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Medical Assistance in Dying

40-6: Medical Assistance in Dying

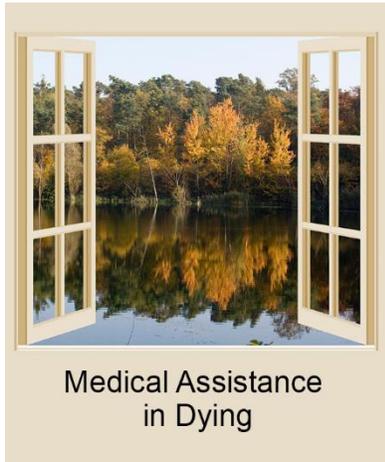


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Medical Assistance in Dying: From *Rodriguez* to Bill-C14

By [Juliana Ho](#)



Medical assistance in dying (MAID) involves intentionally ending one's life with the assistance of a medical doctor. For some individuals, especially those suffering from terminal illnesses, choosing when to die could be very important: for example, persons could choose to end life with dignity, before becoming completely reliant on machines for survival or being forced to endure a slow and painful death because of their illness. In Canada, however, medical assistance in dying has been forbidden under s. 241 of the *Criminal Code*, which prevents anyone from helping another person to end their life. This blanket prohibition was grounded in the state's interest in protecting life and vulnerable peoples who might be induced in "moments of weakness to commit suicide."

Some Canadians had fought to have this ban against medical assistance in dying overturned. In 1992, Sue Rodriguez brought her case for assisted death all the way to the Supreme Court of Canada. Ms. Rodriguez suffered from ALS (Amyotrophic Lateral Sclerosis), an incurable and progressive disease that causes the muscles in a person's body to slowly deteriorate, eventually leaving its victim unable to speak or eat without assistance. Statistics suggest that victims typically succumb to the illness two to three years after being diagnosed, with choking, suffocation or pneumonia the likely cause of death. As a result, Ms. Rodriguez argued that prohibiting anyone from helping her end her life when she reached the later stages of her disease violates section 7 of the *Canadian Charter of Rights and Freedoms*, which protects the right to life, liberty and security of the person. More specifically, Ms. Rodriguez claimed that she had the right to control what happened to her body and as such, she ought to be able to make personal decisions about what happens to her in the terminal stages of the illness without government interference. According to Ms. Rodriguez, the inability to make those decisions caused her both physical pain and severe psychological stress.

In its decision, the Court held that while human dignity and free choice is one of the underlying principles of Canadian society, preserving human life is fundamental. Allowing "the state to kill will cheapen the value of human life" and as such, it decided that even those who have terminal illnesses

cannot be allowed to make a conscious choice of death over life by seeking to control how and when they want to die. For the Court, the state has a strong responsibility to serve as a role model for individuals. Allowing doctors to lawfully participate in taking life would be contrary to this responsibility, because it would “send a strong signal that there are circumstances in which the state approves of suicide.” <http://www.canlii.org/en/ca/scc/doc/1993/1993canlii75/1993canlii75.html>

Things changed in 2015 with the Supreme Court’s *Carter* decision, which established that prohibiting medical assistance in dying violates section 7 of the *Canadian Charter of Rights and Freedoms* <http://www.canlii.org/en/ca/scc/doc/2015/2015scc5/2015scc5.html> One of the appellants, Gloria Taylor, also suffered from ALS and knew that because of the total ban on assisted death, she would be unable to request help in ending her life even at the most painful and debilitating last stages of her illness. This left her with what she called a “cruel choice” between “killing herself which she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death.” She was given a constitutional exemption by the Supreme Court of British Columbia but died before she could exercise this option. Another appellant, Kay Carter carried on with the case.

In this landmark judgment, the Court held that the ban on assisted death is not meant to preserve life at all costs. Rather, it is meant to protect particularly vulnerable individuals from getting help in ending life when they’re experiencing moments of weakness. While this may be true, the Court in *Carter* decided that there are less harmful ways of meeting this goal than maintaining a total ban on assisted suicide. For example, properly qualified and experienced doctors are well-positioned to assess whether patients have the capacity to understand that they are making the decision to end life and whether they are making these decisions of their own free will. Giving doctors the ability to exercise their discretion in this way could better respect an individual’s choice to end his or her life, while also ensuring that particularly vulnerable people have the opportunity to speak to medical professionals who can explain the alternatives to assisted dying, such as palliative care options.

For these reasons, the Court decided that to impose a ban on physician-assisted death infringes upon section 7 of the *Charter*, because preventing even terminally ill persons from deciding what to do with their bodies at any stage of their illness “imposes unnecessary suffering on affected individuals.” While the ban would certainly protect vulnerable persons from being coerced or pressured to seek help in ending their lives, it also prevents competent, fully informed persons from deciding when and how they would like their lives to end. Being deprived of this important decision “about what to do with their bodies and how those bodies will be treated” may cause some terminally ill people to take their own lives sooner, while they are still able to do so themselves.

In light of this decision, Parliament was given twelve months to enact legislation that is constitutionally valid. The newly elected Liberal government drafted a proposed medical assistance in dying bill. The Senate voted to amend a critical but controversial provision, which restricts the ability to seek help in ending life to those people whose death is “reasonably foreseeable.” Some senators argued that in such a situation, the ban would still apply to many informed individuals, including those with serious physical

disabilities, if their deaths are not imminent or reasonably foreseeable. Despite their determined opposition, the bill passed in the Senate. The House of Commons agreed to some minor amendments suggested by the Senate and the new law received Royal Assent on June 17, 2016. Canada now joins a small group of countries and U.S. states that have a medical assistance in death (MAID) law.

Global Perspective: A cross-jurisdictional look at medical assistance in dying

By [Ashley Ferguson](#)



On February 6th 2015, the Supreme Court of Canada delivered the landmark decision of *Carter v Canada (Attorney General)* 2015 SCC 5, [2015] 1 SCR 331. The Court unanimously ruled to overturn the legal ban on medical assistance in dying in Canada. The Court declared that sections 14 and 241 of the *Criminal Code of Canada*, which created the legal ban on medically-assisted suicide, infringed s.7 of the *Charter*. Therefore, these sections were declared of no force or effect, to the extent that they prohibit medical assistance in dying for a competent adult person who:

- (1) clearly consents to the termination of life; and
- (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition

In light of the *Carter* decision, the federal government was challenged with creating a legislative framework that is flexible enough to achieve its intended purpose, but also has sufficient safeguards to protect vulnerable individuals.

While the idea of medical assistance in dying is a novel issue in Canada, there are other jurisdictions around the world that have embraced this reality for many years. Those jurisdictions with medical assistance in dying legislation include Switzerland and Germany, as well as the states of Washington, Oregon, California, Montana and Vermont in the United States. Medical assistance in dying in these countries usually means a doctor prescribes a lethal dose of medication, which the patient then self-administers in the setting of their choice. Euthanasia, in which a doctor assists in the dying process in either a hospital or other setting, is legal in the Netherlands, Belgium, Luxembourg, and Colombia.

In the European countries where either medically-assisted dying or euthanasia is legal, the legislation is quite liberal. For example, in Switzerland, article 115 of the *Swiss Criminal Code* allows for people to

assist in another person's suicide, as long as it is not for selfish motives or personal gain. The legislative scheme also does not require that the recipient be a Swiss citizen. One of the results of such permissive laws is that an adult, who wishes to die but is neither terminally ill, nor a Swiss resident, can access end of life treatment. Switzerland has seen the emergence of 'suicide tourism' a particular phenomenon that the Canadian version of medical assistance in dying would not allow.

A similar 'altruistic' requirement is present in the recently adopted German suicide bill. Germany does not allow active euthanasia.

The Dutch *Termination of Life on Request and Assisted Suicide Act*, which sets out the legislative scheme in the Netherlands, was one of the first. The Dutch law only applies to individuals who reside in the Netherlands, however, and the patient must be experiencing unbearable suffering with no prospect of improvement. This has been interpreted by the Hague Court of Appeal not to be limited to physical pain. 'Psychic suffering', or patients suffering from a mental illness or distress, fall within the ambit of 'unbearable suffering'.

Patients in the Netherlands can make 'advance directives' which allow individuals to make written directives outlining circumstances where they wish euthanasia to be performed. The legislation sets out a process where a minor, as young as 12, may access the end-of-life regime with the consent of parents or guardians. These are three key aspects of the Dutch regime that are expressly excluded from the Canadian version of medical assistance in dying legislation we have seen so far.

The Belgian version of legal euthanasia has a similar requirement for a patient who requests access to the program to be suffering intractable and unbearable pain. Traditionally in Belgium, patients suffering psychological pain can access the program under this criterion. Death by lethal injection is the method operating in Belgium, and the permissive interpretation of the law has caused controversy for the European country. A convicted rapist/murderer whose suffering was based on mental anguish as a result of his crimes and incarceration, as well as individuals who are going blind are two examples of the breadth of the Belgian regime. More recently, Belgium has amended its legislation and legalized euthanasia for children with no age limit.

Luxembourg allows for both euthanasia and assisted suicide under its 2009 legislation. However, this advance was not without its own controversy. The introduction of this bill in Luxembourg triggered a constitutional amendment after the Grand Duke refused to sign the bill into law. The change to the Constitution effectively took away the Monarchy's veto power.

Colombia is the only Latin American country to legalize euthanasia. While the Constitutional Court of Colombia effectively legalized the practice almost two decades ago, the regulations only came into effect last year. Now, a patient's family can prove advance consent for those who are unable to make the request themselves, and the procedure for all (conscious and unconscious patients) must be approved by a panel of doctors.

Each state in the United States has sole jurisdiction over its assisted dying laws, but the regimes differ only slightly between the states that have legalized the practice.

A common requirement among California, Washington, Vermont and Oregon is that the applicant must be at least 18 years old, a resident of the state and diagnosed with a terminal illness that will lead to death in the next six months. Likewise, all physicians must be satisfied that the patient is mentally competent and their judgment is not impaired (may be determined following a psychological evaluation) to receive approval. In practice, these requirements bar individuals suffering from mental illness from accessing the programs. The various legislation requires multiple requests (typically three: two oral and one written) which must be at least 15 days apart. The prescribing physician, or in many cases a representative from a dying with dignity support group, can help prepare the lethal dosage for the patient. However, the patient must self-administer the dose. Two states, Montana and New Mexico, have *de facto* allowed assisted suicide through court rulings rather than legislation. In Montana, the State Supreme Court ruled that doctors have a defence to prosecution as long as they followed their patient's written consent. In New Mexico, a District Court ruled on the issue, but this case was appealed and overruled by the Court of Appeals. An appeal to the State Supreme Court is pending.

Comparatively, the legislative framework in the American states is the most stringent in the world: specifically in the age (18 years) and terminal illness (death in six months) requirements.

The European position is quite different. These countries have generally extended the right to die (either by euthanasia or assistance) to those suffering from psychological pain, as well as adopting a more flexible age requirement.

