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To the Special Joint Committee on Assisted Dying

Centre For Inquiry Canada is a registered Canadian charity with the mission to provide education and training to the public in the application of skeptical, secular, rational and humanistic inquiry. CFI Canada is the leading national community for science and secular humanism with more than 5800 member, subscriber, volunteer and client contacts across Canada. It is a leading voice for Canada's non-religious community with members in every province.

Executive Summary of Recommendations

- respect for individual autonomy and dignity must take the primary place in the government's treatment of this important issue
- moral propositions based on instinct, intuition and/or religious belief cannot be allowed to give rise to restrictions that would sterilize the right of a competent adult individual to seek medically assisted dying if life becomes valueless to that person
- legislators should be wary of arguments for restrictions that lack a solid foundation in scientific evidence.
- concepts of competence and voluntariness are not self-applying; all moral and legal concepts are fraught with ambiguity and require judgment in their application. This should not be permitted to lead to unduly onerous restrictions on medically assisted dying
- restricting the right to those who have been diagnosed with terminal disease would not fully respect the Court's decision and the value of individual autonomy that underpins it; the right should not be restricted to those whose irremediable condition is physical in nature as opposed to psychological
- CFIC submits that physician's rights to conscientious objection should not extend to the power to refuse to refer patients to physicians who do not object to providing assistance in dying
- all publicly funded primary healthcare institutions must provide physician-assisted death services

- federal legislation must be tied to health-system funding to ensure appropriate implementation by the provinces

Detailed Comments

This submission is based, in part, on a 2011 *Report of the Royal Society*[1] that was mentioned at paragraph 7 of the Supreme Court of Canada's decision in *Carter v Canada*.[2] In many respects, *Carter* reflects the reasoning in that report. For that reason, it is respectfully commended to you.

Canada is a pluralist liberal democracy. Canadians reach a wide range of conclusions about ethical issues. As far as the source of ethics is concerned, some Canadians believe that ethics should be grounded in the will of God. But there are many religious conceptions, some of which are non-theistic. Furthermore, significant segments of Canadian society reject religious belief as the ground of morality and still lead ethical and valuable lives. Canada's non-religious community includes people who self-identify as atheist, agnostic, secular humanist, humanist. Canadians reflecting on important ethical issues in a context of freedom of thought and expression also reach quite diverse conclusions as to the contents of ethics, of the values that ought to have pride of place. Some believe that it should be about the protection of individual autonomy. Others think that it should ultimately aim to maximize happiness and well-being.

Accordingly, when legislators address controversial moral issues such as assisted dying, it is necessary to seek common ground. Fortunately, such common ground exists in the values that form the ethical cornerstones of Canada's institutional order as a liberal democracy. A particularly rich fount of such values is our *Charter of Rights and Freedoms* and the three decades of legal and ethical reasoning that it has given rise to.

When we examine the matrix of constitutional values, as enunciated in the Charter and the jurisprudence under it, including *Carter*, we find that respect for individual autonomy takes the principal, but not exclusive place. Individuals may choose what to believe about the basis of morality and, subject to reasonable limits, the content of morality. Very recently, the Supreme Court of Canada unanimously held in a case banning municipal councils from opening their meetings with prayers that the state is subject to a "duty of religious neutrality" which, although not expressly set out in the *Charter*, necessarily follows from its guarantees of freedom of conscience and religion. The court made it clear that: "Freedom of religion includes the freedom to have no religious beliefs whatsoever. For the purposes of the protections afforded by the [*Charter*], the concepts of "belief" and

[1] End-of-Life Decision-Making in Canada: The Report by the Royal Society of Canada Expert Panel on End-of-Life Decision-Making, November 2011

[2] Carter v. Canada (Attorney General), [2015] 1 SCR 331, 2015 SCC 5.

"religion" encompass non-belief, atheism and agnosticism."[3]

But the right to autonomy means more than the choice of what to believe and the right to express one's views. In *Charter* jurisprudence establishing patients' rights in the area of health care, autonomy has long been the central value.

