016).

[9] There are 32 licensed producers as of June 20, 2016.

[10] Centre for Addiction and Mental Health (CAMH), October 2014, *Cannabis Policy Framework*, p. 12; City of Toronto Medical Officer of Health, May 13, 2016, *Legalization and Regulation of Non-Medical Cannabis*, pp. 12-13.

[11] Sheryl Spithoff, Brian Emerson and Andrea Spithoff, "Cannabis legalization: adhering to public health best practice", *Canadian Medical Association Journal* (September 21, 2015); Canadian Centre on Substance Abuse, November 2015, *Cannabis Regulation: Lessons Learned in Colorado and Washington State*, p. 8; Ian Culbert, Executive Director of the Canadian Public Health Association, "**Cannabis reform must not be derailed by special interest**".

[12] CAMH, October 2014, *Cannabis Policy Framework*, pp. 12-13; City of Toronto Medical Officer of Health, May 13, 2016, *Legalization and Regulation of Non-Medical Cannabis,* pp. 12-13; Mark Haden and Brian Emerson, "A vision for cannabis regulation: a public health approach based on the lessons learned from the regulation of alcohol and tobacco", *Open Medicine* v. 8(2) 2014, June 10, 2014; Canadian Centre on Substance Abuse, October 2014, *Marijuana for non-therapeutic purposes*, pp. 8-9.

[13] *B (R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 at para. 80.

her own good.[14] Despite this, expect to hear the Liberals to use the words "public health" a lot in next three years as public health is used as a fig leaf for the law enforcement/LP model.

Jurisdiction will also point the Liberals in the wrong direction. No government ever wants to give up jurisdiction. For a government, jurisdiction is power. The Liberals will want to maintain as much as they can. They will be vying with provincial governments trying to elbow their way in. The *Constitution Act*, 1867[15] gives the federal government exclusive jurisdiction over criminal law and procedure in criminal matters while giving the provinces authority over property and civil rights. There is no explicit grant of authority over health, rather, it has developed as a divided jurisdiction. The Liberals will be on safe jurisdictional ground if the legislation can be defended under the criminal law power.

Criminal law legislation must have a valid criminal law purpose backed by a prohibition and a penalty.[16] A valid criminal law purpose must be directed at prohibiting matters that represent an "evil or injurious or undesirable effect upon the public."[17] Purposes such as peace, order, security, health and morality have been recognized as criminal.[18] The criminal law power has been used to apply to a lot of different situations suggesting elasticity; however, there are limits. In the ***Reference re Validity of Section 5 (a) Dairy Industry Act***, [1949] SCR 1, it was found that margarine did not constitute a hazard to health and the legislation was focused on trade. Rand J. said this about the attempt to fit the legislation within the criminal law power, "there is nothing of a general or injurious nature to be abolished or removed; it is a matter of preferring certain local trade to others."[19] If the Liberals want to maintain maximum jurisdiction then they will need to cast this process as an attempt to better prohibit cannabis harms. This suggests that punitive regulations along with tough language about stomping out some yet to be articulated evil will put the Liberals on a more solid jurisdictional footing. That would be a smart approach if maintaining jurisdiction were an important priority.

What should the Liberals do?

The Liberals should permit home-growing and cooperative growing with reasonable regulations ensuring electrical safety and air quality. That should not be difficult as it is just a plant. The risk of electrical hazards can be addressed by having a certified electrician take care of any electrical installations.[20] The risk of toxic mould can be avoided by having a proper ventilation system.[21] I can grow tomatoes in my home, but if I grow cannabis then my house explodes. This police/fire misinformation was exposed in *Allard*.

The Liberals should permit the mom and pop cannabis enthusiasts to operate adult use dispensaries under reasonable regulation. The Toronto dispensaries were maligned by the City of Toronto for not following consistent rules. That is because there were no rules to follow. The dispensaries want rules. Give them coherent rules and they will gladly operate within that framework. These are the people who understand this plant best. They have the potential to contribute a craft cannabis niche that would richly enhance the market while not indoctrinating every human in Canada to consume corporate cannabis. There is no need to put these micro-artisans out of work and discard their knowledge and expertise.

The Liberals should create an open and competitive legalized cannabis marketplace, where the barriers to entry are reasonable and comparable to similar industries such as wine, beer or natural health products.[22] The LP application process was plagued by opaque standards that shifted over time and seemed to have more to do with who you knew than the quality of your application. There should be measurable pre-license requirements applied with reasonable application fees.[23]

The Liberals should recognize that cannabis did not just fall from the sky. There is already an existing market infrastructure. The new regime should incorporate this existing market infrastructure. The cannabis community is not going to stop just because the government tells them that corporate Canada is going to be taking over cannabis distribution. The growers will continue to grow and breed a wide range of diverse strains. The bakers will continue to bake, package, and label edibles. The extract artists will continue to produce concentrates. The dispensaries will continue to sell a wide array of cannabis products. The Liberals know this and they also know that they could solve the problem by bringing the cannabis community in and regulating them, but they won't. Accordingly, despite legalization, the unregulated cannabis grey market will continue to flourish alongside ongoing criminal charges, protests, litigation, and legal confusion.

[14] John Christman, **"Autonomy in Moral and Political Philosophy"**, 2.2, *Stanford Encyclopedia of Philosophy*.

[15] Sections 91(27) and 92(13) of the *Constitution Act,* 1867 (UK), 30 and 31 Vict., c. 3, reprinted R.S.C. 1985, c. 16.

[16] *Reference re: Firearms Act* (Canada), [2000] 1 S.C.R. 783 at para 27.

[17] *Reference re: Validity* of s. 5(a) of *Dairy Industry Act (Canada*), [1949] S.C.R. 1 at para 142 (*Margarine Reference).*

[18] *Reference re: Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457 at para 41.

[19] *Margarine Reference,* supra note 16, at para 147.

[20] *Allard*, supra note 4, at para 116-122.

[21] *Allard*, supra note 4, at paras 123-130.

[22] Cannabis Trade Alliance of Canada, *Cannabis Legalization in Canada: Creating a World-Class Sustainable Industry Through Inclusivity, Transparency and Evidence-Based Policy*, May 24, 2016, p. 16.

[23] Cannabis Trade Alliance of Canada, *Cannabis Legalization in Canada: Creating a World-Class Sustainable Industry Through Inclusivity, Transparency and Evidence-Based Policy*, May 24, 2016, pp. 12 and 14.

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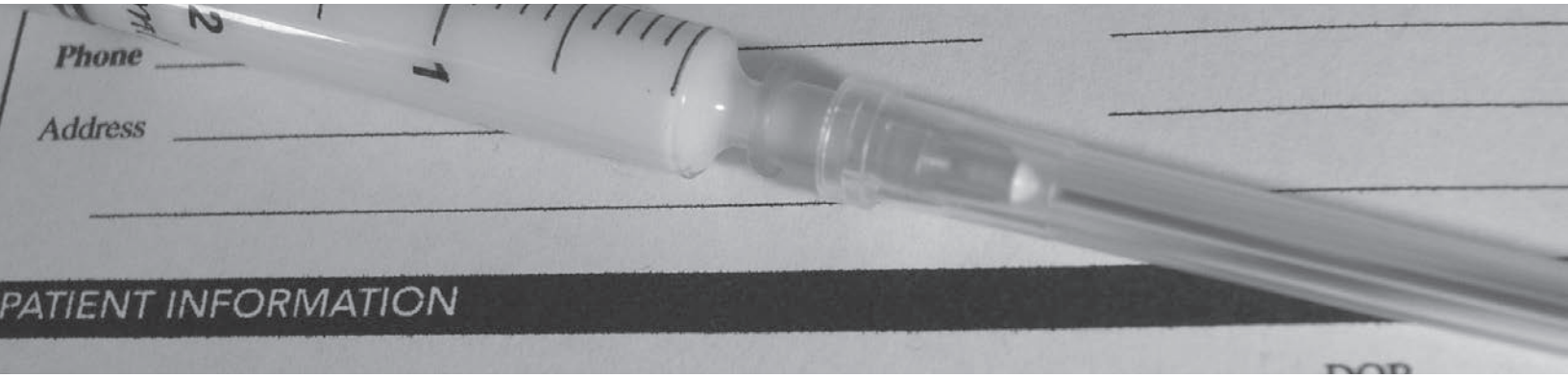

Preserving Life through Death: Reflections on Medical Assistance in Dying in the Post-*Carter* Legal Landscape

By Emma Carver, B.A., J.D.

Fifteen years ago, my grandfather, who required dialysis three times a week to stay alive due to his malfunctioning kidney, made the courageous decision to stop treatment. He knew that this would mean his certain and imminent death. While his mind was perfectly intact, and he may have lived for many more years, he was suffering from intolerable amounts of pain. He no longer wanted to spend three days a week hooked up to a dialysis machine (as he had been doing for six years), increasingly unable to enjoy any quality of life. My grandfather chose death over an extended life of pain and suffering.

I remember our last conversation, the weekend before he stopped treatment. He was unwavering in his choice, and despite the emotional occasion, he seemed at peace. He knew he would die within 5 to 10 days, but beyond that he had no control over the timing or manner of death. His medical team kept his death as comfortable as possible through the use of morphine and painkillers. At that time, it would have been illegal for his physician to assist with the death.

This was my first experience with voluntary death. It instilled within me a deep appreciation for the right of individuals who are suffering intolerably to choose when to end their lives. For me, this was always a straightforward question of compassion.

Six months into practicing law, Andrew Faith, a partner at our firm, asked me to help him bring the first physician-assisted death (PAD) application in Ontario. Since then, we have argued eight of the twelve applications for PAD brought in the Toronto region. In addition to these eight clients, I have spoken with dozens of other potential applicants, some of whom passed away painfully before their applications made it to court.