Canada now has its own unique law to create medical assistance in dying. It is informative and helpful to consider the global company that this type of legislation has. There are strengths and weaknesses to be found in each example.

Medical Assistance in Dying: An Enormous Change in Canadian Social Policy

By [Teresa Mitchell](#)



On June 17, 2016, Canada passed Bill C-14, *An Act to Amend the Criminal Code*, to enable citizens to access medical assistance in dying. Canada now joins a small group of countries and U.S. states that give their citizens such an option. It came about because of the *Carter* case, a Supreme Court of Canada decision that mandated Parliament to create a law to help grievously ill and suffering Canadians end their lives with dignity. Here are the main components of the new law.

1. The *Criminal Code* has been changed so that doctors and nurse practitioners, and those who help them, such as social workers, lawyers, and pharmacists, can provide medical assistance in dying for eligible patients without the risk of being charged with assisted suicide or homicide.

2. Medical assistance in dying is available to a person who:

- is eligible for health care in Canada; and
- is at least 18 years old, who is mentally competent (capable of making health care decisions for themselves); and
- has a grievous and irremediable medical condition; and
- makes a voluntary request for medical assistance in dying, which is not the result of pressure from other people; and
- gives informed consent to receive medical assistance in dying.

3. A person has a grievous and irremediable medical condition if:

- he or she has a serious illness, disease, or disability; and
- he or she is in an advanced state of irreversible decline; and
- he or she is experiencing intolerable suffering from the illness, disease, disability, or state of decline; and,
- natural death has become reasonably foreseeable, taking into account all medical circumstances.

4. Two types of medical assistance in dying are permitted:

- a doctor or nurse practitioner directly administers a substance that causes the death of the person who requested it, commonly called voluntary euthanasia;

OR

- a doctor or nurse practitioner gives or prescribes a substance to the person that can be self-administered to cause death; commonly called physician or medically assisted suicide.

The *Criminal Code* will now allow doctors and nurse practitioners to provide both types of medical assistance in dying.

5. Safeguards built into the *Criminal Code* include:

- the request for medical assistance in dying must be in writing by the person requesting it, or another adult on the person's behalf and in the person's presence if he or she is unable to sign and date the request, and witnessed by two independent witnesses;
- independent witnesses must be at least 18 years of age, understand what it means to request medical assistance in dying, and cannot benefit from the patient's death, be an owner of a health care facility where care is being delivered, or be directly involved in providing the patient with health or personal care;
- a physician or nurse practitioner must have the opinion that the patient is eligible to receive medical assistance in dying, confirmed by a second, written opinion by an independent physician or nurse practitioner;
- the doctors or nurse practitioners providing the assessments must be independent, which means they cannot hold a position of authority over each other or knowingly benefit from the patient's death;
- the patient must be informed of all available forms of treatments and all means available to relieve suffering, including palliative care;
- there is a mandatory reflection period of ten days from the date of signing the request to the day on which medical assistance in dying;
- the patient has the ability to withdraw his or her request at any time; and
- immediately before providing medical assistance in dying, the physician or nurse practitioner must give the patient the opportunity to withdraw his or her request and ensure that the patient gives express consent to medical assistance in dying.

6. Pharmacists must be informed in writing that the drugs they prescribe are intended for medical assistance in dying.

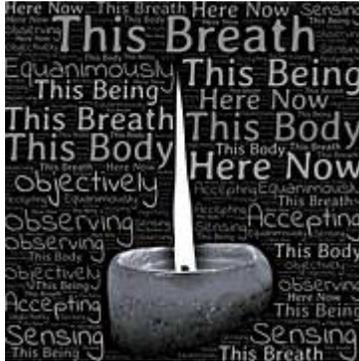
7. Death certificates may include medical assistance in dying as the manner of death.
8. Patients cannot guarantee their access to medical assistance in dying by including it in an Advance Directive. This is because Advance Directives are made before they are needed and come into effect after a person cannot communicate their wishes. People who can't communicate can't confirm that they still consent to procedures requested in their Advance Directives.
9. The federal government will conduct further research on extending medical assistance in dying to mature minors, advance requests, and mental illness, where it is the sole underlying medical condition.
10. Health care providers cannot be compelled to provide medical assistance in dying or help their patients access medical assistance in dying.

Medical Assistance in Dying is created by changes to the *Criminal Code*, which is federal legislation and is therefore the law across Canada. Now, the focus will shift to the provinces. Under the *Constitution*, the provision of health care is a provincial responsibility. The ministries of health in each province will create protocols, rules, forms and policies to implement the new law. For example, the ministries of health could address whether special training will be required to provide MAID, the forms to be used and how the cause of death should be recorded on death certificates. For further developments, watch for announcements from the Ministry of Health in your province.

For more information on tools for planning ahead, visit www.OakNet.ca. To learn more about the medical assistance in dying, visit <http://healthy Canadians.gc.ca/health-system-systeme-sante/services/palliative-palliatifs/index-eng.php>

Medically Assisted Death Offers Options

By [Charles Davison](#)



In 2015 the Supreme Court of Canada issued a decision in the case of a B.C. woman who wanted the right to be able to determine the timing and circumstances of her own death; what was termed at the time “doctor-assisted suicide”, and what has now become referred to as medical assistance in dying or MAID. This reflects the fact that sometimes other medical professionals, including nurse practitioners and pharmacists, may be involved.

It has virtually always been a crime in Canada for any person to assist another to commit suicide (presently section 241 of the *Criminal Code*). In 1993 the Supreme Court refused to strike down this law when it decided the case of *Rodriguez v. Attorney General of British Columbia*. However, by 2015 the legal and social landscape had changed, and the Supreme Court ruled that Canadians should have the right to the assistance of a doctor in ending their own lives, in certain circumstances (*Carter v. Attorney General of Canada*).

The details of the decision and arguments against physician-assisted death are being explored in other articles in this issue. In this piece, I will attempt to identify and discuss what might be considered the advantages of allowing individuals this final, ultimate choice.

The most obvious benefit to this change in the law is also the point which was most central to the Supreme Court’s decision: the alleviation of extreme personal suffering and pain. Many of the individuals who have litigated these issues (including Sue Rodriguez in 1993 and Gloria Taylor in, as well as “S.M.”, the applicant in the first decision in Canada permitting physician assisted death made on February 29, 2016 in Calgary) suffered from amyotrophic lateral sclerosis (“ALS”). It was described in the 2015 Supreme Court decision as leading to the gradual loss of all basic body functions: “ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and eventually breathe.” Despite medical procedures and the use of medication and drugs, death comes painfully and at least sometimes, slowly.

And unfortunately, it is not just persons suffering from ALS who must endure such ordeals: many other diseases and conditions involve unending, permanent pain and unpredictable periods of suffering. Some

conditions end in death, while others do not. In some situations, the individual must look forward to a long, painful life of disability and suffering.

With the change in the law triggered by the Supreme Court decision in 2015, in at least some situations, those persons who wish to avoid prolonged periods of suffering may now have that choice. The Court recognized that liberty and security of the person (both interests which are protected under Section 7 of the *Charter of Rights and Freedoms*) included giving individuals the power to make their own decisions about essential medical care and their responses to such grievous medical situations. Even the protected interest of life itself was negatively impacted by the prohibition on physician-assisted dying. It was under review because the law forced at least some persons to take their own lives prematurely and without assistance (suicide is not against the law, but assisting someone to take their own life is) for fear that waiting until their condition worsened would leave them incapable of doing so later. In short, a fundamental aspect of personal autonomy and freedom was found to include having the power to decide when to end one's own suffering, and the ability, with assistance if necessary, to act on that decision.

On June 17, 2016 an Act to amend the *Criminal Code*, removing the ban on assisted suicide received Royal Assent. It also created new provisions to allow medical assistance in dying (MAID). However, controversy continues about this legislative response to the *Carter* decision. The main point of contention lies in the scope of the government's proposed changes to the law. While the Supreme Court did not limit the results of its ruling to persons for whom death is imminent, that is a central feature of the new law. As the amendments are presently worded, the law would be changed in such a way as to allow medical assistance in dying to be available only for persons whose death "has become reasonably foreseeable" even though this would not require a precise prediction of when the end will actually come. At issue is whether the law would restrict the benefits or options of seeking medical assistance in dying to those persons for whom death is already near.

In a decision rendered on May 17, 2016, the Court of Appeal of Alberta rejected federal government arguments that such a limitation flowed from the Supreme Court decision in *Carter*. The higher court's ruling was intended to address the situations of persons suffering from conditions which were intolerable and unending, but not necessarily such that the conditions in question were themselves "life-threatening or that reduce one's life expectancy." The Court of Appeal noted that, under the government's position, the cruelty of unending suffering which the high court intended to relieve against would be continued without relief or end, in cases where the illness itself was not considered terminal.

Thus, at this time it remains an open question as to whether the law narrows the scope of this benefit – or the group of persons who may make use of the benefit – or whether the options available as a result of the *Carter* decision will be available to a wider selection of persons (that is, those whose suffering is a permanent condition but whose deaths are not necessarily being hastened as a result).

A second, related “benefit” to the change in the law is likely the emotional and mental health result which flows from placing of control over the timing of one’s death into the hands of the person involved. Alleviating physical suffering and anguish is the most obvious beneficial result of the Supreme Court’s decision, but the emotional value of providing a greater degree of certainty and control of the timing of one’s own death cannot be underestimated either. Most people have, at some point in their lives, contemplated the philosophical question of whether or not it is preferable to know in advance the timing and circumstances of their deaths. Where that intellectually and emotionally interesting (and usually fairly theoretical) issue becomes very real and meaningful, however, is in the throes of a serious and permanent medical condition causing unending, extreme suffering for the patient. Along with enduring the physical results of the disease or disorder, until now patients also had to suffer the mental anguish of not knowing how long their condition would persist (in the sense they had no way of knowing when they would finally die, and thus, end their suffering) or what physical state they might be in when their final moments finally arrived.

With Medical Assistance in Dying now available, persons suffering in such ways will have perhaps a small measure of comfort which comes from being given a greater degree of control as to when, and in what circumstances, they will finally pass away. Those for whom death is imminent and who do not wish to spend their final moments in a hospital bed will have the ability to make other arrangements to allow themselves to spend the final days in a more comfortable and personal setting, such as their own homes or in a hospice for the terminally ill. Unlike the individuals whose court cases have led to these changes, they will now have greater control over how long they are prepared and willing to suffer physically and will be able to take charge of their own end of life scenarios in a way previously not possible.

The relief from the anguish which comes from such uncertainty and lack of control will also be available for family members and others who care about the condition of the afflicted. Watching a family member or loved one suffer endlessly and being helpless to alleviate that condition carries its own form of mental and emotional pain. With the change in the law brought about by the Supreme Court decision, family members will have greater comfort knowing the person about whom they care deeply can decide for him- or herself how long they will continue to endure the suffering, and can then plan for their final ending accordingly.