In *Carter v Canada*, the Supreme Court of Canada expanded on its previous decisions holding that patients have the right to refuse treatment even when the refusal will shorten their lives. In so doing, the Court rejected the proposition that the "existential formulation of the right to life requires an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life."[4] The Court continued: "This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 [of the Charter] also encompasses life, liberty and security of the person during the passage to death."[5] While the Court accepted that the proscription against assisting suicide in s. 241(b) of the Criminal Code violated the guarantee of life in section 7 because it deprives some individuals of life by effectively forcing some individuals to take their own lives without assistance before they lost the capacity to do so, the Carter decision is based on the guarantees of "liberty and security of the person". The Court said that: "Underlying both of these rights is a concern for the protection of individual autonomy and dignity." As the Court observed, many people "instinctively recoil" at a person's decision to seek death because of the belief, often rooted in religion, in the sanctity of life. However, such beliefs do not trump the right of those "suffering intolerably as a result of a grievous and irremediable medical condition" to act and to seek assistance in acting "out of a deeply personal and fundamental belief about how they wish to live, or cease to live."

Consequently, moral propositions based on instinct, intuition and/or religious belief cannot be allowed to give rise to restrictions that would sterilize the right the right of a competent adult individual to seek medically assisted dying if life becomes valueless, because the individual "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." Any restrictions to the right enacted to "protect the vulnerable from being induced to commit suicide at a time of weakness must be based on evidence", as the Court stressed.

Legislators should be wary of arguments in favour of restrictions that lack a solid foundation in evidence. Speculative arguments about the vulnerable being induced to commit suicide may well be rooted in unstated intuitions and attitudes, such as the belief that people have a duty to live for God or for other human beings until death by natural

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[3] *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3, 2015 SCC 16 at para. 70.

[4] *Carter* at para. 63.

[5] *Carter* at para. 63.

causes ensues or the belief that it is impossible (except for God) to be sure that a person is truly competent and is not subject to undue pressure to seek to end her life. As *Carter* states, "it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity."[6] The concepts of competence and voluntariness are not self-applying, like a litmus test. All moral and legal concepts are fraught with ambiguity and require judgment in their application. This reality should not be permitted to lead to unduly onerous restrictions on medically assisted dying.

In addition to the submission that legislation must be animated by the values at the heart of the Canadian institutional order, which are neutral with respect to beliefs concerning the ground of morality and which are, therefore, secular in nature, CFIC has several specific submissions.

The first relates to the scope of the right to medically assisted dying. *Carter* makes it clear that the right is not limited to those who are suffering terminal illness. Rather, it extends to those whose life has become valueless to them because of an "irremediable" condition, including disability as well as disease that causes enduring, grievous and intolerable suffering.[7] Restricting the right to those who have been diagnosed with terminal disease would not fully respect the Court's decision and the value of individual autonomy that underpins it. For the same reason, the right should not be restricted to those whose irremediable condition is physical in nature as opposed to psychological. First, the distinction between mind and body is becoming increasingly tenuous from an objective standpoint. Indeed, the Supreme Court of Canada has remarked on the elusiveness of the distinction in the context of a tort case.[8] Second, the mind-body distinction is rooted in philosophies and religious traditions that Canadians do not uniformly share. Third, our society is increasingly coming to the conclusion that mental suffering should be taken just as seriously as physical suffering and those who suffer from psychological distress should not be stigmatized.

The second specific submission concerns the right of physicians to conscientious objection. CFIC submits that this right should not extend to the power to refuse to refer patients to physicians who do not object to providing assistance in dying. Those admitted to the practice of medicine enjoy a somewhat monopolistic position with respect to a good that, in Canada, is essentially a public good. Individual conscience cannot be allowed to sterilize the rights of patients bearing the yoke of unbearable suffering to exercise their autonomy to end their suffering. Further, to the extent that the right to conscientious objection may render assisted dying services unavailable in certain parts of Canada, it is submitted that the federal and provincial governments owe a moral obligation to devise effective measures to ensure that the rights of patients are respected.

Our third specific submission requires that publicly funded primary healthcare institutions, including hospitals, hospices and long-term care facilities, must be required to provide

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[6] *Carter* at para. 116.

[7] *Carter* at para.4.

[8] *Mustapha v. Culligan of Canada Ltd*., [2008] 2 SCR 114, 2008 SCC 27 at para. 8.

physician-assisted dying on their premises.

Conclusion

The federal government must take a leadership position on the issue of physician-assisted dying by establishing progressive policy that is tied to health-system funding to ensure that provinces are motivated to provide appropriate services and to protect secular human rights.

Canada's non-religious communities value health and social policy which is founded in reason, ethics, scientific evidence and the deepest regard for individual secular human rights and dignity.

On behalf of CFIC's Board of Directors and Consulting Expert Advisers,

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