My extensive involvement with these applications has, in my opinion, put me in a unique position to comment on the debate over PAD (or, as it is now referred to, medical aid in dying (MAID)). Over the past few months, I have come to know many of the individuals who have benefitted from the availability of MAID. I have heard their life stories, reviewed hundreds of pages of their medical records, come to understand the nature of their conditions and prognoses, spoken with their loved ones, and listened to their clear, well thought out desires for MAID. On each occasion, I have had to communicate to the court, on their behalf, the nature and degree of their intolerable suffering and the reasoning behind their request for MAID. I have been in touch with many of their families both leading up to and in the aftermath of their applications. I feel both humbled and privileged to have been a small part of this new chapter in Canadian history, and the experience has turned me from a passive supporter to a staunch advocate for legalized MAID.

As I watch the public debate over this issue, one of my greatest frustrations is that the public will never be introduced to these courageous individuals in any great detail, due to their understandable desire to maintain privacy. In my conversations over the past few months, I have come to realize that much opposition to PAD comes from a place of fear or misunderstanding. I firmly believe that anyone who knows the dire circumstances of our clients would understand how cruel it would be to deny their request to end their intolerable suffering. For this reason, I feel compelled to speak about MAID. I want to shed light on the unique perspective of individuals who seek MAID, so that the public can understand why the constitutional right granted in ***Carter v Canada (Attorney General)***, 2015 SCC 5, is so important to those who are looking to end their suffering. Drawing from my experiences with the individuals who are actually seeking assisted death, I hope to provide insight into the MAID process, clarify some of the misunderstandings that exist, and show why fears about the process are misplaced.

It is important to first clarify what the Supreme Court actually decided in *Carter*. For better or worse, the Supreme Court did not grant a positive entitlement to MAID, even for individuals who meet the *Carter* criteria. Rather, the Court found that the government could not prohibit MAID for those individuals who meet these criteria, which require that an individual (i) is a competent adult, (ii) has a grievous and irremediable medical condition, (iii) is experiencing intolerable suffering that cannot be alleviated by any treatment acceptable to them, and (iv) clearly consents to PAD. "Clear consent" requires a person to be fully informed of their medical condition, prognosis and treatment options, and be free from any undue influence or coercion.

In reality, many people who meet these criteria will still be unable to avail themselves of a PAD, even where their suffering is extraordinary and their wishes are clear.

Accessing MAID can be difficult, even for the most deserving and qualified patients. The assessment process requires the involvement of at least two independent physicians or nurse practitioners, and in many cases a third physician will be required due to internal hospital policies mandating psychiatric consultations. The health care system can be difficult to navigate at the best of times. For those individuals who lack social and economic resources, and who find themselves in the deepest depths of suffering, the work involved in marshalling assessments and timely referrals can be insurmountable. Finding a physician willing to carry out the procedure is even more challenging, and is already creating barriers in many parts of the country. I applaud those provincial governments and organizations that have commenced efforts to assist with the referral process, but I remain somewhat skeptical. Even in Toronto, finding physicians has, in several cases, been challenging.

Obtaining the required drugs for the procedure also creates an access problem. Currently, these drugs can only be dispensed through hospitals. In Toronto, I am only aware of a few hospitals willing to dispense them. This has led to enormous barriers for individuals who have never been patients at these hospitals, or who do not have someone (whether it be a family member, lawyer or attending physician) willing to advocate for them. The disparity between rural areas and urban areas, and between those of higher and lower socioeconomic status, is not likely to disappear any time soon.

A fear that commonly surfaces during discussions about MAID is that the vulnerable will be induced to access PAD in a time of weakness. In my experience, regardless of how one defines "vulnerability", this concern is misguided. In actuality, the vulnerable face the biggest barriers in accessing MAID, even when they are the most deserving and clearly meet the *Carter* criteria. Adding to the systemic barriers noted above – which will undoubtedly be more pronounced for the vulnerable – is the fact that physicians will (appropriately) approach anyone who appears to be vulnerable with great caution. Assisted death is a very time-consuming, personal experience between a physician and a patient, and many physicians may simply not have the energy to expend on harder-to-serve individuals. They may also be reluctant to take the risk of assisting such patients given the complexities involved. I have seen this play out first hand in my efforts to connect a patient who was extremely vulnerable, both from a physical and socioeconomic perspective, to physicians willing to make the appropriate referrals for assessment. Some physicians who are strained under their current workload may subconsciously gravitate towards patients who will require less of their time – namely, those with social resources, a strong support network, good communication skills and higher intellect.

Further, basing opposition to MAID on a concern for the vulnerable is inconsistent with the amount of confidence and trust we place in our physicians and nurse practitioners in every single aspect of our health care system. We are fortunate in Canada to have a health system filled with compassionate and highly skilled medical practitioners who are tasked with protecting the vulnerable in a variety of contexts. Physicians and nurse practitioners belong to regulated professions that have released comprehensive guidelines and safeguards regarding MAID. If we start to doubt the ability of these medical professionals to determine capacity, consent, undue influence and other medical questions, and if we question the ability of our physicians to protect vulnerable patients, we risk threatening the core foundations upon which our healthcare system is built.

Another common objection to MAID derives from the notion that the healthcare system is designed to help, not harm. In addressing this concern, it is important to

mindfully reflect on what "harm" truly is. One lesson my clients have taught me is that death does not need to be seen as some unequivocally harmful outcome to be avoided at all costs. Rather, death can be incredibly peaceful and meaningful – something to embrace, not something to fear. This proposition feels intuitively wrong for many of us, and I think our discomfort with this concept stems from the way our culture tends to hide death away. We avoid talking about death, even with those who are terminally ill. In a uniquely modern way, MAID has caused us to reflect on and discuss our own inevitable mortality, and has reconnected us to a time when death was simply seen as a natural part of life.

Over the last few months, not a day has gone by where I have not spoken about death in some way or another. Usually, these conversations take place with someone who is staring death in the face. Discussing with a client their prognosis, arranging the timing and logistics of a death, explaining to a patient's family how the assisted death will occur, and hearing from a client why they feel death would be the ultimate release from their suffering, has enabled me to slowly chip away at the socially constructed taboo that surrounded the notion of death in my own mind. I have found this experience to be enriching and enlightening.

In many ways, the MAID process has been a transformative one for those involved. I have witnessed the fear of speaking about death evaporate among family members and our clients. For the first time in Canadian history, patients who are suffering can openly express to their family members and their doctors a desire to die without feeling ashamed or being labelled suicidal. Patients can expect to be listened to and validated. The pain and suffering that many would have chosen to bear in silence can now be expressed and addressed. Families are able to start the grieving process together, with the person who they are mourning. Children can fly in from across the country to say goodbye to a parent; families can be together and provide comfort to each other as the death occurs. Patients who would otherwise die in hospital can be discharged so that the death can occur at home. While our clients' deaths were "medical" in the truest sense of the word, they were also deeply personal and intimate. They were free from the beeps of heart monitors, intrusive and uncomfortable medical equipment, the chaos of shift changes, and the cramped quarters of sterile hospital rooms. In one case, I was told by the client's son that his father was beaming, joyful, and making jokes up until the end – one of the only good days he had had in years. Most people are not so fortunate to die surrounded by all their loved ones, having said their goodbyes. In short, death no longer has to be a lonely experience.

It was plainly apparent to me that all of our clients clearly wanted to die, had made up their minds completely of their own volition, and were suffering unbearably. They varied in age, and their life experiences, education levels and past careers differed greatly. Most had children and grandchildren, many had spouses, and some were widowed. Our clients were both men and women; their genders were roughly evenly split. Some were religious, others were not, and they had different perspectives on spirituality and the afterlife. I had no concerns that these individuals may have been motivated by negative experiences with the healthcare system. In fact, the one thing they all had in common was a deep appreciation and respect for their physicians and health care teams. Most were extremely grateful and effusive about the treatment that they had received, and those who were terminal had uniformly positive experiences with palliative care. The reality was simply that the medical treatment offered could not sufficiently alleviate their intolerable suffering, and they were ready to die at a time of their choosing.

Almost all of our clients used their authorizations within a few days, which spoke to the unbearable nature of their suffering. Some, however, waited longer. For these clients, the knowledge that they would be able to access PAD when they were ready was enough to provide comfort and restore a sense of control.

After our first case, I was asked whether the "victory" was "bittersweet". My first instinct was to cautiously agree, feeling odd and somewhat guilty about celebrating a death. But I have come to feel only gratitude from knowing that these individuals have found peace in death, knowing that death was exactly what they wanted. Witnessing the overwhelming sense of relief that my clients expressed the moment their court applications were granted were some of the most rewarding moments of my legal career to date, and I have no doubt that they will remain so. The emotional aspect of these cases was not the death itself, but rather the knowledge that every delay in the application process might prolong their suffering, which was extremely difficult to watch.

I often think back to the first time I read ***Rodriguez v British Columbia (Attorney General)***, [1993] 3 SCR 519 in first year constitutional law, where the Supreme Court denied a woman suffering from ALS the ability to end her life with the assistance of a physician. It was the first time I felt real anger in response to a judicial decision. I was angered by the arrogance of detached individuals at the other end of the country telling a woman who was facing unfathomable suffering that she could not die in peace. I was angered by the fact that the amorphous objective of "preserving life" – a cruel concept when daily living is excruciating – was used to justify condemning someone to suffer.

I am thankful that judges and legislators have since implicitly acknowledged that respect for life – and for those who are living it – does not mean preventing death at all costs. PAD is not about life versus death, and it is not inherently incompatible with protecting the vulnerable. Instead, it is about compassion for those who are suffering

and respect for their fundamental personal choices. Indeed, if we start distrusting the notion that individuals are able to accurately determine for themselves when their suffering is intolerable, we risk regressing back to a dangerous form of paternalism, where autonomy and dignity are compromised for the sake of antiquated concepts of morality.