Having this control also means being able to properly plan and prepare for the aftermath of death. Family members and others can arrange in advance for details such as funeral arrangements and the holding of any commemorative events. Having a chance to make proper preparations for death and the events which follow would be preferable to a scenario where such decisions must be made while loved ones are still in states of shock and grief (and sometimes, even horror) which follow an unexpected death.

Finally, another group who may find some relief and a form of benefit from the change in the law are medical professionals. While the profession is somewhat divided about what the role of doctors and nurse practitioners should be when it comes to the end of life, those who are willing to assist patients who wish to end their own suffering will be able to do so, within the bounds imposed by the new law, as

well as the internal guidelines and policies being formulated by various medical associations and health ministries across the country). Until now, anyone – including doctors, nurse practitioners, pharmacists and others – who in any way knowingly assisted any other person to end their own lives were liable to be prosecuted for extremely serious criminal offences: assisting in a suicide (which carries a maximum punishment of 14 years imprisonment) or even murder (mandatory minimum sentence of life imprisonment without a chance of parole for 10 to 25 years, depending on a number of factors). Now, medical caregivers who wish to assist their patients in this way will no longer be open to prosecution. They will be able to act according to their consciences in an effort to humanely alleviate and end the terrible sufferings of some of their patients.

Without any doubt, the concept of medical assistance in dying is a very difficult one, with many intertwined ethical and moral issues. Various groups within Canadian society are divided about the merits and wisdom of allowing any form of assisted suicide and there are grounds for some of the fears expressed in the public debate which surrounds the *Carter* decision. But with the proper restrictions and safeguards and the careful enforcement of them, those who wish to take advantage of this very significant change in our law will be able to do so. Deciding how much suffering to endure, and whether and when to terminate one's own life in order to end that pain will always be an extremely personal decision. But the new medical assistance in dying law has now opened the way to such steps being taken.

Critiques of Assisted Suicide

By [Peter Bowal](#) and [Paulami Saha](#)



A terminal illness is any disease that curtails life even for a day.

– Jack Kevorkian, National Press Club in 1992

Introduction

The *Carter* decision of the Supreme Court of Canada appears to have been generally well received by most Canadians. Yet the decision and new implementing legislation are fraught with quandaries at several levels. There are many who say this sudden and drastic change to such important social policy affecting life and death – basically a court overruling very longstanding parliamentary will – should have received more public consultation and democratic scrutiny. This is not a policy that can be easily reversed or moderated.

Apart from the fact that this critical social policy comes about by a few judges striking a crime out of the *Criminal Code*, Canadians still are sharply divided on the important details. The recent tug-of-war in the House of Commons and Senate over Bill C-14 demonstrates that the line-drawing about who should be able to legally choose this option and under what circumstances falls far short of a national, multicultural consensus. Ethnic and religious views and philosophies of life and death vary significantly from group to group. Minority perspectives on assisted suicide were largely unsolicited.

Some judicial principles also seem to have been contested to get to this result. For example, the Court had to overlook or amend its own doctrine of mootness. Ms. Carter, who brought the case, had died before the decision was made. Accordingly, any decision had no direct impact on her and the question she raised did not need to be answered. For the Court to follow through in any event raised the spectre of the Court legislating on the issue. The Court also had to confront the binding effect of its own 1993

precedent of *Rodriguez* [[CanLII - 1993 CanLII 75 \(SCC\)](#)] which stood in the way of permitting assisted suicide.

Nor can it be said that assisted suicide is so widely approved in other countries that there was some form of need to “catch up” with modern western values and practices. Only six other countries have legalized it. These are: the United States (Washington, Oregon, Montana and Vermont), Colombia, Luxembourg, Belgium, the Netherlands, and Switzerland.

Even the nomenclature that attaches to this law reform is politically contentious. The reform takes place in the context of criminal law. The *Criminal Code* provision that the Court struck out has its 19th century roots in concepts of murder and homicide. A euphemism would be euthanasia. The impugned crime, until it was struck out, was “counselling, aiding or abetting . . . suicide”. The Court and other proponents of the *Carter* outcome avoid the unpalatable criminal language of murder, homicide and suicide. The federal legislation is subtitled “medical assistance in dying.” Proponents of the phenomenon are likely to focus on “quality of life” and “dying with dignity” themes. Oregon immediately referred to the suicide option as “comfort care.” Words have power and content.

This article, however, takes a different critical approach. We describe some of the substantive drawbacks and pitfalls of the assisted suicide issue.

Arguments Against Physician-Assisted Suicide

(1.) Suicide devalues human life

There has long been a moral and legal taboo around suicide in Canadian society. Until recently, suicides were not carried in the news. Attention was not drawn to suicide in the hope it would not be mainstreamed in any way. Suicide, euthanasia and murder-with-consent are seen to devalue human life. When assisted suicide is presented as a means of “taking control” or acting “with dignity,” all Canadians – including the young and fit – may view suicide as an easy and acceptable response to life’s problems. When the sanctity of life is displaced by a culture of respectable voluntary death, attitudes will eventually disrupt the personal autonomy of the living.

The Hippocratic Oath commands physicians to “do no harm”. The same sentiment is contained in the Canadian Medical Association’s Code of Ethics. But now, the helping hand is called on to take life. We are collectively, for the first time since the abolition of capital punishment, handing physicians the legal license to kill others under certain circumstances. It visits the greatest harm (some would say benefit) possible on the patient by the physician. Medical conceptions of well-being and treatment are radically and permanently transformed, as are perceptions of medical professionals.

Ultimately, a very tiny number of Canadians will elect assisted suicide as a human right. Yet they have a disproportionate impact on how the rest of society views the medical sciences, their practitioners, consent to life and death, and the value of life. This tiny group is able to effectively remove this taboo about killing, which opens all of society to what is referred to below as the slippery slope hazard.

(2.) Impacts on health care professionals

By legalizing suicide assistance, we alter the fundamental role of physicians and other health professionals. Instead of working toward the cure or prevention of disease, physicians are now equally expected to help end lives. We involuntarily conscript them into the suicide project which they may not have signed up for. The new Act says that “for greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying. However, it is now up to each province and each provincial medical association to create the protocols and rules around the service. At this point it is not clear what protections will be put in place and what balancing will take place concerning the consciences and religious interests of physicians, nurses and pharmacists who are asked to participate in ending the lives of others.

(3.) Finality and Non-Reversibility

One of the main objections to capital punishment is that it cannot be undone. The same applies for suicide. Despite all the checks and balances, mistakes and misunderstandings will happen and there is no second chance when it comes to suicide. The precautionary principle ought to apply such that it is preferable to prohibit assisted suicides if even a small number of them can go awry.

The deceased would miss out on new treatments and cures that may come along. What may today be a “terminal” condition may become treatable. Patients are able to assess options only in light of their current experience and knowledge but they are not objective and they may misjudge. Erroneous diagnoses will lead to assisted suicides. The new Canadian legislation protects medical practitioners and nurse practitioners who act under “reasonable but mistaken belief.”

We know from experience that enforcement of legal standards and safeguards will be far from perfect. How much independent control can be exercised over the full spectrum of this procedure? How will one, after the death, ever know whether the deceased “made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure” [section 241.2 (1)(d)]? If the suicide has occurred without the safeguards being met, it will be practically impossible to establish that beyond a reasonable doubt.

(4.) Rational Basis in Social Context

History has taught us the dangers of removing the taboo on suicide, which is why so few countries to date have regulated and legalized the practice. Almost all societies for thousands of years have condemned and criminalized assisted suicide. How can a traditionally and culturally repugnant behaviour be seen as suddenly acceptable?

(5.) Assisted Suicide Impedes Development of Pain Treatment and Palliative Care

Pain control medicine and palliative care are far better than they have ever been any time in history and they are continuously improving. When assisted suicide becomes a an acceptable treatment option, the

motivation of medical science to continue research and make advancements in prevention, therapies, pain control and palliation declines.

Physician-assisted suicide has been legal in the Netherlands since 2002. Today more than 4000 Dutch citizens each year opt for that medical procedure. At the same time, advancements in palliative care in the Netherlands have lagged behind most other developed countries.

(6.) Autonomy and Consent Inherently Illusory

People with advanced dementia or other mental illness such as severe depression cannot voluntarily consent to suicide. Likewise for those who cannot communicate. Even for others, when choosing and orchestrating something as extreme as one's own death, one's judgment is inherently in question. Most mindful people do not volunteer for suicide. Any expressed consent is a Sophie's Choice consent, not a *Reibl v. Hughes* informed consent [<http://canlii.ca/t/1mjvr>]. Even among the population of mentally and physically competent people, the line that separates voluntary and involuntary decision-making and consent is unclear. It can never be assumed to be free, fully informed and absolute.

(7.) Qualifying for "Assistance"

This is one of the most contentious aspects of assisting suicide. The new Canadian legislation requires one to suffer from "a grievous and irremediable medical condition." This threshold is satisfied by meeting all of the following [section 241.2 (2)]:

- (a) they have a serious and incurable illness, disease or disability;
- (b) they are in an advanced state of irreversible decline in capability;
- (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

What do these concepts mean: "serious," "incurable," "illness," "disease," "disability," "advanced state of irreversible decline in capability," "enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable," and "their natural death has become reasonably foreseeable"?

The physician or nurse practitioner makes the decision that each of these requirements are met and one cannot expect all of them will form the same conclusions. Some proponents of this option will more

liberally than others determine that the requisite conditions have been met in patients.

A co-founder of the Hemlock Society often refers to “terminal old age.” Jack Kevorkian, an early activist for assisted suicide, regarded a terminal illness as “any disease that curtails life even for a day.” It is virtually impossible to predict the life expectancy of any particular patient. Some people diagnosed as terminally ill do not die for years, if at all, from the condition. As for the Canadian prerequisite that “natural death has become reasonably foreseeable,” natural death is more than “foreseeable”. It is inevitable. What is one to make of the “foreseeability” of death?

Slippery Slope

The last two issues are concerns about the ‘slippery slope’. Assisted suicide is a major social experiment that may prove to defy some predictions and objectives and produce unintended consequences of serious proportions. The rationale for authorizing some people to help others die arises from each individual’s dignity, personal autonomy and equality.

(8.) The Power of Incrementalism in Law Reform

Incrementalism is a powerful, almost invisible, force in law and policy reform. Once an activity that was long prohibited has been declared legal, there invariably follows a relentless energy applied to expand that activity through law. For example, in the early 1990s, after the Supreme Court of Canada struck down all criminal restraints against abortion in the *Morgentaler* case [<http://canlii.ca/t/1ftjt>], most legislators and Canadians at the time were not comfortable with an “abortion on demand” policy. When the federal government was unable to find a balance regulating abortion, Canada got abortion on demand. No contemporary politician will attempt to regulate abortion today. *Carter* has been implemented by Bill C-14 regulation. Government presumes its regulatory scheme will prevent abuse and other harm in this vulnerable population.

