



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

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

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 offence), 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 offence); "[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.](#)

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

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 Ct), 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,

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)

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

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

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

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

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

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

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

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

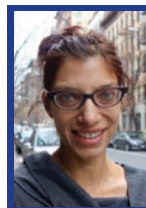
The criminalization and censorship of rough sex, risky sex and kinky text exposes how moralism infects our jurisprudence. In each case, we see that the law tolerates comparable rough activities, risky procedures and violent texts, so long as sexual pleasure is not the primary goal. Furthermore, the pragmatic 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 2014³⁸, 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

¹Professor 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.

²Samuel 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, Deschâtelets 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 Deschâtelets 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 *Deschâtelets* 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

³See 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.

⁴We 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.

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

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.

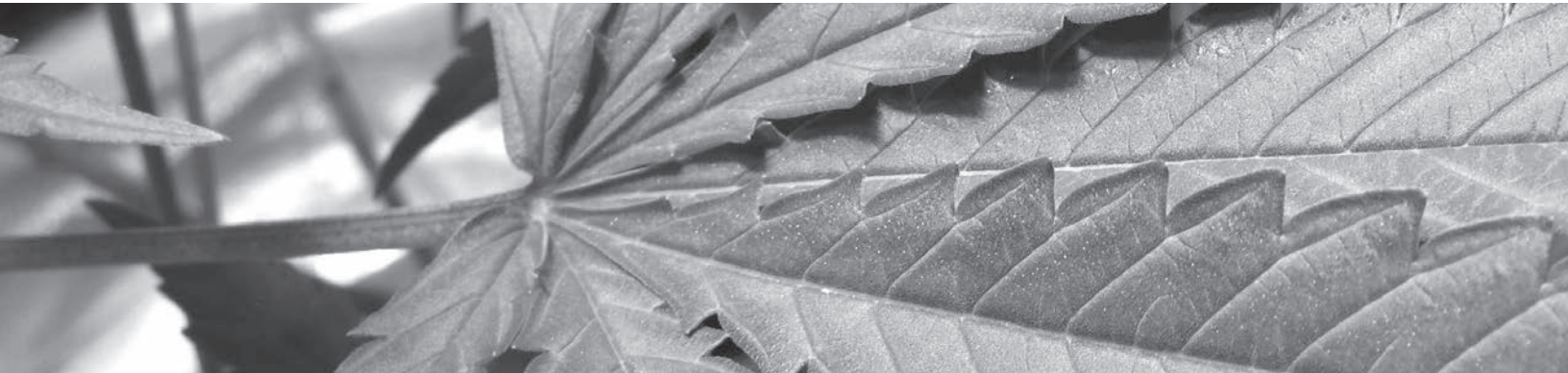
[R v Lavergne-Bowkett](#), 2013 BCSC 1737 demonstrates how difficult it can be to establish the required intent for a choking to overcome resistance charge. L.B. denied engaging in rough sex and claimed the acts were consensual, although his counsel later asserted the harm induced was from rough sex—a 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

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).

32 of these big companies⁹ 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

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

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.

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. 🇨🇦

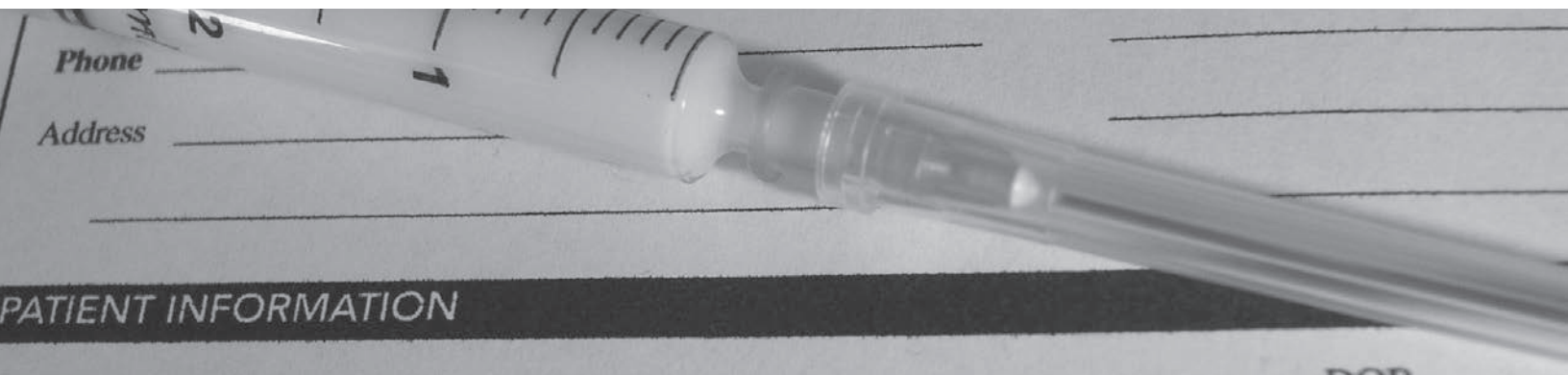
²¹ *Allard*, supra note 4, at paras 123-130.