Had *Carter* been decided differently, some of our clients who have had MAID would at this moment be suffering from excruciating pain, some without the benefit of family members nearby to care for them. Some may have died alone and suffering. Until we find ourselves in a body that has stopped working, until we experience intolerable and relentless suffering so horrific that we seek assistance in dying, I do not think any of us can truly understand the importance of having the freedom to choose how we end our lives.

Much of my role in court applications for MAID has ended with the passing of **Bill C-14**, but I continue to be contacted by people who do not fit squarely within the corners of the new legislation. I have seen firsthand the cruelty that will result from excluding non-terminal individuals from the bill's ambit, and I am deeply disappointed in the government for blatantly overriding the clear criteria established by the Supreme Court in *Carter* (as explicitly confirmed in at least two subsequent court decisions, ***Canada (Attorney General) v EF***, 2016 ABCA 155, and ***IJ v Canada (Attorney General)***, 2016 ONSC 3380). As described in the opening words of *Carter*, the exclusion of non-terminal patients leaves these individuals with a cruel choice: to take their own lives prematurely, often by dangerous or violent means, or to suffer until they die from natural causes. I also foresee inevitable issues with access to MAID, as discussed above, including a troubling rural-urban and socioeconomic divide that may take decades to remedy. I look forward to remaining part of the conversation, and advocating for those who may face barriers in accessing MAID. We are at a pivotal point in Canadian history, and I urge all of those involved to approach this new legal landscape not from a place of fear, but from a perspective of compassion and respect for the autonomy of those who are suffering.

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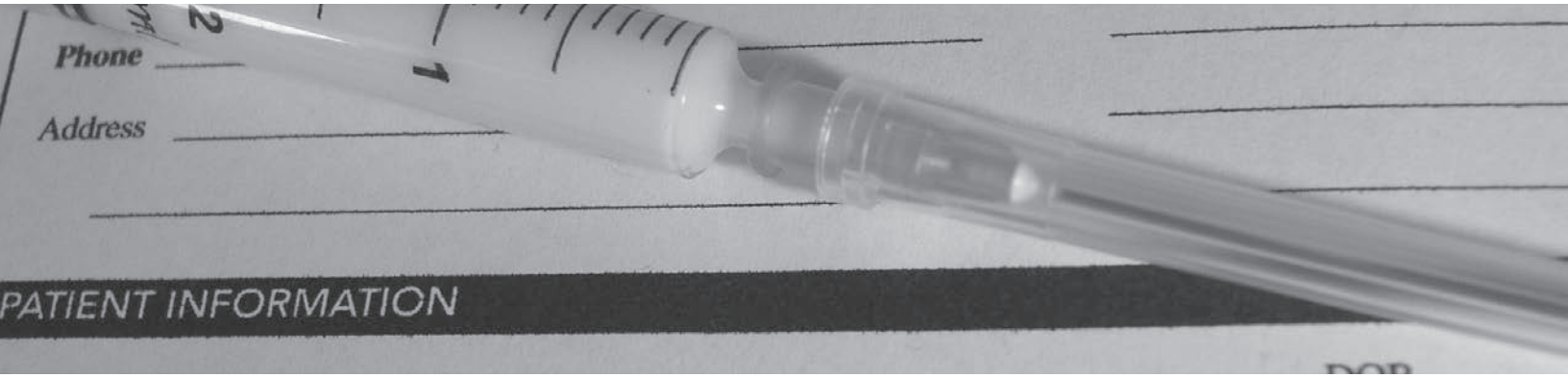

It Breaks a Village: What Autonomy Rhetoric Doesn't Teach Us About (Assisted) Suicide

By Derek Ross, LL.B., LL.M. & John Sikkema, B.A. (Hons), J.D.

It has been 17 months since the Supreme Court of Canada determined that the Criminal Code's complete ban on assisted suicide was unconstitutional. Since that time, Canadians have wrestled with how best to respond to the decision with a new regulatory regime. Every week, it seems, has brought with it a public call to further "broaden access" to assisted suicide.

The recently passed **Bill C-14** (Parliament's response to ***Carter v Canada (Attorney General)***, 2015 SCC 5) contemplates that in the near future a patient may not even need to be an adult, suffering from a physical illness, or mentally competent at the time they are euthanized.[1] Even still, the bill has been criticized for being too restrictive in requiring that a patient's natural death be at least "reasonably foreseeable". Pro-euthanasia advocates have called for scrapping this requirement in favour of making euthanasia available to those who are not dying or terminally ill (and the Senate adopted such an amendment, although it was ultimately rejected by the House of Commons).

It seems we have all but forgotten the stringent conditions imposed by the trial judge in *Carter*, including the requirement that the plaintiff, Ms. Taylor (who had advanced ALS), be terminally ill and near death with no hope of recovering before her physician could cause her death. Similarly, the Supreme Court of Canada's repeated statements that its decision was limited to the facts of Ms. Taylor and people in her position have not been given due weight.[2] And it is worth remembering that the Supreme Court said in 2001: "Killing a person – in order to relieve the suffering produced by a medically manageable physical or mental condition – is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition."

Our discourse has shifted drastically. In just over a year, we've gone from talking about euthanasia for terminally ill, near-death, physically debilitated patients with no hope

[1] The Preamble to **Bill C-14**, includes a commitment to develop "a full range of options for end-of-life care… in which a person may seek access to medical assistance in dying, namely situations giving rise to requests by mature minors, advance requests and requests where mental illness is the sole underlying medical condition." See Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts* (medical assistance in dying), 1st Sess, 42nd Parl, 2016.

[2] The Court addresses the rights of "people like Ms. Taylor" and "persons in her position". In paragraph 127, the court explicitly states, "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." See *Carter v Canada (Attorney General),* 2015 SCC 5, at paras 56, 65, 66, 111, 126, 127. See also Sikkema & Ross: **Misreading Carter**.

[3] For example, the **Report** of the Special Joint Committee on Physician-Assisted Dying recommends that Parliament make assisted suicide available for those experiencing psychological suffering and that, within three years, Parliament also make assisted suicide available to "mature minors".

why permitting "medical aid in dying" at all is problematic. It transforms our conception of suicide from "a tragedy we should seek to prevent to a release from suffering we should seek to assist."[4] And the more we expand the "medical aid in dying" regime, such as by extending it to individuals who are not dying, the more we will normalize suicide (assisted or not) in practice.[5]

What is the difference between someone who ends their own life because it has become intolerable to them and someone who has a doctor do it for them for the same reason? How can we continue to seek to discourage the former, while we pay for and provide the latter as "health care"?

These are the difficult issues we are forced to confront in a post-*Carter* Canada, and that were not addressed in the Supreme Court's ruling. Part of the reason for their absence in the Court's decision was its narrow reading of the purpose of the assisted-suicide ban. The Supreme Court determined that the law's sole objective was "preventing vulnerable persons from being induced to commit suicide at a time of weakness", despite submissions from the Attorney General[6] and interveners[7] that the law had other objectives, including preventing suicide and upholding the inviolability of life.

Sidelining those considerations was perhaps a luxury that the Supreme Court of Canada could enjoy in adjudicating fact-specific legal questions arising from an individual's *Charter* claim. But Parliament – and indeed, all of us as members of the collective responsible for this regime – do not have this luxury. We must examine this issue not solely through the lens of an individual's fact-specific *Charter* claim, but as one that has broad and far-reaching societal and ethical implications that "are not suited to resolution by a court on affidavit evidence at the instance of a single individual."[8] Prudence demands that we consider the broader implications that were not addressed by the Court.

The Social Impact of Suicide

If the choice to live or die is solely the individual's to make, why have attempted suicide, assisted suicide, and consensual homicide long been considered legal offences in Canada and other countries?

First, it is a foundational principle of Canadian law that the lives of all persons have equal and inherent worth – despite the many inequalities that may exist among persons (in physical and mental ability, for example).[9] As a result, our laws have historically upheld the inviolability of life: the principle that the intentional and premature taking of another human life is "intrinsically morally and legally wrong", no matter whose life it may be.[10]

Second, suicide is not just an individual issue. It is a societal issue. It affects those the victim leaves behind.[11] Even when the most socially isolated person commits suicide, though she may have neither friend nor family member to grieve her, we consider it a societal failure. We do not shrug it off as her choice.

Implications for the "Assister"

The same is true when it comes to assisted suicide. Its impact extends beyond the victim and the assister, but it is worth pausing to consider the impact on the assister. Unlike suicide, with assisted suicide the act itself, not just its effects, is intrinsically social because another person is involved. The assister is morally responsible as a participant in another's death. To help someone kill herself is to fail to help her in some other, life-affirming way, and to rob others of the chance to do the latter. Then there are the **potentially damaging psychological effects** of the act itself to consider—even anticipating euthanizing a person can cause severe stress.

Broader Societal Considerations

Zooming out further, we should consider the implications of legalized "assisted death" for society. In an **interview** with the CBC, Jean Vanier, the founder of L'Arche communities for the disabled, was asked how lawmakers should approach the issue of "assisted death" in light of the fact that the *Charter* grants rights to *individuals* and the issue has been framed as a matter of *individual rights*. He replied:

> People can go through periods of just depression, fatigue, loneliness, so we mustn't go too quickly to just say there's a legal right; they also have a legal right to be walked with, accompanied, and helped. I hear what you're saying, that everybody is independent. Of course. We're also all interdependent, we need all to be loved in order to find the beauty of life […]. […]

[4] **Andrew Coyne**, "Canada is making suicide a public service. Have we lost our way as a Society?" *National Post*, February 29, 2016.