(9.) The Inexorable Drive to Reduce Health Care Costs and Family Impact Compromises Voluntariness

The Alberta health care system alone costs more than \$20 billion per year, some \$56 million per day. It alone accounts for 46% of total Alberta spending on programs and operations. This continues to be the fastest growing expenditure category, at about a 3% increase each year. That level of spending on health care will be unsustainable. Efforts to contain and prioritize costs will increase as the population ages and taxpayers demand relief from the burden.

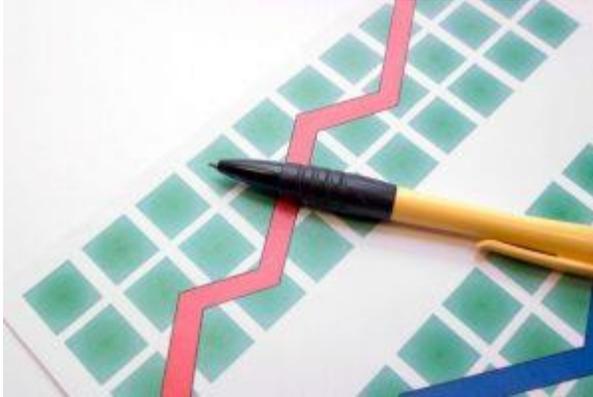
In Canada, hospital stays are already being shortened and money is tight for home care. Registered nurses are being replaced with less expensive practical nurses. Patients endure long waits for many surgeries. Statistically, by far most of the health care costs are spent in the last months and weeks of one’s life. A 2014 study by the Institute of Health Policy in Toronto, estimated the total cost of end-of-life care at \$34,197.73 per patient over the entire palliative trajectory which averages four months. A dose of suicide drugs costs about \$100.

The social pressure to save money and ration care will be palpable. The story is told about a request for public funding of a chemotherapy drug that cost US\$4000 per month in Oregon. The health plan denied the request but approved coverage of a suicide drug dose. Doctors, hospitals, family members and even provincial governments might all have perverse incentives to favour death overall as the best treatment option. Costs and other pressures will be brought to bear upon the disabled, depressed, dependent and elderly to ease the emotional and service burden on caregivers.

In a public health care system with limited resources, where suicide is regarded as a good and brave decision, one might feel guilty just for choosing life.

Taxation for Students

By [Gunnar Rawe](#)



Going to university can be a big change for a lot of students. They are finally adults, they might move away and there are a lot more responsibilities. One of these responsibilities that might seem a bit muddy is filing a personal tax return.

Why file?

Many students think that because they won't owe any tax they don't have to file a return. However, by doing so, they could be missing out on a great deal of credits and benefits. Of course, if the student owes tax, they must file a return regardless. If they don't file a return they won't be able to:

1. claim a refund on that summer job they worked – any tax paid on earnings will likely be refunded due to the education tax credits;
2. apply for GST/HST credit, which is a tax-free payment four times a year, or similar provincial payments, such as the Carbon Levy Rebate Alberta will offer commencing in 2017; and
3. carry forward or transfer education-related amounts.

How to File?

There are numerous free tax preparation software products that are fairly easy and simple to use. Canada Revenue Agency ("CRA") has a few it recommends listed on its website at <http://www.cra-arc.gc.ca/netfilessoftware/>. If "online products" is clicked, it should list the various free tax preparation sites.

There are free tax clinics put on by university or college tax clubs. Some companies will also travel to schools and provide tax services for free. Students should pay attention around February and March for notices regarding these services at their schools. CRA also has a program called the Community Volunteer Income Tax Program that works with community organizations to put on tax preparation clinics where students and other low-income people with simple tax returns can get their returns prepared.

What to File?

Usually students' tax returns are fairly simple – there isn't a lot going on in them as students are focused on school throughout the year. The following are some items that would typically be expected on a college/university student's return (the list is not comprehensive, but is a good starting point).

1. T4 – A summer job or part-time job for a student during the year is fairly common. The employer will issue a T4 outlining the amount earned, as well as taxes, CPP and EI paid.
2. T4A – This slip documents the scholarship, fellowship and bursary income received by the student. Registered education savings plan payments are also noted here.
3. T5 and T3 – Some students may have investments and the income would show up on these slips.
4. T2202A – This slip outlines the months enrolled in school (on which the education and textbook credit is calculated) as well as tuition paid to the institution in the year. Many educational institutions make these receipts available through their student portal, and do not send paper copies to students. Tuition credits are based on actual costs of educational programs. The education and textbook credits are calculated based on the number of full-time and part-time months a student is enrolled. Textbook receipts and other student-related receipts do not have to be saved (for tax purposes) as these credits are flat monthly amounts. It is also important to note that when the full amount of these credits can't be used by the student, they can be transferred to the student's parents or common law partner, as detailed below.
5. Interest paid on student loans – this is more applicable to people who have graduated, as most student loans don't incur interest until after the student graduates, but there is a credit for this interest paid. The loans must be made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act*, the *Apprentice Loans Act* or the equivalent provincial or territorial law. If there isn't enough income to fully claim the interest credit, then the amounts are able to be carried forward and applied within the next five years.
6. Moving expenses – a student who moves at least 40 kilometers away from home to go to school is eligible to claim moving expenses on their return. However, it is only deductible against scholarships, fellowships, bursaries and grants that are related to schooling. These amounts can be carried forward to offset future income of the same kind. Expenses related to a move to earn income from employment or business (such as moving back home to take up a summer job) can be deducted to the extent of income from that activity.
7. Public transit amount – bus passes and similar costs of regular public transit usage generate a tax credit. Most post-secondary institutions in Alberta are presently involved in arrangements with the public transit authority in their city to provide lower cost public transit. In these situations, all students enrolled at the school pay for this transit. These amounts paid are eligible for a credit, and the receipt is usually available through the school's student portal.
8. Child care expenses – if students have to pay someone to look after their child(ren) while they attend school, some or all of these amounts are deductible.

What to do With Extra Credits?

Often, students have limited income, and don't need all of their credits to eliminate their own taxes payable. If all of the tuition, education and textbook credits claimed in a year are not used, there are two available options. The first is that they can be transferred to a spouse or common-law partner, or to the student's parents or grandparents, or even the parents or grandparents of the student's spouse or common-law partner. To facilitate this transfer there is a section on the T2202A that must be filled in and signed by the student which should be held by the person receiving the transfer in case CRA asks for a copy. The maximum amount that can be transferred is \$5,000, less the amount required to reduce the student's own tax payable. The order in which credits are claimed is set by income tax law, so the education credits must sometimes be used by the student in priority to other credits.

The other option is to carry forward the remaining balance, including those exceeding the transferable amounts. Education and tuition amounts must be used to the extent possible in the current year. However, during school when most students' incomes are summer jobs, they end up having a balance that isn't used at the year-end (even if some is transferred). Any unused portions of the tuition credit for the year will be carried forward indefinitely until it can be used.

What Educational Institutions Are Eligible?

The following is a list of the types of institutions that offer education eligible for the tuition credit:

1. Canadian universities, colleges and other post-secondary schooling in Canada;
2. institutions provided courses geared towards developing skills in an occupation that have been certified by Employment and Social Development Canada;
3. schools outside of Canada which offer degrees at the bachelor level or higher where the course lasts at least three consecutive weeks; and
4. universities in the United States that offer post-secondary schooling, if the student is living in Canada near a border throughout the year and commutes to the institution.

2016 Federal Budget – What Changed?

The 2016 Federal Budget had some significant changes for students. The Government of Canada has pledged to increase the funding for the Canada Student Grant by 50% for both full and part-time students. It has made changes to loan repayment regulations so that students do not have to repay their Canada Student Loans until they are making at least \$25,000 per year, which allows them some time to get on their feet after university.

The education and textbook credit however, will only be available for eligible enrollment in 2016 and prior years, as the budget eliminated these credits for 2017. Tuition amounts will still be able to be claimed. Any unused amounts from prior years will still be available for carry forward.

Conclusion

It is important to keep all the tax slips received and to have records of all receipts for the above listed deductions and credits. Because they move frequently, students have an abnormally high incidence of slips that do not arrive in the mail, and as part-time jobs can be fairly short-lived, many students have multiple slips for such employment. Therefore, it might be useful to register for “My Account” with CRA, which allows a user to view and download income slips filed with CRA. This will ensure that no slips are missed when filing.

Filing a tax return can be a new and daunting experience for students, but it is worth it to take advantage of things like the GST/HST credit as well as the tuition carry forward amounts, and to claim any refund owed. And, of course, they will need to file when they graduate and put that education to use in the workforce.

A-loan in the Dark

By [Elizabeth Chen](#)



It is 6:59 a.m. on Saturday morning, and you have been sleepily staring at your course registration screen for what seems like hours, with your mouse carefully hovering over the “register” button. Registration starts at 7:00 a.m. and, let’s be honest, university students are essentially vultures when it comes to signing up for classes. The clock changes to 7:00 a.m. and you click with anticipation.

“You may not register for classes due to a hold on your account.”

And out comes that huff and puff of frustration. How did this happen?

Sometimes, it’s due to unpaid tuition or other large fees that are hard to miss. However, it is usually due to small, inconspicuous fines that accumulate on your record.

Remember that unpaid parking ticket that you never bothered to pay off because you didn’t believe the university would actually tow your car? That’s a hold.

Or, remember that library book you returned two days late and never bothered to pay off the \$2.09 overdue fee? That’s a hold.

Not registering for a class right on time is a small issue, when you compare it to Amitpal’s situation.

Amitpal worked hard through his four years of undergraduate studies, but he ended up having this conversation with his parents:

“Where’s your degree?”

“...Oh, I forgot to pay a parking ticket, so I missed the convocation date this year.”

It seems silly, that forgetting to pay a fine or an unpaid parking ticket would lead to delayed convocation. Yet, it happens so often, that many Canadian universities have written it into their policies (yes, you should read that).

Can the university do that? Some may not have the authority to tow your car, depending on the province that you are in, but many Canadian universities will find a way to enforce fines and penalties through their policies.

For example, in the 2009 case of *Barbour v UBC*, Justice Goepel ruled that the University did not have the power to charge or collect Parking Regulation fines.^[1] However, shortly after, the B.C. government passed a retroactive law that permitted UBC to issue and collect the fines.

Students must therefore be very careful in paying their fees and fines in full to avoid missing registration, convocation, and having their grades withheld.

For students who are from out of province and have to organize on-campus or off-campus housing for the first time, dealing with rent and rental agreements can be very confusing.

Take Bea, for example. As an out-of-province student going into her first year of law school, she thought she had picked the perfect residence (“Res A”). Although it had a communal kitchen to be shared by over 30 students, it was a steal at only \$900 per month, including TV, Internet, and utilities.

However, one of the terms that she had overlooked was the length of the agreement. Her program ends in April, but the rental agreement terminates in August, with no subletting option. Suddenly, the \$900/month did not seem to be such a great deal after all, considering that she will have to pay \$3600 (\$900 x 4) over the summer, without even living there.