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.



Paul Lewin is a Toronto lawyer with a focus on cannabis offences. He is also the national secretary for NORML Canada. He has litigated the constitutionality of the religious use of cannabis, the medical cannabis doctor-as-gatekeeper rules, and the privacy laws that permit the police to access without warrant the hydro consumption records of cannabis growers.



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

CHOOSE FROM ALBERTA'S TOP MEDIATORS AND ARBITRATORS



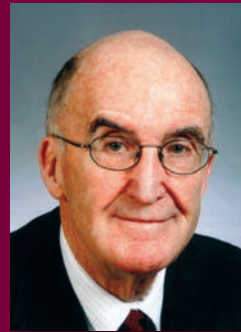
and respect for their fundamental personal choices. Indeed, if we start distrusting the notion that individuals are able to accurately determine for themselves when their suffering is intolerable, we risk regressing back to a dangerous form of paternalism, where autonomy and dignity are compromised for 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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The Hon. John C. (Jack)
Major, C.C., Q.C.



The Hon. W. Vaughan
Hembroff, Q.C.



The Hon. Ernest
Marshall, Q.C.



Clint G. Docken, Q.C.



Graham Price, Q.C.



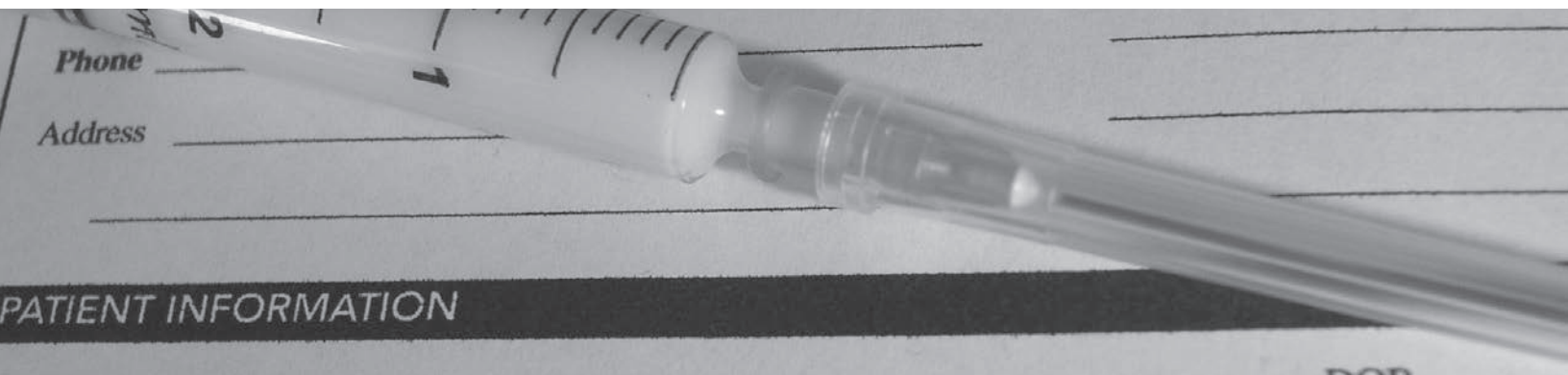
E. David D. Tavender,
Q.C.



Harold W. Veale, Q.C.



Robert B. White, Q.C.



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).

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.

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

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 General⁶ and interveners⁷ 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

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.

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 [...]. [...]

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.

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

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.

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.

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.

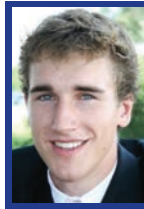
Nor should the national discussion about assisted suicide end once a new law is passed. We must continue to work towards solutions to better serve those who are suffering, ill, disabled, or elderly. We must continuously ask whether we are doing all we can to help ameliorate suffering and

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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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 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 laws¹ 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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(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

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

From the desks of Bonnie Bokenfohr and David J. Hiebert

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

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.

From the desks of Kate Bilson and Sean FitzGerald

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 positions 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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