[5] See Trudo Lemmens, "The Conflict between Open-Ended Access to Physician-Assisted Dying and the Protection of the Vulnerable: Lessons from Belgium's Euthanasia Regime for the Canadian Post-Carter Era" in Catherine Regis, Lara Khoury & Robert Kouri, eds., *Key Conflicts in Health Law* (Cowensville: Yvon Blais, 2016), pp. 261-317, as discussed further infra.

[6] *Carter v Canada (Attorney General),* 2015 SCC 5 (Factum of the Respondent at paras 4, 5, 142, 147, 152, 156, 161).

[7] *Ibid* (Factum of the Intervener, Christian Legal Fellowship at paras 3, 10, 16, 20, 23).

[8] *Rodriguez v British Columbia (AG),* 1993 CanLII 1191 (BCCA), at para 172.

[9] *Granovsky v Canada (Minister of Employment and Immigration),* [2000] 1 SCR 703 at paras 54-58, 186 DLR (4th) 1.

[10] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at 601.

[11] This is reflected in the preamble to Bill C-14 which says "Whereas suicide is a significant public health issue that can have lasting and harmful effects on individuals, families and communities".

> [L]awmakers should also realize that the human being – we're born in weakness and we die in weakness and that we're all vulnerable and that we all always need help. Society needs to encourage opening our hearts to those who are weaker and more fragile. There's something in society that's going wrong when we're thinking all the time that people have to be perfectly independent or perfectly strong, when in reality, my God, we need each other, we need help, we need good doctors, we need old people's homes that are caring […]. […]
>
> All legislation is not just independence; all legislation is to help people to become more human and to help them to become fully alive in various situations, fully alive as they grow older, […] fully alive also in sickness or cancer or whatever it is, to help people hold onto the beauty of life. We can help each other to become more human.

In contrast to Mr. Vanier's statements above, the Supreme Court's analysis in *Carter* was based on an individual rights claim and consequently highly individualistic. The Supreme Court in *Carter* accepted Ms. Taylor's evidence that because she had a "rational and persistent" wish to die she was therefore not vulnerable. But should our only concern be that "assisted death" is "chosen"? Is a person not vulnerable provided she has a "rational" and persistent wish to die?

Dr. Margaret Somerville, founding director of the Centre for Medicine, Ethics, and Law at McGill University, challenges that view. The very notion that suicide is freely chosen so long as the person is competent and not subject to coercion or undue influence represents an extremely myopic understanding of human vulnerability. As Dr. Somerville explains, the Court failed to consider what is necessary to protect all of us as vulnerable people by upholding "respect for life" in society as a whole.

Indeed, the Supreme Court's narrow framing of the law's objective effectively sidelined broader ethical and societal concerns. A person's desire to receive assistance to commit suicide may be the result of a complex web of factors or influences - internal and external, interpersonal, familial, institutional, and cultural - that the Court did not and could not adequately take into account. We are interconnected, not autonomous. Others' attitudes shape our own, and vice versa. National laws and policies are both shaped by, and shape, people's views. Publicly funded euthanasia, for example, sends the message that euthanasia is not only an acceptable practice, but a social good.

When people embrace the message that euthanasia is a social good, we should expect their views on other matters to change as well. If euthanasia is accepted as a social good, what might we eventually think about costlier alternatives to euthanasia? As it is, just 16 percent of terminally ill Canadians have access to quality palliative care. If "assisted death" is a "dignified" way to die when your strength is declining and your dependence increasing, what will we think about those who choose to continue to live in a state of total dependence on others?

It should not surprise us that various disability rights organizations oppose making "assisted death" broadly available, and some oppose legalizing it at all. A long list of such organizations have endorsed the Vulnerable Persons Standard (VPS), for example, which calls for limiting "assisted death" eligibility to those who are in an advanced state of weakening capacities, with no chance of improvement, and at the end of life.

For all of these reasons, it also should not surprise us that many physicians do not regard assisted suicide or euthanasia as health care at all, and some have warned that legalizing such practices undermines longstanding principles of medical ethics and risks eroding public trust in the profession.[12]

Normalizing Suicide

If "assisted suicide" is a "dignified" way to die, then why not unassisted suicide? Robert-Falcon Ouellette, an indigenous Canadian and Member of Parliament, has taken a stand against legalizing assisted suicide for just this reason: it sends a message that suicide is a solution to suffering. He shared his personal story of contemplating suicide as a six-year old boy and reflected that if his elders had opted for assisted suicide, he might not have chosen life for himself:

> If grandma, grandfather decides they had enough in life […] if they weren't able to carry on, why should I carry on? If they weren't strong enough, why should I be strong enough? I think that is a question that is asked in in Attawapiskat more often than not […].

A study published in the Southern Medical Journal in October 2015 indicates that general suicide rates have increased in each American state that has legalized assisted suicide.

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[12] Most palliative care specialists, who dedicate themselves to maximizing the quality of life of patients facing life-threatening illness, wish to keep assisted suicide and euthanasia out of their discipline. A recent survey conducted by the Canadian Medical Association of its member physicians revealed that only 29% would even consider providing medical aid in dying if requested by a patient (and of those, even fewer would do so in cases of nonterminal illness (23%) or psychological suffering (19%)). The World Medical Association "strongly encourages all National Medical Associations and physicians to refrain from participating in euthanasia, even if national law allows it." Prof. Kevin Fitzpatrick argues in the *British Medical Journal* that allowing euthanasia may further erode "what may already be a shaky sense of safety in medical care". Patients need to feel safe in order to seek medical help. For further reading, see Ross & Sikkema: Assisted suicide: crime today, health care tomorrow?

Another study reveals that the number of reported (and, likely, unreported) cases of euthanasia carried out in Belgium (which legalized the practice in 2002) has steadily increased - from 347 in 2004 to 1,926 in 2014.[13] Moreover, the rate of requests for euthanasia that are granted in Belgium also appears to have gone up, from 56.3% in 2007 to 76.8% in 2013.[14] In a detailed review of Belgium's empirical data, Professor Trudo Lemmens concludes that there exists "a growing comfort level among physicians in granting requests and in actually performing euthanasia." And once active life-ending decisions become part of medical practice, it also "leads to a normalization even in situations that go beyond those where [physician assisted death] was seen to be a compassionate response (i.e. to significant physical suffering at the end of life)."[16]

Suicide must not become the "new normal" as a medical response to suffering. We must support the efforts of health care providers and others to prevent suicide (whether medically assisted or otherwise) and promote treatment.[17] However, we fear that suicide prevention efforts may come to be perceived as undermining the so-called "right"[18] to assisted suicide. In Quebec, for example, the College of Physicians **recently discovered** that physicians were allowing suicide victims to die when life-saving treatment was available. The legalization of assisted death was cited as creating ambiguity about the need to intervene in such cases.

Legislative Options

In light of the *Carter* ruling, do concerns about social attitudes towards the sick, the normalization of suicide, and the erosion of medical ethics have any place when it comes to law making? Were these matters rendered irrelevant by *Carter*? Thankfully not. Such concerns were sidelined because the Court examined only the very narrow question of whether or not a complete ban on assisted suicide was necessary in order to protect vulnerable persons from being induced to commit suicide in a moment of weakness.

Our collective task now is to consider not only individual rights, but also the common good, which entails more than ensuring that people comply with a set of rules and obtain informed consent before killing someone or aiding their suicide. We must concern ourselves with combatting the inclination towards and social acceptance of suicide generally, assisted or not.

Christian Legal Fellowship's position, as reflected in its **interventions** at all three levels of court in *Carter*, is that a complete prohibition on assisted suicide and euthanasia is the only sure way of achieving this objective, as well as countering negative perceptions about the quality of life of persons who are elderly, ill or disabled, and protecting the vulnerable from error and abuse. After all, the Supreme Court accepted in *Carter* that the risks to the vulnerable from legalizing assisted suicide could only be "very substantially minimized" by a "carefully designed system" imposing "strict limits that are scrupulously monitored and enforced"; it did not say those risks could be *eliminated*. Only a complete prohibition could do that.

Nevertheless, with Bill C-14 the government has taken the path towards legalizing assisted suicide and euthanasia. Contrary to much commentary that Bill C-14 is unconstitutional for making "medical aid in dying" too narrowly available, **Parliament is entitled** to enact a strict law.[19] Allowing "assisted death" where natural death is not near, as Professor Emeritus Dianne Pothier **points out**, creates the risk of premature death for those who may have changed their minds if death had not precluded that option. It also precludes the use of new treatments discovered after the patient's premature death that could have ameliorated their condition, as **explored** by Konrad Yakabuski.

In a **recent speech** in the Senate, Senator Murray Sinclair, a former judge, grasped well Parliament's role in responding to *Carter* and its responsibility to expand its view beyond that court ruling:

> Suicide was not easily condoned in any nation, and we do not want a society to think that suicide is always an option. We certainly do not want others encouraging others to end their lives. […] As a matter of principle, we still believe that life ought to be sacred. Therefore, when we are asked to consider a bill which undermines that principle, we must proceed cautiously. Our obligation as senators is to ensure that this law protects the weak, the impressionable and the vulnerable from themselves if necessary but certainly from others. We must ensure that as a matter of principle taking one's life is not undertaken easily.

[13] Lemmens, *supra* note 3, at para 49. Figures from the **Dutch Euthanasia Review Committee** also show that euthanasia in the Netherlands has also **steadily increased** – by 76% since just 2010, with more than 5,500 reported cases in the country last year alone.

[14] *Ibid.*

[15] *Ibid*.

[16] *Ibid,* at para 55.