The communal living situation also became a significant distraction for her studies. Since there was only one kitchen, her roommates had to alternate cooking times, ranging from six a.m to three a.m. While it was an excellent place to socialize, it was not conducive to sleeping or studying.

As midterms were approaching, Bea became concerned with the lack of quiet studying time available to her in the residence. After several meetings with Housing Services at her university, a Residence Assistant notified Bea of a spot in a different, quieter residence (“Res B”). Bea would live in a 2-bedroom unit with Ann (a resident of Res B). Bea was to move during the middle of exams, but was allowed to follow the old contractual terms (\$900/month for 12 months).

Unfortunately, Bea and Ann went through the typical “roommate horror story”, resulting from different hygienic habits, schedules, and personalities. It was further exacerbated by exam season, when Bea had to deal with the stress from housing issues, exam issues, interview season, and moot season. She suffered significant mental distress, and needed to return to her home province for treatment. Law

school was expensive, so her student loans did not leave her with enough money to cover the \$3600 she would have to pay over the summer. In the middle of final exams, Bea had to make weekly appointments with her psychologist and Housing Services to see if there was a way to amend her contract to have it terminated by April, so she could return home.

Luckily, Housing Services notified Bea of a vacated spot at another residence (“Res C”). Unlike Res A and Res B, Res C followed an eight-month agreement, meaning that all rental agreements were to terminate in April. Housing Services was willing to give early termination of Bea’s rental agreement at Res A and B (at the cost of her deposit + one month’s rent), and Bea would be released from further contractual obligations at the end of April. The only caveat would be that Bea would have to move, yet again, in the middle of final exams.

Bea’s experience in first year has taught her two invaluable lessons. First, Bea prioritizes studying, so she should have picked a residence that either had no roommates, or was a quiet residence. Second, Bea’s program is eight months long, so she should have chosen a residence that aligned to that term. Of course, the more criteria a student has, the more difficult it is to find a residence that meets all those criteria.

Another option would be find off-campus housing. However, this can lead to difficulties as well.

Bryce was 25, but had moved out when he was 18. With seven years of renting experience under his belt, he felt he was more familiar with rental contracts than his new landlord. He signed the agreement after giving it a casual skim. Bryce lived happily in his cozy Montreal apartment for two years while he worked towards his Master’s degree, and renewed it for a third year. He decided to install wallpaper in the apartment to brighten it up, and he had done so with no issue in his previous home. Two months later, his landlord called, giving Bryce a month’s notice to move out of the apartment.

The landlord had fallen into financial difficulties and needed to sell the apartment.

Bryce was not worried at the time, because he was given a month’s notice to move out, and with an excellent tenant record, he was certain that he would receive his rental deposit of \$2000. Unfortunately, Bryce’s landlord considered the wallpaper to be damaging to the walls, because he planned to strip it. As per their rental agreement, any damage to walls, flooring, or the structure of the apartment would lead to a forfeiture of the rental deposit.

Without the \$2000, Bryce could not afford the rental deposit for any other off-campus housing, and it was too late in the year to apply for on-campus housing. As a result, Bryce had to crash at a friend’s basement suite for two months until he could apply for more loans in June.

Students are warned time and again to carefully read every contract and policy, but the reality is that most students will ignore this advice. University is a wonderful experience, but not if you constantly

have to worry about legal issues. Dedicate that extra five-ten minutes of your time to carefully read over the terms of any contract you sign, so that you never, ever, have to appear in a horror story article.

****A special thank you to my friends who gave me permission to write about their stories.***

Notes:

[\[1\]](#) *Barbour v The University of British Columbia*, 2009 BCSC 425, Goepel J.

BenchPress – Vol 40-6

By [Teresa Mitchell](#)

1. CRA loses out to Solicitor-Client Privilege

The Canada Revenue Agency (CRA) sent a lawyer a request to produce documents about his personal finances and also his current accounts receivable. The lawyer provided some material but refused to produce his current accounts, claiming that to do so would violate solicitor-client privilege, since it would reveal his clients' names. The Federal Court and the Federal Court of Appeal sided with CRA, but the Supreme Court of Canada disagreed. The unanimous judgment stated: "Solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice. An intrusion on solicitor-client privilege must be permitted only if doing so is absolutely necessary to achieve the ends of the enabling legislation." The Court noted that the definition of "solicitor-client privilege" in the *Income Tax Act* is very clear and lawyers' accounting records are expressly excluded. It further noted that solicitor-client privilege belongs to the client and can only be waived by the client.

Minister of National Revenue v. Thompson 2016 SCC 21 (CanLII)

<http://www.canlii.org/en/ca/scc/doc/2016/2016scc21/2016scc21.html>

2. "Morally Blameworthy Conduct"

An Alberta couple has been convicted of failing to provide the necessities of life to their 18-month-old son. Baby Ezekiel fell ill, with symptoms including a fever, difficulty breathing and swallowing and decreased appetite. Over several weeks, as his symptoms worsened, his parents treated him with naturopathic remedies, natural supplements, fluids, fresh air and humidity. They did not take him to a doctor. One evening, Ezekiel stopped breathing. His dad called 911 but cancelled the call when the baby began breathing again. The family set out to the hospital but Ezekiel again stopped breathing. An ambulance met the family car and took over the baby's care. Several days later, doctors at the Alberta Children's Hospital Pediatric Intensive Care Unit declared the baby brain dead and life-sustaining therapies were discontinued. The parents were convicted by a jury of failing to provide the necessities of life to their son. In a Finding of Fact as a preliminary to sentencing, Justice R.A. Jerke found:

- A reasonably prudent person without medical training would have realized that Ezekiel needed medical attention;
- A reasonably prudent and ordinary person would have foreseen that failing to provide medical attention would endanger Ezekiel's life; and
- A reasonably prudent person would have taken Ezekiel to a doctor.

Justice Jerke concluded: “Mr. and Mrs. Stephan did not provide Ezekiel with medical attention. This was a failure of their legal duty to provide necessities of life. It was a marked departure from the required standard of care. It is morally blameworthy conduct.”

Justice Jerke sentenced the dad, David Stephan to four months in jail and the mom, Collet Stephan to three months of house arrest.

R v. Stephan 2016 ABQB 319 (CanLII)

<http://www.canlii.org/en/ab/abqb/doc/2016/2016abqb319/2016abqb319.html>

3. Fetal Alcohol Syndrome as a Mitigating Factor in Sentencing

The Manitoba Court of Appeal has reduced a convicted offender’s sentence for manslaughter from six years to four because he suffers from Fetal Alcohol Syndrome. Justice Monnin wrote: “an offender’s moral blameworthiness may be reduced if he suffers from an FASD-related diagnosis and there is a connection between the condition and the offence for which he stands charged.” He noted that the trial judge chose a lengthier sentence for reasons of public safety over the accused’s rehabilitation. However, Justice Monnin stated: “...it would be inappropriate...to give up on the accused and park him in a penitentiary for an additional period of time on the basis of his partial FAS diagnosis.” He added that learning how to control and modify behaviour can be a form of rehabilitation and should be considered in sentencing, even if the condition that produced the illegal behaviour cannot be cured.

R v. Friesen, 2016 MBCA 50 (CanLII)

<http://www.canlii.org/en/mb/mbca/doc/2016/2016mbca50/2016mbca50.html>

Changes to Child Support Applications

By [Sarah Dargatz](#)



Exchanging financial information is crucial to determine child support. John-Paul Boyd gave a great overview of child support in LawNow Issues 38-4 and 38-5. I covered the general duty to disclose financial information in family law cases in LawNow Issue 39-5. There have been some recent changes in Alberta Family Courts that emphasize the need for the timely exchange of financial information (often called “disclosure”).

The Court of Queen’s Bench issued two Notices to the Profession and Public on April 15, 2016 and May 19, 2016. Notices to the Profession and Public are official notices regarding procedure issued by the Chief Justices of the Courts. They let us know in advance how the judges will collectively decide on procedural issues. They also often include information about what the clerks of the court have been instructed to do when dealing with lawyers and the public. All such Notices can be found on the Alberta Courts website under “[Announcements](#)”. If you are self-represented, it is worth having a look at any Notices that apply to family law.

In the recent past, the general practice in Alberta for many parties to a child support application was to simply exchange financial information between themselves and their lawyers. Sometimes, parties filed Notices to Disclose with the court to ensure that basic financial information was exchanged. Rarely was the complete disclosure filed with the courts, though some documents may have been attached to affidavits to support or respond to an application. However, s. 21 of the Federal [and Alberta] Child Support Guidelines requires that the financial documents listed (including tax returns and notices, pay statements, business or corporate financial statements, statements for any other income) be actually provided to the court, as well as to the other party.

Also, in the recent past, it was common for people to file an application for child support, to change a child support order, or to respond to an application without ever providing their financial disclosure. The courts were then left to make decisions with an absence of information, or court time was spent chasing down one party for their information. This was a not a good use of court time when the disclosure requirements are very clear.

Now, anyone applying for child support or to vary a child support order must file, along with their application, a [Disclosure Statement](#) and attach the relevant [schedule](#) with their financial disclosure.

Financial disclosure must be filed with the court if the Applicant's income is relevant to the determination (they are the payor, there is shared or split parenting, undue hardship is claimed, or s. 7 expenses are at issue). If their income is not relevant, this can be checked off on the Disclosure Statement. The Respondent must also provide a Disclosure Statement along with their Response which is due within 30 days. If the Disclosure Statements are not attached to the Application or Response, the clerks are instructed not to file it. This addresses the issue of disclosure right from the start. Further, if the Respondents do not reply and provide their information, their income could be imputed or costs may be awarded.

In emergency situations, a party can ask a Justice for permission to file an application without their information attached (via a *fiat*). However, these are rarely granted. The requirement to file a Disclosure Statement does not apply to an application for a stay of enforcement regarding child support arrears, if that is the only application. Parties may also still file Notices to Disclose if they choose.

One issue of concern that many have raised is that materials filed with the court are publicly accessible. Many people do not want their financial information made available to anyone who asks. The courts are looking into changing the rules about the accessibility of family court documents; however, no changes have yet been made.

It's important to note that the requirement to file financial disclosure only applies when an application is made, which means it can be avoided if the parties reach an agreement outside of court. This is one more reason for parties to make their best efforts to agree and avoid court altogether.

A comprehensive guide, [Providing Financial Disclosure](#), designed primarily for self-represented litigants, is available online, from the clerk's counter, or at Resolution Services.

Another recent change that anyone with a child support order should be aware of is a change to the Maintenance Enforcement Program's (MEP) policy regarding special expenses (also called "s. 7 expenses"). In the recent past, recipients of child support could submit receipts for s. 7 expenses to MEP and it would collect from the payor of child support. Many child support orders simply say that the payor must pay a certain percent of s. 7 expenses when they arise without specifying the type of expense. MEP had a list of allowable expenses based on the categories listed in the Federal [and Alberta] Child Support Guidelines. MEP will no longer do this. Now, MEP will collect s. 7 expenses only if the amount and/or specific type of expense is listed in the Order. More information about this policy can be found [here](#). As a result, parties would be wise to clearly spell out acceptable s. 7 expenses in any future child support orders.

Same-Sex Families in some Canadian Provinces still Face Discrimination Challenges

By [Linda McKay-Panos](#)



Across Canada we have seen many developments in GLBT rights in the past few years. With the legal recognition of same-sex marriage, we might have thought that true equality for same-sex families had been reached. However, some of our provincial family laws have not kept up to these legal changes. In particular, in some provinces, when married gay or lesbian partners have a child, the non-birth parent(s) must legally adopt the child before they have any status as parents. The example given in discussion surrounding a recent Ontario case, *Grand v (Ontario) Attorney General*, 2016 ONSC 3434, follows.

Two married women partners are at the hospital. One partner, Djos, is haemorrhaging after giving birth. The child was conceived with sperm donated by a family friend. Grand, the non-biological mother, is struck with the horrible thought that the child is not legally hers, as she is required under law to adopt the child first. Also, the current vital statistics legislation will not permit her to be listed as a parent. This means that if something terrible were to happen to her wife, the child could not legally go home with Grand. Fortunately, Djos survives, and Grand hires a lawyer to help with the adoption of the baby a few weeks later.

Compare the situation of a married heterosexual couple—also conceiving through the use of assisted conception (sperm donor). Under existing law in some provinces, the male partner is presumed to be the child's parent, and is able to be recorded as a parent under vital statistics law. He is no more of a biological parent than is Grand. Yet, he does not have to adopt the child in order to be considered the child's parent. Thus, while same-sex parties have equal marriage rights, they do not have equal parenting rights.

In 2006 several couples challenged this situation in Ontario in *MDR v Ontario (Deputy Registrar General)*, (2006), 81 OR (3d) 81 (SCJ) (“MDR”). Lesbian parents whose children were conceived through reproductive technology sought to have the names of both mothers listed on the Statement of Live Birth under the Ontario *Vital Statistics Act* RSO 1990. The existing *Vital Statistics Act* only permitted the listing of one mother and one father. At the same time, non-biological fathers of children conceived through reproductive technology were permitted to have their names listed as parents on the Statement of Live Birth. The Court noted that the only solution for lesbian co-mothers was to proceed to adopt the child or to go to court to obtain a declaration under the *Children's Law Reform Act*.

The Ontario Superior Court of Justice held that the *Vital Statistics Act* violated the *Canadian Charter of Rights and Freedoms* (“*Charter*”) section 15(1). Lesbian co-mothers who plan a pregnancy with their spouse using reproductive technology were compared to heterosexual non-biological fathers who plan a pregnancy with their spouse using reproductive technology. Lesbian mothers were discriminated against on the basis of sex and sexual orientation. The children of these two groups were denied presumptive proof of parentage, and this was discriminatory too. The Court held that the discrimination was not saved by *Charter* s 1. If we assume the objective of the *Vital Statistics Act* is to make accurate and timely recording of births, and this is pressing and substantial, there is no rational connection between the objective and the means chosen; recognizing lesbian co-mothers need not be done to the exclusion of collecting accurate biological information. Further, the government has means that are less minimally impairing of the rights of lesbian co-parents, yet still maintain the record of the biological particulars of parentage. Both sets of information could be captured. The benefit to the government of refusing to register lesbian co-parents would be an increase in the accuracy of biological information in the system. On the other hand, the deleterious effects on lesbian co-parents include the pain and hardship that actually goes to their essential dignity. The *Vital Statistics Act*, s 9, was struck down, with the Court allowing a delay of 12 months for the declaration of invalidity, to give the government the opportunity to remedy the constitutional defects.

Perhaps in response to this decision, Ontario amended the *Vital Statistics Act* in 2007 to allow an “other parent” to certify a birth statement, if the child’s mother acknowledges him or her. The provisions apply in any case of assisted conception other than sexual intercourse, but only if the biological father is unknown. Where the biological father is a known sperm donor, a non-biological parent cannot be included on the registration. This does not address the difficulties faced by same-sex families in the above-noted situations.

It is possible to amend family legislation to address these circumstances. Comparable family laws in British Columbia, Alberta, Manitoba and Quebec have already made changes to their birth registration legislation. See: Jane Taber “Ontario legislation will grant equal rights to same-sex parents” 31 May 2016 *The Globe and Mail*.

In *Grand v (Ontario) Attorney General*, a group of LGBT families launched a second *Charter* challenge, alleging that the Ontario government has been too slow to react to the decision of 2006. In addition, the individuals involved in the 2006 law case, and others in the same circumstances, pressured the government to make the changes suggested in 2006. Private Members’ Bill 137, was introduced in Ontario’s Parliament in late 2015, and has passed first and second reading. It is called “*Cy and Ruby’s Act*”. It is apparently stalled at the committee stage (see: Alyshah Hasham “Same-sex parents still struggling for legal recognition” *Toronto Star* 24 May 2016, online).

The Ontario Attorney General explained that the delay in passing the Bill is in the wording of the Bill, which needs to be “re-worked” (see: Jane Taber “Ontario legislation will grant equal rights to same-sex parents” 31 May 2016 *The Globe and Mail* online).

Since there are models that are working in several other provinces, perhaps Ontario should consider consulting these models in order to speed up the process of enabling families in Ontario to have the same rights. It probably should not take ten years to fix the problem identified by the Ontario Court.

What Types of Proceedings Can You File Under the *Bankruptcy & Insolvency Act*?

By [J. Doug Hoyes](#)



The *Bankruptcy & Insolvency Act* regulates insolvency law in Canada. This legislation governs both business proceedings and personal procedures. In terms of personal insolvency, individuals have three basic legal measures available to them to obtain relief from creditors. The primary types of insolvency proceedings under the *Bankruptcy & Insolvency Act* include filing personal bankruptcy, a consumer proposal, or a Division I proposal.

All of these proceedings have common outcomes:

- the elimination of overwhelming unsecured debt;
- protection from creditor actions, including court orders and wage garnishments;
- fair and orderly distribution of funds to creditors; and
- all must be filed through a Licensed Insolvency Trustee.

However, how these objectives are achieved differs depending on which proceeding an insolvent individual chooses to file.

Personal Bankruptcy

Personal bankruptcy is a legal process whereby the insolvent person surrenders certain assets in exchange for a complete discharge of eligible unsecured debts. Not all assets are seized. Provincial legislation sets out certain exemptions which vary by province but cover most basics such as personal belongings, a motor vehicle up to a certain value and, in many provinces, a certain amount of home equity. In addition, while most unsecured debts are completely eliminated through a personal bankruptcy, there are exceptions, including student loans less than seven years old, child and spousal support arrears, court fines, and penalties.

Upon [filing for bankruptcy](#), bankrupts will be required to complete certain duties. These will include providing proof of income and expenses monthly so that the Licensed Insolvency Trustee can calculate the potential surplus income payments due in a personal bankruptcy if they earn income above the legislated threshold.

Technically, there are two types of personal bankruptcy procedures in Canada: a summary administration and an ordinary administration.

A summary administration occurs when the bankrupt's realizable assets are worth less than \$15,000. The vast majority of personal bankruptcies are summary administrations. While the duties of the bankrupt do not change, in a summary administration the trustee is not required to advertise the bankruptcy in the newspaper and the trustee is not required to call a mandated first meeting of creditors.

A bankruptcy becomes an ordinary administration when the bankrupt's realizable assets exceed \$15,000 in value. Ordinary administrations are rare because if an individual has significant assets, or a high enough income to trigger substantial surplus income payments, the Licensed Insolvency Trustee will generally recommend they consider a consumer proposal.

From the bankrupt's perspective there is little difference between these two bankruptcy procedures, it is more a matter of administration. The bankrupt will be discharged in the same length of time under either a summary or ordinary bankruptcy, although the trustee may not be discharged from his duties under an ordinary administration for a longer period of time.

Consumer Proposal

A consumer proposal is a legal agreement to settle unsecured debts with your creditors filed under the *Bankruptcy & Insolvency Act*. As part of the process, you file a plan offering to pay your creditors a portion of what you owe over a period of up to five years. To file a consumer proposal, an insolvent debtor must:

- be an individual; corporations have their own procedures; and
- owe less than \$250,000 excluding the mortgage on their principal residence.

There are significant differences between a consumer proposal and bankruptcy, which makes this option particularly attractive in certain circumstances. For instance, debtors are not required to surrender any assets, nor are they required to report income and expenses, or make any additional payments beyond what is negotiated in the proposal. In addition, the length of the proposal is determined by the original plan. Debtors have significant flexibility in determining these payments. While proposals can last no longer than 60 months, payment arrangements can include lump sum payments and debtors have the option to complete their payments, and thus their proposals, early.

Creditors have 45 days to vote for or against the proposal or request a meeting. If they vote for the proposal within this period, no meeting is required.

A consumer proposal, filed with a Licensed Insolvency Trustee, provides the same creditor protection and elimination of debts as can be achieved through personal bankruptcy.

Division I Proposal

Individuals whose debts exceed \$250,000, and businesses cannot file a consumer proposal but still have the option of making a deal with their creditors through a [Division I proposal](#). Again, the difference is largely administrative. Some additional information is required, including a projected cash flow, and there is a mandatory meeting of creditors. In addition, debtors are still required to submit a payment plan of no more than five years and their debts will be eliminated upon completion. A greater percentage of creditors is required for acceptance than in a consumer proposal.

One significant difference between a consumer proposal and a Division I proposal is that if creditors reject a Division I proposal, the debtor is automatically bankrupt. In a consumer proposal, debtors can choose to file for bankruptcy or can continue to work with their creditors on their own.

As Licensed Insolvency Trustees, we are able to provide options to individuals looking for relief from debts and seeking creditor protection. Today, almost half of all insolvency filings in Canada are consumer proposals. While the choice of which to file will depend on individual circumstances, talking to a Licensed Insolvency Trustee is the best option when struggling with significant debts.

Constructive Dismissal Still Under Construction

By [Peter Bowal](#) and [Patrick Tapuska](#)



“constructive dismissal can [occur when]... a series of acts that, taken together, show that the employer intended to no longer be bound by the contract.”

– *Potter v. New Brunswick Legal Aid Services Commission*

[2015] 1 SCR 500

<http://canlii.ca/t/ggkhh>

Introduction

Constructive dismissal was revisited by the Supreme Court of Canada last year in the case of *Potter v. New Brunswick Legal Aid Services Commission* [<http://canlii.ca/t/ggkhh>]. A unanimous Court expanded the law about constructive dismissal for employees.