[17] Currently, there are **over 50 Canadian organizations** devoted specifically to suicide prevention and awareness with registered charity status, and these are just the ones that include the word "suicide" in their name.

[18] *Carter* did not establish a freestanding or positive right to "assisted dying". It "simply renders the [existing] criminal prohibition invalid" because the existing prohibition was found to be broader than necessary to advance the statutory objective of protecting vulnerable people from error and abuse.

[19] As the Justice Department affirmed in its recent **Report**, Bill C-14 need not mimic the language of the *Carter* ruling. The constitutionality of any new law on euthanasia will not be determined by a simple comparison with the *Carter* judgement, but "will involve an assessment of the provisions of the Bill in light of its new and distinct purposes, as compared to the purposes of the total prohibition, and the legislative record."

Continuing the Conversation

Every person, no matter how old, disabled, or infirm they may be, has inherent and equal worth. For that reason, as Justice Sopinka recognized in *Rodriguez*, Canadian law has long recognized that the active participation by one individual in the death of another is "intrinsically morally and legally wrong".[20] That principle was not challenged or overturned in *Carter* – in fact, the Court affirmed that "sanctity of life" remains one of Canada's "most fundamental societal values" - although *Carter* now allows for a legal exception in certain circumstances.

If we are going to permit assisted suicide in some circumstances, it does not mean we should allow it in all circumstances, celebrate it, encourage it, or strip away important procedural safeguards. Nothing in *Carter* requires this.

Nor should the national discussion about assisted suicide end once a new law is passed. We must continue to work towards solutions to better serve those who are suffering, ill, disabled, or elderly. We must continuously ask whether we are doing all we can to help ameliorate suffering and loneliness. We have let our fellow Canadians down if they reach the point where, because we have not supported them with the care and companionship they need, they feel their only solution is to end their lives. Hopefully, there is a fruitful conversation we can all have, regardless of our respective views on assisted suicide, about how to improve and protect the lives of those who need our support the most.

[20] *Supra*, note 10.

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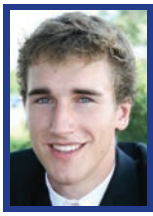
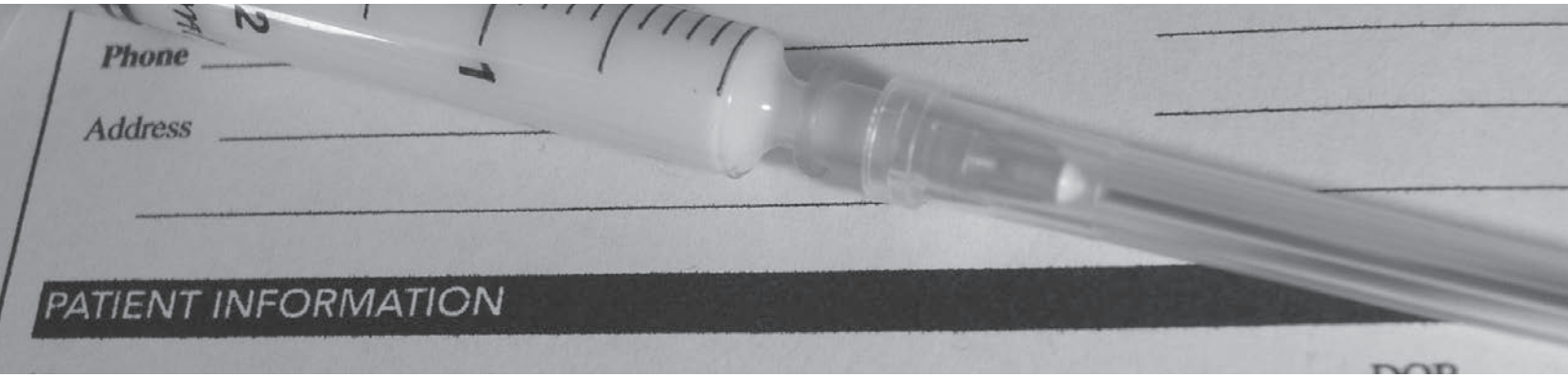


John Sikkema, J.D. (Queen's), is Associate Counsel with Christian Legal Fellowship (CLF). John works on CLF's judicial interventions, including its recent intervention at the Supreme Court of Canada in "Carter II". His writing has appeared in the Naional Post and Policy Options. John currently serves as an Executive Committee Member of Advocates for the Rule of Law, a Canadian legal think tank.



Ready to Die: A Doctor's Reflections on Access to Assisted Dying

By Thomas McLaughlin, B.Sc. (Hons), MD

There are few legal decisions that attract major attention within the medical community: ***Carter v Canada (Attorney General),*** 2015 SCC 5 was one of them. Around water coolers, break rooms, and across scrub curtains in operating theatres, Canadian doctors debated how the ruling would affect our patients and our profession.

Personally, I continue to struggle with my own opinions on Medical Assistance In Dying (MAID – please see the "definitions" box on page 40), as likely a vast swathe of the physician community does. I will leave it to brighter legal minds (including those within the pages of this magazine) to debate the central question of whether or not the Supreme Court of Canada was morally and constitutionally correct in *Carter*. However, in a practical sense, doctors have a uniquely intimate familiarity with the dying process, with consent and capacity determination, and with safeguards of vulnerable populations. These experiences can inform valuable insights into many of the most difficult legal aspects of MAID.

I will use these experiences to argue that any law on MAID based on maximizing personal autonomy needs to extend the right to die to all competent individuals. Currently, several patient groups are excluded without a principled basis from our newly-created regulation on MAID, in contradiction of the Court's holding in *Carter*. These restrictions serve only to further infantilize patients who already carry great stigma. Finally, I will argue that our laws need to include strong protection for physicians participating in MAID, and for those who wish to conscientiously object.

Who should be able to obtain MAID?

Every doctor carries within them countless memories of patients who have experienced debilitating illness, immense suffering, or death.

I remember from medical school, for example, a middle-aged woman with ALS (Lou Gehrig's Disease, a degenerative neurologic disease). She was accepting of the fact that she would need a feeding tube, and help with cleaning herself, and that she would progressively lose the ability to breathe - on the one condition that she always be able to write the crossword in the morning. She remained generally cheerful until she lost the use of her hands, at which point she became deeply miserable.

Far be it for me to assign value to this woman's life, or to particular aspects of it. I'm not a crossword fan, but for her it symbolized the maintenance of her independence, her dexterity, and her intellect. Similarly, each one of us has deeply unique desires, goals, and values, that allow us to define what constitutes a meaningful quality of life or, conversely, unacceptable suffering.

Respect for our patients' autonomy to make this definition for themselves is deeply engrained within our physicians' code of ethics, and with our evolving Canadian social landscape. Indeed, the Court in *Carter* explicitly avoids defining what counts as a "grievous and irremediable" medical condition, and instead defines it as any illness,

disease, or disability that "causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition". Intolerable suffering occurs broadly, across the entire spectrum of medicine; it therefore behooves us to apply MAID equally broadly if we wish to remain consistent with the overarching principle of individual autonomy.

Terminal Illness

Bill C-14, the federal legislation on MAID, restricts MAID to **patients with terminal illnesses in an advanced state of irreversible decline**. This restriction will be problematic for doctors to enact, and is inconsistent with the principle of patient autonomy underpinning *Carter*.

Bill C-14's legislation generally leaves doctors free to determine patient eligibility for MAID, provided that "natural death is reasonably foreseeable". I worry that doctors will struggle with defining what "reasonably foreseeable" means. For example, if I have a leukemia patient with a 50% chance of dying six months from now, is that "reasonably foreseeable"? What if it's an 80% or 90% chance of death? What about a patient with a disease like heart failure, where they may potentially live a long time but there is a reasonable chance within any given month of having an acute deterioration that may lead to death? Asking physicians to determine when natural death counts as "reasonably foreseeable" will lead inevitably to inconsistent application or subjective cut-offs. Judges or lawyers may be more familiar with commonly-used legal terms like "reasonable" and "foreseeable", but it is equally problematic if the regulatory system is confusing enough that doctors need to seek legal advice on a regular basis.

Even more importantly, patients without terminal illnesses can suffer immensely, and it robs them of their autonomy to restrict them from MAID. What purpose does it serve to force a patient with heart failure, for example, to experience months or years of extreme shortness of breath (described by one of my patients as "drowning all the time"), until they eventually become close to death and thus eligible for MAID? MAID is legal on the basis that competent individuals should have the autonomy to determine when their quality of life is outweighed by intolerable suffering – a determination that can occur regardless of how close one is to death.

Requirements for patients to be near the end of life are also inconsistent with *Carter* itself. Kay Carter suffered from spinal stenosis, a disease which can cause debilitating pain, but which is not lethal and does not lead to a reasonably foreseeable death. I am no lawyer, but I think it would be unfitting for the regulation brought about by *Carter* to be created in such a way that the plaintiff herself would not qualify.

Mental Illness

Bill C-14 restricts MAID to individuals with physical illnesses - this discriminates against people with mental illness. Diseases like depression or psychosis can cause profound suffering, preventing people from being able to work or enjoy any quality of life. Doctors presume that patients with these diseases have actually departed from their normal selves, and may return with appropriate treatment.

But what happens when they are completely unresponsive to treatment? I have seen patients involuntarily admitted to hospital for their twelfth episode of depression, refractory to drugs, counseling, and electro-convulsive therapy. For patients like this, at some point the suicidality of an acute (and presumably reversible) mental illness becomes a reasonable desire to die rather than continue to suffer intolerable symptoms of that same mental illness (such as worthlessness, guilt, and self-loathing). Teasing out this

Definitions

In any debate, our choice of words colours our arguments. Surely, everyone is supportive of "dying with dignity", and against doctors "killing" patients, just like nobody claims to be "anti-choice" or "anti-life". The following definitions should serve to clarify the arguments:

Medical Aid in Dying (MAID): *when a medical doctor or nurse practitioner (NP) intentionally participates in the death of a patient, by directly administering a lethal medication, or by providing the means by which a patient can end their own life. This has been legalized in* Carter. *Because the law in Canada includes NP, MAID is a preferable term to Physician-Assisted Death (PAD).*

Euthanasia: *This is when someone (often, but not always, a doctor), intentionally ends another person's life in order to relieve suffering, with or without consent.* Carter *leaves many forms of euthanasia illegal, such as euthanasia of dying infants and children. Of note, some jurisdictions (e.g. Belgium) have legalized forms of infant and child euthanasia.*

"Dying with Dignity": *refers to a death that occurs within the parameters set forth by a dying individual. It is NOT synonymous with euthanasia or MAID.*

Palliative Care: *is an approach to medical care for people with serious or terminal illnesses. It focuses on quality of life and relief from symptoms such as pain, shortness of breath, and mental stress.*

Mature Minor: *refers to the legal doctrine in Canada that has existed since* **AC v Manitoba (Director of Child and Family Services)**, [2009] 2 SCR 181. *This decision annulled laws restricting capacity determinations to those aged 16 and older, and said that if a child demonstrates the "ability to exercise mature and independent judgment", their views "ought to be respected".*

"Grievous and Irremediable": *a medical illness, disease, or disability that causes enduring suffering and is intolerable to an individual.*

fine line will undoubtedly remain a challenge for doctors, however we already have extensive frameworks for diagnosis and capacity assessment in psychiatric patients. These ought to be reasonably applied to patients seeking MAID.

Dementia

Physicians routinely allow competent patients to make their wishes known in advance for times when they may be incompetent to make medical decisions. This "advance consent" is such a common part of medical care that it is used in routine situations (e.g. consent to remove the appendix of a patient when they are anesthetized) and in issues of of life and death (e.g. "Do Not Resuscitate" or DNR orders).

It is therefore inconsistent to exclude advance consent for MAID. The legislators who created Bill C-14 worried that these patients would not be able to change their minds, but this concern is common to all advance consent. I don't have to wake a patient up periodically to ask them if I should proceed with surgery, and I can remove an unconscious patient's breathing tube based on a DNR order created months before.

We already thoroughly scrutinize patients' understanding when it comes to advance wishes for issues of life and death. With DNR orders, for example, a family doctor might confirm multiple times, over a period of years, that their patient knows what it means to have a breathing tube removed. The same doctor might demand that wishes for DNR's be made without family present, or in writing. If there is any doubt that the patient fully understands the finality of a DNR order, the doctor can (and often does) refuse to enact it. These same safeguards can be reasonably applied to advanced consent for MAID.

If we don't allow advanced consent, we also force patients with dementia into a terrible choice: to end their lives early when they are of sound mind, or to wait too long and then later be found incompetent to consent to death.

Mature Minors

If MAID is legal, it should be available to all capable individuals with grievous and irremediable medical conditions, including mature minors. Nobody doubts that children and teenagers can experience immense suffering - as a resident doctor in pediatrics myself, I see this far too often. The question is whether or not minors under 18 are capable of understanding the consequences of their decisions, and have mature personal values that can inform those decisions. Minors also need special protection from external influences, such as their parents or peers.

Pediatricians navigate these issues on a daily basis. Assessing a child's development and growing level of intelligence might involve using standardized tests or questionnaires, confidential interviewing with parents absent, or consultation with a psychiatrist or specialist in adolescent medicine. It should involve probing deeply into a youth's understanding of death and disease, and the consequences of decisions. This understanding evolves as children mature, and along with it we can reasonably give children a growing role in decision-making.

For example, I won't let a five year-old who needs antibiotics refuse an IV, but I will let him choose which arm I'll insert it into. I won't let a twelve year-old decline a life-saving leg amputation, but I might let her delay it a couple of weeks until after her middle school graduation. At the far end of the spectrum, I might let a 16 year-old with leukemia refuse life-sustaining chemotherapy. This child may have already undergone years of treatment, affording him a mature understanding of pain, suffering, quality of life, and death. He might very well be more mature than the average 21 year-old, and should be capable of fully consenting to treatment. He might be allowed to attend clinic appointments on his own and he might take an active role in treatment decisions.

MAID can be reasonably extended to mature minors using this same robust system of capacity assessment in children. Indeed, our courts have struck down laws[1] that impose arbitrary age cut-offs for consent, and instead have granted children the right "to a degree of decision-making autonomy that is reflective of their evolving intelligence and understanding". To do otherwise flies in the face of the personal autonomy central to *Carter*, and only serves to trap mature minors in intolerable suffering until they reach their 18th birthday.

Who will provide MAID?

With MAID legal, there need to be strong protections and supports for the physician community who will be providing this service. *Carter* has made death a right, and therefore we as physicians collectively have a corresponding obligation. I worry that without proper safeguards and supports, there may be an erosion of the doctor-patient relationship, and there may be problems for doctors who wish to conscientiously object.

First, we will need to protect the special relationship between people and their doctors. Patients reveal their secrets, fears, and core beliefs to doctors in ways that are uniquely honest, on the basis that doctors always have their patients' best interests in mind. This close relationship has immense value, and allows doctors to help people navigate complex health decisions. It's easy to think of doctors as merely providing a menu of treatment options from which competent patients choose, but the reality is very different. People often rely on their doctors for advice, asking "what would you do?" If MAID is part of that conversation, I worry that patients might fear the opinions of their doctors, or that unscrupulous

[1] *AC v Manitoba (Director of Child and Family Services),* [2009] 2 SCR 181.

doctors might coerce their patients into choosing MAID. Experience from Belgium and the Netherlands shows that fear of these "rogue doctors" is indeed a risk. Strong safeguards – e.g. requiring a neutral second doctor to approve every case of MAID – will be necessary to prevent this from happening.

Furthermore, we will need to support doctors through the emotional burden of participating in MAID. Doctors aren't abstract legal concepts, but individuals with lives and emotions. Our profession will have to learn how to humanely end patients lives (needless to say, current medical school curricula are silent on how best to cause death in humans), and individual doctors will have to actually perform the act. I suspect that there exist a great number of doctors (myself included), who support the idea of PAD, but would be emotionally unable to participate. In the Netherlands, 8 out of 10 doctors participating in MAID experience anxiety or more serious mental illness. Canadian doctors will have increased need for mental health services, and these support programs should be made widely available through physician health programs.

Finally, physicians must be allowed to refuse to participate in MAID. Nobody is proposing that unwilling physicians be forced to end their patients lives, but there is disagreement on the thorny issue of "effective referral". If a patient asks their doctor to refer them to another physician willing to end their life, is their doctor obliged to do so? For physicians comfortable with the idea of MAID, but not able or willing to do it themselves, this shouldn't be a problem. However, for physicians who object to MAID on moral or ethical grounds, a referral is functionally equivalent to performing the act itself. In the words of one Conservative Member of Parliament, "this is akin to being a country that doesn't perform capital punishment or torture, but extradites people to countries where they will face capital punishment or torture".

These conscientious objectors need a system that supports them, while still allowing Canadians the right to die under the conditions set out by *Carter*. Ideally, health regions, clinics, and hospitals would compile information of willing providers, and these would be publicly advertised so that patients would not require their own physicians to make a referral.

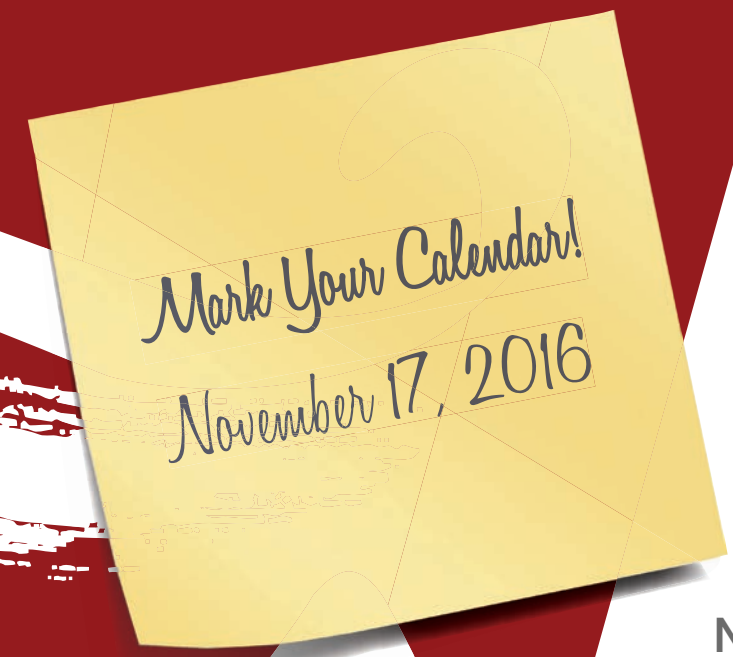
This system should not lead to decreased access. As evidence, until quite recently doctors in Canada were not obliged to refer patients for abortions if they conscientiously objected, and there is little evidence that this led to limited access. By far, the most important factor affecting access to abortion has been the availability of willing providers, not the presence of unwilling objectors. MAID access can be similarly safeguarded by ensuring there are sufficient participating doctors within every region of Canada.