Until last year, the main authority was the 1997 case of *Farber v. Royal Trust Co.* [<http://canlii.ca/t/1fr38>]. In that case, Royal Trust Co., an affiliate of the Royal Bank of Canada, underwent a major reorganization in June 1984, including the elimination of its regional manager positions. As a result, David Farber, the regional manager for Western Quebec, who supervised 400 real estate agents and administered 21 offices, was set to lose his job.

Royal Trust offered Farber the manager’s position at the Dollard branch, a position he had held eight years earlier, but did not guarantee him a base salary. The branch was one of the least profitable in the province, which meant that Farber’s income, in his opinion, would decline substantially to about half if he accepted the offer. Farber sued employer Royal Trust for damages on the ground of constructive dismissal.

The case reached the Supreme Court in 1997 where it was unanimously stated that:

Where an employer decides unilaterally to make substantial changes to the essential terms of an employee’s contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been constructively dismissed.

To determine whether the “unilateral changes imposed by the employer substantially altered the essential terms of the employee’s contract of employment,” the Court articulated the test of whether a

reasonable person, in the same situation as Farber, would have felt that the essential terms of the employment contract were being substantially changed. It was an objective assessment, not merely the opinion of Farber.

The Court concluded Royal Trust constructively dismissed Farber, because it:

. . . substantially altered the essential terms of the employment contract. At the time the offer was made, any reasonable person in the same situation as the appellant would have come to that conclusion. The manager's position at the Dollard branch, which was experiencing problems, was a significant demotion for the appellant. His responsibilities were being drastically cut, resulting in a considerable loss of status and prestige.

Farber was awarded \$150,000 as one year's remuneration in lieu of notice.

Potter v. New Brunswick Legal Aid

David M. Potter was appointed as the Executive Director of the New Brunswick Legal Aid Services Commission for a seven-year term. The relationship between Potter and the Commission quickly fell apart during the first three years. The Commission considered buying out the balance of Potter's contract. Potter took a sick leave. Just before his return, and unknown to Potter, the Commission recommended to the Minister of Justice that Potter's employment be terminated for cause. The Commission suspended Potter indefinitely with pay before he returned from his sick leave. So, Potter voluntarily resigned and alleged that the actions that prompted his resignation constituted constructive dismissal. The case was appealed to the Supreme Court which unanimously held that:

[Potter] was constructively dismissed. In light of the indefinite duration of his suspension, of the fact that the Commission failed to act in good faith insofar as it withheld reasons from him, and of the Commission's concealed intention to have him terminated, the suspension was not authorized by his employment contract.

The Commission did not have the express or implied authority to suspend Potter indefinitely with pay. His suspension was a substantial unilateral change to his contract and hence a constructive dismissal.

Up to this point, whether an employee had been constructively dismissed was determined by two criteria:

- (1.) the court must first identify an express or implied contract term that has been breached; and
- (2.) whether that breach was sufficiently serious to constitute constructive dismissal.

However, in *Potter* the Supreme Court introduced a new factor: “an employer’s conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract.” And “it is now sufficient to show that the ‘course of conduct’ pursued by the employer demonstrates an intention to no longer be bound by the employment contract.”

The Court said that:

Given the nature of the Executive Director’s position and the detail in which his statutory obligations were defined in the contract, the Commission had an obligation to provide [Potter] with work... Because the Commission has failed to establish that the suspension was reasonable or justified . . . the suspension constituted a unilateral act.

Conclusion

In 2015, the Supreme Court of Canada added another test for constructive dismissal. If the employer, in any course of action, demonstrates an intention to no longer be bound by the employment contract, it may be liable to the employee under the constructive dismissal doctrine

Bad Scholarship?

By [Peter Broder](#)



Many years ago I played a small part in the unearthing of a controversial scholarship at the University of Toronto that was, among other things, restricted to white, Protestant candidates. It was called the Leonard Scholarship and dated from 1923. After being featured in a student newspaper of which I was an editor, a story about the scholarship and its restrictions was picked up by the national media. The eventual fallout was a legal action through which a number of unsavoury restrictions on candidates for the scholarship were dropped. The decision employed the doctrine of *cy-pres*.

Cy-pres allows the changing of the terms of a trust that as originally expressed would be impossible, impracticable or illegal to carry out. Under the doctrine, a court is permitted to alter the trust's terms in a manner that comes as close as possible to achieving the intention of the party that created it, while avoiding impossibility, impracticability or illegality.

In the 1990 case of *Canada Trust Co. v. Ontario Human Rights Commission*, the Ontario Court of Appeal ruled that certain conditions to awarding the scholarship in question were contrary to public policy, and thus, the restrictions with respect to race, colour, creed, ethnic origin and sex were removed.

Fast forward to 2016 and an Ontario ruling dealing with scholarships created under a Will, and limited, in part, to "Caucasian (white), male single, heterosexual students", and in part to a "hard-working, single Caucasian white girl who is not feminist or lesbian." Citing the *Canada Trust* case finding that a charitable trust can be void as contrary to public policy to the extent that it discriminates on the grounds of race (colour, nationality, ethnic origin), religion and sex, the judge ruled in *Royal Trust Corporation of Canada v. The University of Western Ontario et al.*, that a number of the restrictions for the scholarships contemplated under the Will were contrary to public policy.

[Note that an executor, administrator or trustee of an estate of a person is considered a trustee, and a Will or similar instrument is considered to give rise to a trust or trusts. In this case, the Will providing instruction on use of the deceased's property included both purportedly charitable aspects – use of resources for scholarships – and non-charitable aspects, distributions to non-charitable beneficiaries.]

The Will in the *Royal Trust* case provided that if particular provisions of the document were held to be void, those provisions should fail without affecting the treatment of the assets under other provisions of the document, so the doctrine of *cy-pres* was not available in this instance.

Notwithstanding that, in the judgment, Justice Mitchell wrote:

I have no hesitation in declaring the qualifications relating to race, marital status, and sexual orientation and, in the case of female candidates, philosophical ideology, in paragraph 3(d)(ii)(E) of the Will void as being contrary to public policy.

(In a footnote, Justice Mitchell also remarked on the derogatory use of the term “girls” in reference to female candidates.)

The facts in this case, like those in the *Canada Trust* case are distasteful. That said, and with due respect to the Court, ruling that the ability to choose between candidates based on “philosophical ideology” can be contrary to public policy may be problematic.

(Parenthetically, another approach that might have achieved the same outcome in a less troublesome way would be to have ruled that determining definitively that someone is or isn’t a “feminist” – or, indeed, adheres to another ideology – is an impracticability that thwarts fulfillment of the trust.)

In another context, a *National Post* columnist recently lamented the availability of two student awards at the University of Victoria “in memory of the late Mao Tse Tung”, pointing to that leader’s long record of political tyranny. At issue for the columnist was not the eligibility criteria for the awards, but naming of the prizes for an oppressive regime. The existence of these two awards is indicative of the range of scholarships and attendant abundance of selection criteria that have been created for such awards in Canada.

Though scholarship and other academic awards are mostly associated with post-secondary institutions – the preponderance of which are registered charities, countless charitable public policy institutes, foundations and leadership groups also offer fellowships, bursaries and similar programs supporting research or training.

While it is reasonable to ask those institutions and organizations to select candidates without discriminating on grounds that have been enumerated in human rights or other legislation as being impermissible, it is another thing to ask them to vet the propriety of the “philosophical ideology” of award criteria.

Not applying a philosophical litmus test will inevitably mean that some people may be offended by the way in which the qualifications for some scholarships or other placements are assessed, but it is the better approach. Doing otherwise would both stifle the range of perspectives available to participate in

legitimate debate and place an unreasonable administrative burden on schools and groups in their efforts to advance knowledge.

The Production of Cell Tower Records Breaches Canadians' Privacy Rights

By [Melody Izadi](#)



Justice Sproat of the Ontario Superior Court of Justice in *R. v. Rogers Communications Partnerships* [2016] O.J. No. 151 has ruled that police cannot seek the production of cellphone records of thousands of Canadians in order to pursue investigations. This means that the personal information of Canadian cellphone users cannot be in the hands of police without specific reasons. In addition, and at the request of Telus and Rogers, the Court created guidelines so that future production orders would not infringe the privacy interests of Canadian citizens. It remains to be seen what ripple effects these guidelines will have on our right to privacy.

It's quite clear that as technology continues to develop, new topical legal issues are raised in courtrooms and litigated nation-wide. Whether it is legislation or common law, the laws around gathering evidence via cell records and other technologies still remain underdeveloped, much like an apple blossom begins to bloom before it becomes a firm, crisp apple.

New legislation was passed, courtesy of the Harper government and reflects the then-government's inclination to support more power for police to search cellphones without legal roadblocks in order to gather evidence. *The Protecting Canadians from Online Crime Act* came into force on March 10, 2015 and gives police a shocking amount of leeway to search Canadians' cellphones and cell records.

Certainly, as our laws develop in an attempt to catch up to today's technological advances, the police have tried to take advantage of the lacunas in the law. They sought to further investigations by gathering evidence created by cellphone usage and use that evidence against accused persons. However, the police have only been given *some* leeway by the courts, and the right to privacy seems to (thankfully) still be championed and safeguarded by Canadian judges. For instance, in 2013 the Ontario Court of Appeal in *R. v. Fearon* 2013 ONCA 106 held that a search warrant is necessary to search a cellphone that is "locked" or password protected, and a search of a password protected phone as a means to arrest would be otherwise unlawful.

In *R. v. Rogers Communications Partnerships*, the police obtained production orders that required Rogers and Telus to produce records of all of the cellphone, tower and subscriber records within a certain area in order to further an investigation into a string of jewelry robberies. The police wanted

these records so that they could identify every individual who used a cellphone near the jewelry store at the time in question. In order to comply with the orders, Telus advised the Court that it would be required to disclose the personal information of at least 9,000 customers. Detective Douglas Cole of the York Regional Police Service testified that these records were invaluable because they could reveal the names of all individuals accessing cell towers close to the crime scenes.

But Justice Sproat recognized the sensitivity of the information at stake. The private information that is created and stored using cellular phones should not be accessed freely by the state, because, as his Honour held:

“common sense indicates that Canadians have a reasonable expectation of privacy in the records of their cellular phone activity. Whether and when someone chooses to contact a divorce lawyer, a suicide prevention hotline, a business competitor or a rehabilitation clinic obviously implicates privacy concerns. The location of a person at a particular time also raises privacy concerns. Was the person at the Blue Jays game instead of at work?”

Justice Sproat held that, not only do Rogers and Telus have legal standing to assert the privacy interests of their clients (us), but that the information we disclose to them ought to be kept private. He found that the overly broad production orders requested by the police infringed Section 8 of the *Charter of Rights and Freedoms*:

“I appreciate that cellphone data is not right up there with Wikileaks and Ashley Madison in terms of information likely to be hacked and published. It remains that it is information Canadians certainly regard as private. The law supports this conclusion.”