Conclusion

We have now crossed the Rubicon, and MAID is legal in Canada. It now falls on the legal and medical communities to create laws that maximize patient autonomy while protecting physicians and vulnerable patient groups. If we wish to live up to this ideal of personal autonomy, and to *Carter*, then access to MAID must include individuals with non-terminal diseases, mental illnesses, dementia, and mature minors. The federal government's legal framework (Bill C-14) fails to include these groups, and will likely face legal challenge and amendment by future governments. Further, it provides insufficient support for physicians participating in MAID, and insufficient safeguards for conscientious objectors.

Ultimately, the legality of MAID comes down to a choice between different visions for Canadian society. We can choose to have a society that maximizes personal autonomy, and allows individuals to live and end their lives in the manner that they desire. Alternatively, we can choose to have a society that protects the intrinsic value of all lives, including the most vulnerable, and protects the traditional role of doctors. We cannot have both. As *Carter* continues our inexorable march towards the first vision, we will need to work hard to ensure that all Canadians share in the benefits of this increasing autonomy, and nobody is left behind.

Dr. Tom McLaughlin is a resident doctor in pediatrics at the University of Toronto. He is one of the chief pediatrics residents at the Hospital for Sick Children in Toronto, and is the Past President of Resident Doctors of Canada (the national organization representing over 9,000 resident doctors in Canada). Follow him on Twitter at @mclaughlin_tom.



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Calgary Chair Appreciation Dinner - May 26, 2016

Members of the CBA Alberta Branch Council, Section and Committee Chairs and Past Presidents at the 2016 Chair Appreciation Dinner in Calgary

Edmonton Chair Appreciation Dinner - June 15, 2016

Members of the CBA Alberta Branch Council, Section and Committee Chairs, and Past Presidents at the 2016 Chair Appreciation Dinner in Edmonton.

Women Lawyers Forum Reception - June 16, 2016

Honouring recent QC appointments, and judicial appointments and elevations. With special guest the Hon. Stephanie McLean (centre front), Minister of Service of Alberta and Minister of Status of Women.

FRONT AND CENTRE

Inns of Court 20th Anniversary

(l to r) Mona Duckett, QC, Judge D.R. Valgardson, Kerry Day, QC, Patricia Hebert, QC, Justice D.A. Yungwirth, Judge J.L. Dixon, Wendy Young

Law & Literature Dinner

Criminal Law (North) Section Co-Chairs Brian Vail, QC & Karen Hewitt, QC (with avatar of Justice Jack Watson).

CBA NATIONAL NEWS

THE PITCH

Have you heard about The Pitch? A group of experts has chosen five legal innovators to state their case for their products to a group of judges, investors and a live audience at the CBA Legal Conference in Ottawa this August.

The finalists (Beagle, blue J Legal, Loom Analytics, Rangefindr and Knomos), will get seven minutes to make their pitches at the August event, and then will spend another five minutes in a Q&A with the judges before awaiting the final decision. The audience will be able to participate in a worldwide Twitter conversation about the event, and will also get the opportunity to vote on the People's Choice. The post-Pitch cocktail party offers audience members, investors and innovators an opportunity to mingle.

Tickets to The Pitch, which will be held Friday, Aug. 12, are included in the full conference registration fee. They're also available as a separate item on the CBA Legal Conference website. The cutting edge of legal technology innovation will be on display this summer at the CLC in Ottawa. Don't miss it.

CBA RE-THINK: VOTING ON GOVERNANCE

One of the most resonant messages from the CBA Legal Futures Initiative report was that in order to succeed in the future, lawyers have to put clients at the centre of everything they do.

And one of the overriding messages from the CBA Re-think is that for the CBA to succeed it needs to take some of its own medicine – make sure the member is at the centre of everything the association does. The strategic direction agreed upon by CBA Council in February reflects that member-centric philosophy, but in order to carry out that mandate the association needs to be more streamlined, responsive and cost-effective.

That brings us to the governance model that will be brought to CBA Council in August as a resolution for approval.

The governance structure was arrived at over the course of three separate retreats and numerous board meetings. The hope is that it will facilitate decision-making, reallocate money to support real member needs, and support the work required to deliver on the strategic direction.

In a nutshell, this model:

- Reduces the Board of Directors from 23 to 14, plus a non-voting CEO
- Replaces CBA National Council by an AGM open to all CBA members, either in person or online
- Establishes a Leadership Forum of key CBA constituent groups that will meet once a year to discuss strategy and issues
- Ensures that Branches remain autonomous with regard to budget approval, service delivery and Executive Director recruitment
- Creates common shared administrative functions throughout our operations across the country.

Check out the CBA Re-Think web page for more information on the governance model that will go before Council in August.

IP TIP SHEET FOR BREXIT

On June 23, 2016, the British public voted to exit from the European Union. How will Brexit affect IP rights? The CBA National IP Section has collated a number of tips to assist in your understanding of what changes are to come. There are still many more questions than answers. We shall endeavour to provide you with further information as it becomes known.

Click here to view the IP Tip Sheet in its entirety.

North

From the desks of Bonnie Bokenfohr and David J. Hiebert

The 2015-2016 section year has come to an end. It was another busy and successful year of section activity. 29 sections held over 230 meetings and events. That is an incredible amount of continuing education and professional development for Alberta lawyers. Thank you to all Section Executives for their hard work and perseverance throughout the year to bring meaningful and timely content and speakers to section meetings. For many of us, it is the CBA lunches that brought us to the CBA. They remain an integral part of the benefits provided through membership.

The Spring Section Executive Workshop was held on May 31. We tried something new this year and it was a success! "It was a little bit rowdy" was our favourite feedback comment, by far. That was exactly what we were hoping for! The interactive hands on workshop was intended to bring section executives together as a means to encourage cross pollination of ideas between sections, begin planning topic ideas for the coming 2016-2017 year, and tackle CBA paperwork. Thank you to everyone who participated and took the time to provide feedback. We have already begun planning improvements for next year, including means by which to harness and exploit that 'rowdy'. As always, feedback consistently included comments on the great support provided by CBA staff Heather, Melissa and Sheilagh.

This summer marks the end of our first year as North Section Coordinators. To be honest, we weren't really sure what we had gotten ourselves into when we started out. It has been a very rewarding year. We have been guided by a goal to continue to try to find ways to make the work of section executives easier. The changed format for the workshop is a start as is the new Section Planning Checklist. We know that every lawyer volunteering their time on a section executive is a busy lawyer who is juggling not just the demands of being a lawyer, but trying to live a life as well. It is our goal to continue to look for ways to make your work easier. Please do not hesitate to provide us with your ideas as well. As we rest up and prepare to move into the 2016-2017 year we will continue to try to attend meetings and connect with you. Your work and contribution is valued. We want you to know that and feel it too.

Enjoy the summer months, don't forget to renew your CBA membership, and see you in the fall.

David Hiebert is a partner at Witten LLP in Edmonton. David is a long-time CBA member and volunteer, having served on Council, as a member of the Alberta Law Conference committee, and as chair or co-chair of a number of different sections.

Bonnie Bokenfohr is in-house counsel and the Public Complaint Director with the Edmonton Police Commission. Bonnie has been a member of the CBA since her very first days at the bar, serving on the executive of the Privacy Section for many years.

South

From the desks of Kate Bilson and Sean FitzGerald

Activity in the 2015-16 section year has been as strong as ever, with all 41 south sections hosting a wide variety of topics, dynamic speakers and providing a forum for discussion on issues that challenge our profession.

It is also a time to recognize those that have aided in the betterment of the sections. Section success would not exist without the passion, effort and energy of the many volunteer members of the Bar who donate countless hours to their respective sections. On behalf of the section coordinators, our thanks go out to each and every one of you. Our thanks also go out to the capable executive and staff of the CBA Calgary office who manage, year after year, to put it all together for CBA members.

What struck me most this year is the unique and continuing relationship the CBA, in particular the sections, has with the judiciary. Despite court resources being stretched to the maximum, our Judges and Masters find the time to support sections and other initiatives, and we are truly fortunate to enjoy this close connection with the Bench. Thanks goes out to Justices Hawco and Phillips and Judge Higa, our judicial liaisons, for maintaining this relationship.

For the upcoming season, we are adding the Internationally Trained Lawyers and Food and Agribusiness Sections, both of which will be available via webcast to members. Food and Agribusiness will also be open for registration across the country via webcast; a first for Alberta sections.

At the end of the 2015-16 year, Kate Bilson will be completing her term as Section Coordinator. Kate has been an absolute pleasure with whom to work and her talents will be missed. Andrew Bateman will be stepping into the role with Sean FitzGerald.

If you are interested in socializing and networking with fellow members of the Bar in your practice area, require up-to-date information on substantive areas of the law and practical pointers relevant to your practice, and quite frankly want the best bang for your buck, be sure to register for the next season. Section registration will commence in August.

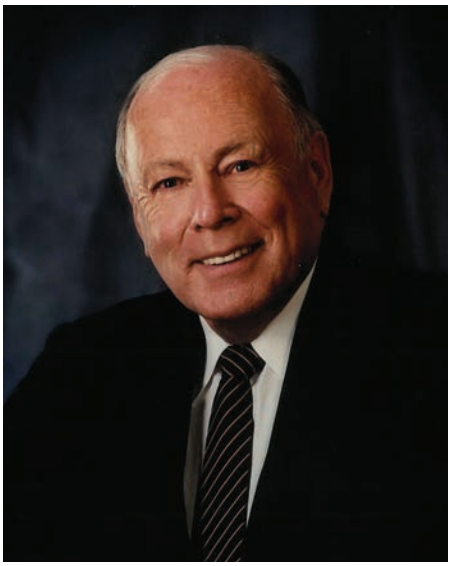
On behalf of the CBA, we hope all of you a safe and relaxed summer. See you in September.

Katherine Bilson, LL.M., is Senior Legal Counsel, Litigation & Employment Law at TransCanada PipeLines Ltd. She primarily practices in the areas of employment, pension and privacy law, and is also an instructor in MRU's Human Resources Certificate Program. Katherine is also a South Section Coordinator for CBA Alberta.