What’s significant to note is how the law has been forced to respond to a new wave of breaches created by the developments in technology, and the influx of evidentiary links that can be made using this technology. Every time we use our cellphones, it’s as if we’re leaving a technological fingerprint that is frozen in time and can be uncovered if necessary. But how the police are able to obtain that data and when, is still a matter for our courts to decide. And so far, our courts seem to decide in line with our *Charter* right to privacy.

Rasouli: Withdrawal of Medical Treatment

By [Peter Bowal](#) and [James Rose](#)



“... a myriad of important interests, such as the integrity of our health care system, (is) at stake.”
– *Cuthbertson v. Rasouli*, [2013] 3 SCR 341

Introduction

In October 2010, Mr. Rasouli underwent surgery at Sunnybrook Health Sciences Centre in Toronto, Ontario to remove a benign brain tumour. Following the procedure, he developed meningitis that caused severe brain damage and left him unconscious. He has been kept alive by mechanical ventilation. It was expected that if his life-support were removed, he would pass away.

Mr. Rasouli’s physicians decided that he was in a persistent vegetative state and there was no hope for his recovery. They were of the opinion that continuing life support would not provide any medical benefit to him.

Rasouli’s wife disagreed. She wanted her husband to be kept alive on life-support. This was partly driven by her religious beliefs, but she also did not accept that her husband was in a state of irreversible unconsciousness.

The case went to the Supreme Court of Canada.

Law

Disputes between next of kin and physicians over consent and life support used to be resolved through the common law. However, Ontario’s 1996 *Health Care Consent Act (HCCA)* set out the law to settle such disputes. Under the *HCCA*, a designated substitute decision-maker (SDM), who is often a close family member, has the right to decide whether life support can be removed. The provision aims “... to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services.” The legislation seeks to protect patient autonomy and medical interests. In cases of disagreement between the patient’s physician and SDM, the physician can appeal the SDM’s decision to the Consent and Capacity Board which makes the final care decision for the patient. The Board is typically composed of physicians, ethicists, lawyers and members of the public.

The issue before the Supreme Court was whether the *HCCA* governed this case. If not, what common law applied to the question of whether life-support should be maintained?

Position of the Physicians

The physicians argued that “treatment” under the *HCCA* is what they determine to be of medical benefit to the patient. They formed the professional opinion that life-support no longer offered any medical benefit for Rasouli despite the fact that the system kept him alive in his unconscious state. They said maintaining life-support for Rasouli cannot be considered “treatment” under the *HCCA*, which then rendered the SDM’s consent for life-support removal unnecessary.

The case came down to the Supreme Court’s interpretation of the Act’s definition of “treatment.” In the *HCCA*, treatment is defined as “... anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan.”

Decision

On October 18, 2013, the Supreme Court of Canada sided with Rasouli’s wife by a 5 to 2 vote [see: <http://canlii.ca/t/g10hr>]. The majority of the Court set out the mechanism for dealing with such disputes under the *HCCA*. The term “treatment” applies to more than just what physicians consider to be of medical benefit to a patient. The Court extended this to also include end-of-life care. The Chief Justice said: “... while the end-of-life context poses difficult ethical dilemmas for physicians, this does not alter the conclusion that withdrawal of life support constitutes treatment requiring consent under the *HCCA*.”

The judgment means that the Consent and Capacity Board has the final say on the continuation of Rasouli’s life-support.

These cases are all unique and complex life-and-death matters. The Toronto Star reported that costs at Sunnybrook’s Intensive Care for Rasouli were about \$2,000 per day. The Court did not take into account any financial considerations in its decision.

Conclusion

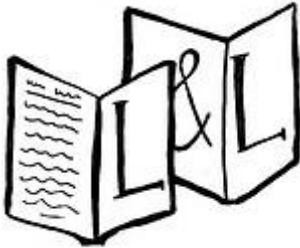
Rasouli has been upgraded from permanent vegetative state to what physicians deem as minimally conscious. Studies have shown that patients in a permanent vegetative state have about a 4% chance of regaining awareness, while those in a minimally conscious state have a 33% chance of making a marked recovery. Since the life-support decision is now in the Board’s hands, Rasouli’s slightly improved condition could warrant indefinite medical support.

At the end of 2013, still comatose, Rasouli was transferred from Sunnybrook to another facility. He had been a critical care patient at Sunnybrook for more than three years. He is now 64 years old.

The Supreme Court decision is a victory for patient autonomy. However, resources are not unlimited and this decision leaves for another day the essential political, governance and ethical debate about allocation of finite health care resources in a real world context of excessive demand for them.

Stranger Than We Can Imagine

By [Rob Normey](#)



Stranger Than We Can Imagine – John Higgs’s intriguing and unique tour of the 20th Century.

I recommend to readers trying to make sense of the tumultuous twentieth century a fresh historical take – John Higgs’s *Stranger Than We Can Imagine: An Alternative History of the Twentieth Century*. Its special quality is the sprightly manner in which Higgs offers up key events that illustrate the transforming qualities of the leading ideas and themes of modernism and postmodernism. The prose is accessible and one can only admire this British author’s uncanny ability to highlight complex ideas and phenomena with clarity in short, incisive chapters.

Stranger Than We Can Imagine takes us from the certainties and (apparent) stability of the Victorian era of progress and light to the various shocks and vigorous new philosophies and ways of being that transformed the world. The book might be better termed an historical investigation than a standard history. It clocks in at just 341 pages so there is much that is unavoidably omitted. For instance, his discussion of Jean Paul Sartre’s existentialism, developed in the immediate aftermath of the ravages of World War II, ties it to nihilism and the type of despair found in Samuel Beckett’s play *Waiting for Godot*. Yet, for Sartre and for those of us who have been energized by existentialism, it was surely intended to be a meaningful attempt to overcome despair and to reject nihilism. A longer section might have helped us to understand why Higgs considers the project to have failed. That being said, the author generally operates as a tour guide in an artful fashion, asking the reader to probe the wondrous and strange developments that were responsible for making the world new. The book can serve as a useful primer on such topics as Einstein’s theory of relativity and the successful literary experiments of James Joyce and Virginia Woolf, such as the use of stream of consciousness and multiple, shifting perspectives.

Legal cases and the role of law play a surprisingly significant role in relation to the events and the cultural icons that Higgs seizes upon to illustrate his narrative history. Indeed, these come into play for me, in the strongest part of the book, as Higgs takes us through the changes of the 1960s and beyond. For instance, in his chapter “Sex” the author relates the controversial and mould-breaking publishing history of D. H. Lawrence’s novel *Lady Chatterley’s Lover*, written in 1928. It could not be legally published in Britain (and generally elsewhere), other than in a heavily abridged edition, until 1960. In that year Penguin Books chose to publish it to offer the reading public the important (if quite flawed) final novel of one of greatest writers of the century. The prosecution under the *Obscene Publications Act*

was a dramatic and breathtaking event, with members of the literary community holding their breath and awaiting the verdict with trepidation until the jury finally rendered its verdict – not guilty!

Where Higgs succeeds is in following up on this event with a quick take on what came next. Here, as elsewhere, a breakthrough led to unexpected, even ironic consequences. For what Lawrence as a modern puritan surely wanted to affirm in his novel, contrary to the mistaken views of his enraged detractors, was a sexual relationship between the two protagonists, Constance, the young bride of an aristocratic lord, and Mellors, the gamekeeper on their estate, based on love and tenderness and what can be termed emotional intelligence.

The coming sexual revolution, ushered in by the court decision and altered perceptions as to what was now permissible in the books, plays and films of the new era, was heedless of Lawrence's suddenly old-fashioned, even quaint, ideals and his concept of an idealized spiritual union between couples. Higgs uses as his example the novels of Henry Miller, notably *Tropic of Cancer*, which move a long way beyond tenderness between partners.

In his chapter on individualism Higgs certainly hits his stride and I appreciated his account of the significance of the rise of the Rolling Stones and rock music as a new form of cultural expression – the power of youthful rebellion, nurtured on a diet of “drugs and sex and rock and roll.” It pains me to look back on the exciting times of the counterculture in the late 60s and 70s, when groups like the Stones seemed to be heralding some form of breakthrough, perhaps even a political and social revolution. Mick Jagger and Keith Richards and the other Stones truly did seem to represent some form of progressive political movement. However, a philosophy of individualism and defiance, without some genuine concept of the social good, is bound to lead to disappointment. What was thrilling and apparently meaningful when done by a young person becomes far less praiseworthy when performed by middle aged millionaires who have taken their place as “superstars” at the top of a new establishment.

Stranger Than We Can Imagine depicts two encounters Keith Richards has with the police. One is at a point soon after the Rolling Stones' meteoric rise to the top. He and Mick Jagger are convicted of simple drug possession but are treated fairly leniently by the magistrate and are aided by a sympathetic press. Later, Richards is apprehended after a run-in with U.S. police officers on an occasion where he took a risky drive through the heart of the Southern Bible Belt, his car laden with “dope, pills, peyote and coke” that even he considered excessive. The attitude he displayed on that and many other occasions is exemplified for Higgs by the phrase the guitarist used to explain himself – “We needed to do what we wanted to do.” With the help of high-powered lawyers he avoided disaster. (Pity the many young people who must have tried to emulate Richards and either overdosed on heroin or faced serious jail time). However, as the years have gone on, and Jagger and Richards continue to operate as “bad boys” of rock, they have long ceased to symbolize any meaningful form of rebellion and have come to personify unrepentant or irresponsible individualism. Higgs connects them to the Thatcher revolution of the 1980s and beyond that made this behaviour eminently respectable (not the drug taking, but the relentless focus on the bottom line for oneself), and notes that Jagger became a staunch Thatcher supporter.

Another strong chapter is the one on Growth, which chronicles the rise in power of the corporation, to the point that the large, multinational corporations now exert much more power than many governments around the globe. Lawyers did a successful job of utilizing the Fourteenth Amendment of the U.S. *Constitution*, which protects the life, liberty and property of any person, to increase the already heady powers of corporations in an exponential fashion. It is something of a mystery as to why corporations should be granted personhood at law, a development that has extended to Canada and many other nations, but a short history of this power play is provided here. Higgs describes this problematic transformation of our modern world with biting humour, using the Canadian documentary *The Corporation* as his launching pad. Filmmakers Mark Achbar and Jennifer Abbott took seriously the legal fiction that corporations are persons by asking just what kind of psychological profile can be created of this person. It is self-centred and even narcissistic, fails to conform to social norms with respect to lawful behaviour, has a callous lack of concern for the feelings of others and perhaps should be labelled a psychopath. The film draws on the book by law professor Joel Bakan which is worth consulting. We know, of course, that corporations are not, in fact, persons, but this instructive way of looking at their role in society shows a link with the self-centred behaviour of teenagers. Indeed, a connection can no doubt be drawn between the irresponsible individualism of these “persons” known as corporations and the unrepentant individualism of members of major rock acts, with their endless tours, outrageously high ticket prices and relentless flogging of tour merchandise. The perfect corporations!

There is much more, on a variety of topics, in this frequently exciting history of the past century.