Sean FitzGerald is a partner with Miles Davison LLP in Calgary, where he primarily practices in general civil litigation. Sean has previously sat on the executive committees of the Civil Litigation, Employment Law and Insolvency Law sections.

Thomas Joseph Walsh, C.M., A.O.E., Q.C., LL.D.

By Joanne F. Crook



Thomas J. Walsh, a legend in the legal community, passed away on June 30, 2016 at the age of 89 years. Tom was the founding member of Walsh LLP in Calgary. Since establishing the firm in 1959 and long after his retirement, Tom was an integral part of Walsh LLP, instilling deep and lasting values that have allowed the firm to be successful for over 55 years.

Born in St. Boniface, Manitoba on March 2, 1927 to a CPR station agent and a registered nurse, he grew up in Manitoba and then came to Alberta to attend the University of Alberta where he obtained his Bachelor of Arts, LL.B. and Honorary Doctorate of laws. When you met Tom, it did not take long for you to realize his love for his family, and absolute devotion to his wife of 62 years, who he referred to with fondness and respect as his "bride". The loyalty that he showed to his family was part of his character that he also displayed through his commitment to the members of his firm and the clients that he served through his many years of practicing law.

Tom described himself as a business lawyer, doing "real estate and labour law and liking it". He was a courageous leader and he showed that through his many accomplishments including as a bencher with the Law Society of Alberta, as president of the Canadian Bar Association, founding chairman of the Calgary Parks Foundation, chairman of the Calgary Chamber of Commerce, president of the Downtown Rotary, board member of the Calgary Stampede Foundation, chairman of the Calgary Airport Authority and many volunteer position which he participated in to the fullest extent of his abilities. Tom never did anything halfway.

Members of Walsh LLP were privileged to hear stories of his exploits first hand, from testing butter at one of his first jobs, to flying airplanes, his educational pursuits, detailed history of the firm, notable people that he had met and worked with, and his absolute commitment to the community he lived in.

Tom was recognized for his achievements on many levels and he received the Order of Canada, the Alberta Order of Excellence, Canadian Bar Association`s Distinguished Service Award, Diamond Jubilee Medal and Queen`s 50th Anniversary Golden Jubilee Medal. He was on the top 20 Power List in 2003 as one of the people who have what it takes to move, shake and keep Calgary going. In 2008 after retiring as a lawyer with 60 years at the bar, he was honoured by over 200 of his closest friends and family with a supper at the Palliser in Calgary. During the speeches at that event many of his exploits and accomplishments were brought to light and it was clear that he touched people from all walks of life.

Tom continued to visit Walsh LLP after his retirement and his booming voice never failed to bring a smile to us when he walked through the door. His family has said that he "brightened the corner where he was" and everybody at Walsh LLP can attest to that. We are very happy to be one of the corners where he spent time. He will be missed in the halls of Walsh LLP but his memory and his work will be carried on.

Judicial Updates

COURT OF APPEAL

The Honourable Sheila J. Greckol (Edmonton) has been appointed to the Alberta Court of Appeal, effective June 17, 2016.

The Honourable Sheilah L. Martin (Calgary) has been appointed to the Alberta Court of Appeal, effective June 17, 2016.

COURT OF QUEEN'S BENCH

The Honourable John T. Henderson (Edmonton) has been appointed to the Court of Queen's Bench of Alberta, effective June 17, 2016.

Gillian D. Marriott, QC, (Calgary) has been appointed to the Court of Queen's Bench of Alberta, effective June 17, 2016.

Avril B. Inglis, (Edmonton) has been appointed to the Court of Queen's Bench of Alberta, effective June 17, 2016.

Douglas R. Mah, QC, (Edmonton) has been appointed to the Court of Queen's Bench of Alberta, effective June 17, 2016.

Master in Chambers K.R. Laycock, (Calgary) has been appointed as an ad hoc Master in Chambers effective July 1, 2016.

The Honourable Madam Justice R.E. Nation (Calgary) has elected to become a supernumerary judge effective July 1, 2016.

PROVINCIAL COURT

The Honourable Judge N.A.F. Mackie (Edmonton Region) retired effective July 6, 2016.

The Honourable Judge F.A. Day has been appointed as a part-time judge, and has transferred from Edmonton Criminal Division to Calgary Civil Division, effective July 4, 2016.

A VIEW FROM THE BENCH

By The Honourable Judge A.A. Fradsham

The Court of which I have the honour to be a member is what is often called a "front-line" court. The Judges of the Provincial Court interact with members of the public every juridical day, and we hear stories that sometimes make one weep, sometimes laugh, and sometimes just shake one's head. There seems to be no end to the cavalcade of extraordinary and diverse factual scenarios which parade before us. Indeed, what I hear at work makes me realize how… what is the phrase I want… oh, right… how dull and sheltered my life is. I remember that not long after my appointment I went home quite wide-eyed after spending the day listening to evidence which included descriptions of the sexual practices of a particular couple. I said to Gloria, "You would be amazed at what some people do with carrots!" I was right; she was amazed while pronouncing it to be an unjustifiable waste of good food.

Having now been on this bench for 26 years, I thought the days of being surprised by human conduct were behind me. It took a family event to prove me wrong.

Gloria's mom, at age 96, passed away this year. While still competent, she had left strict instructions as to what was, and was not, to occur: cremation, and no funeral. We were directed to scatter her ashes on the farm which she and her late husband had worked for almost 50 years. Happily, the farm still belongs to a family member; I had no interest in having to explain to some large, and disbelieving RCMP officer why I was tiptoeing around someone's farm yard in the middle of the night while carrying a small, suspicious-looking box.

Gloria's parents lived almost the entirety of their very long lives in the same small Alberta town in which they eventually died. Now, without doubt, there are some wonderful aspects to small towns, but living one's life in anonymity is not one of them. Mom's obituary appeared in the local weekly paper which, conveniently, had a publication date within a day or two of the death. It explained that, in accordance with mom's clear instructions, no service would be held. Within hours of the paper hitting the streets (well, truth be told, it was more akin to a small flyer hitting a few roads), one of Gloria's cousins who still lives in the community received a telephone call from a local resident.

"Did you see the obituary?", asked this current events aficionado. "Who wrote it?"

"Yes, I saw the obituary, and the family wrote it," replied the cousin as she wondered where this might be going.

"I don't know why they did not have me write the obituary… it is what I do!" Before the poor cousin (not in the traditional economic sense; rather, in the "Alice trying to make sense of the Queen of Hearts" sense) could respond to that comment (personally, I was unaware that obituary writing was a distinct career field), the woman at the other end of the line asked, "Why is there no service? Some of us would like to have a service." My own view is that "some of them" would like a free lunch, but I digress.

"She was clear that she did not want a service. Her children are going to meet privately and spread her ashes on the farm."

Undeterred by fact (reminiscent of some submissions I have heard), the woman continued on: "May I have some of the ashes?" It was at that very moment when this woman won the 2016 Nobel Prize for Weirdest and Most Macabre Question Posed By A Person Who Is Not Subject to a Mental Health Warrant. Other nominees for the award have had their application fees returned to them because it just wasn't a fair fight.

When I heard this story, and after I had retrieved my jaw from where it had dropped in immediate free fall, I felt significant relief, and profound gratitude, that our instructions had been to cremate. Otherwise, the request would have been more along the lines of "may I have her left leg?" The spectre (I knew I could work that word into this story) of *Criminal Code* section 182(b) [indignity to a dead body] appeared before my eyes.

Inexplicably, Gloria's family rejected my conciliatory suggestion that we collect some ashes from the fire pit of a local campground, and tearfully deliver them to the woman with our warmest wishes. What a lost opportunity. Since the family does not seem to appreciate creativity, I think I had best not tell them my carrot story.

The Honourable Judge A.A. Fradsham is a Provincial Court Judge with the Criminal Court in Calgary. His column "A View From the Bench" has been a highlight in the Canadian Bar Association newsletters for over 15 years.

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WILL SEARCH. Anyone having any knowledge of a Will of the late David Robert Turnbull late of Calgary, Alberta and Indonesia, who died on or about September 2, 2015, is requested to contact **David Freedman of Hull and Hull LLP at 416-640-4819 or fax to 416-369-1517 or email to dfreedman@hullandhull.com.**

WILL SEARCH. Anyone having any knowledge of a will signed by Lawrence Dennis Morrill on or after January 15, 2010, please contact **Colleen Feehan of Dentons Canada LLP at colleen.feehan@dentons.com, or by phone (780) 423-7140.**

WILL SEARCH. The Public Trustee of Alberta is seeking the will for Trevor Arthur Ditchburn, late of Calgary. Please contact direct: **(403) 297-7149 or mail: 900, 444 - 7 Ave SW, Calgary AB T2P 0X8**

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VOLUNTEERS NEEDED. The Edmonton Community Legal Centre is holding the second-annual ECLC Advice-a-thon on Saturday, September 24 from 10am - 4pm at Churchill Square in Edmonton. **Sign up to volunteer online at www.eclc.ca/advice-a-thon.**

This text-only section is provided for non-profit organizations free of charge. To include your organization's announcement, please contact the CBA Alberta Branch at 403-218-4310, or by email at communications@cba-alberta.org.

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Law Matters is published by The Canadian Bar Association Alberta Branch four times annually. Submissions are subject to approval and editing by the Editorial Committee. Law Matters is intended to provide general information only and not specific legal advice. The views and opinions expressed here are those of the writers and do not necessarily reflect the position of the publisher. Direct submissions and enquiries to Law Matters, Southern Office, or email communications@cba-alberta.org.

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