ELIGIBILITY CRITERIA

1. Age

Carter v. Canada allows the Criminal Code prohibition to apply to minors under the age of 18. This is in the best interests of children. The decision of the Supreme Court of Canada in A.C. v. Manitoba, [2009] 2 SCR 181 requires Parliament to act in the best interests of children and create a presumption that children are not competent to make life and death decisions. A.C. v. Manitoba also requires Parliament to give discretion to a judge to allow a minor to access services available to an adult where the child can prove that the child is a mature minor and otherwise meets the test in the legislation.

2. Capacity

The capacity limitations identified in Carter v. Canada are critical to protect the vulnerable. No one suffering from a mental disability that impacts capacity should be allowed to access suicide assistance. The decision of the Supreme Court of Canada in Eve v. E., [1986] 2 SCR 388 prohibits consent on behalf of a person who is incompetent to give consent. This includes the immature, the mentally disabled and those who have lost the ability to make competent decisions for any other reason. There can be no advance directive on the subject of physician assisted suicide.

3. Conditions

All of the conditions identified in Carter v. Canada must be reiterated in the legislation adopted by Canada. The failure to include conditions will create unnecessary risk of abuse and will create an impression that government supports suicide. This is not a message that should be given at this time. Particularly in Alberta where the suicide rate on some First Nations communities is 100 times the national average.

4. Vulnerable Canadians

The Supreme Court of Canada, in Carter v. Canada, carefully balanced the right to life of those in unremitting pain, with the right to life of the vulnerable who need protection from abuse under the Criminal Code. The Court observed the models in other jurisdictions and was not impressed. The right to life in section 7 of the Charter requires Parliament to take into account both perspectives on life. The European Court of Human Rights recognized the dual responsibility of government in Haas v. Switzerland, Application No. 31322/07 (20 January 2011).

II. PROCESSES AND PROCEDURES

1. Mechanics of Request

The legislation from Parliament should prohibit a physician or any person from raising the subject of suicide with an individual. The individual must raise the question before the subject may be addressed. There are numerous stories of extreme psychological stress caused by government or medical staff raising the idea with the ill or the elderly. This abuse must be prohibited and prevented. Until the idea of suicide is voluntary addressed by the patient, the medical team must only offer palliative care.

There is another reason to require the individual to raise the issue. We know from the history of sterilization in Alberta from 1929 to 1972 that healthcare providers may abuse a power, if it is in their financial interest or if it is in accordance with their world view. Even Canadian hero Nellie McClung got caught up in the evils of eugenics. See **Sterilizing the "Feeble-minded": Eugenics in Alberta, Canada, 1929-1972**, Grekul, Krahn and Odynak, authors, Journal of Historical Sociology, Volume 17, No. 4, December 2004. This article is a sobering reminder that not all progress is desirable.

Once a request is made, then all of the health status requirements of Carter v. Canada must be met by the attending physician.

2. Oversight

After consent has been validated, the physician should have the duty to apply to a judge for approval of the death before it occurs. The physician should be required to seek the opinion of a second physician and both should be required to swear affidavits that they are satisfied that the conditions of the law have been met. The physicians should be required to serve copies of the application and affidavits upon the next of kin. This is the minimum required when an application is made under Adult Guardianship and Trusteeship legislation in Alberta and other jurisdictions in Canada. Death is more significant and more permanent than decisions regarding finances and housing. If the loss of financial control requires judicial oversight, surely loss of life deserves no less.

Courts are experienced in making decisions regarding these questions based upon the evidence of physicians. The religious objection to blood transfusions issue is just one area where the courts have been called upon to make life and death decisions. The courts have been able to make those decisions on an emergency basis, with minimum risk to the individual and minimum delay. It is a regular occurrence in Canada.

Some have advocated leaving the entire responsibility to the physician and to exclude judicial oversight. That Supreme Court of Canada has already addressed this issue and determined that there is no right to have these life and death decisions made in secret. In Cuthbertson v. Rasouli, [2013] 3 SCR 341, the Supreme Court of Canada reviewed and affirmed the judicial oversight provided under the Health Care Consent Act of Ontario. Physicians must be involved, but they should not be the ultimate arbiters of life and death. Independent judicial review prior to death is best. It will avoid much suffering and prevent the expenditure of significant funds on legal fees. Estates should go to the children and beneficiaries, not to lawyers fighting over whether a physician properly secured and documented consent.

3. Privacy Considerations

Courts and physicians have effectively preserved the privacy of individuals over the decades when issues of life and death have come before the courts. The legislation enacted by Parliament should maintain that standard of medical ethics. All applications to a court for judicial oversight should be restricted to the parties named and served under the legislation.

III. Roles and Regulation of Healthcare Practitioners

1. Who Should Do What

The physician should be given the responsibility to manage the process. However, the legislation must recognize the roles of others and authorize their participation. Healthcare facility owners, administrators and employees must all be given immunity, once a court order is issued. Carter v. Canada only addresses physicians. All participants must be considered in the legislation.

2. Rights of Conscience

Carter v. Canada specifically and expressly requires Parliament and legislatures to respect the conscience rights of all engaged in this process. The Supreme Court of Canada has determined that individuals have a right to seek medical assistance in suicide, not a right to force doctors to become executioners. There are more than enough physicians in Canada willing to offer assistance. There is no need to force a physician to kill. Physicians are not the state and do not act on behalf of the state. They are not governed by the Charter. Instead, like individual patients, doctors have Charter rights and those rights must be respected and protected by Parliament. In the unlikely event that a patient cannot find a doctor to assist in death, it is the government of a province, not the physician, that the Charter requires to provide accommodation. Provinces can be counted upon to fulfill their Charter obligations. There is no reason to believe that it will be necessary to enslave doctors in order to achieve that goal.

The Parliament of Canada should enact an absolute right of refusal to participate or assist in a suicide without question and without demonstrated reason. To do otherwise would be to replace one human rights infringement with another.

3. Discipline and Penalties

Parliament need not address the issue of discipline, that is a provincial area of jurisdiction. Parliament should focus on which penalties will apply under the Criminal Code. There is no reason to change the penalties that currently exist. If a physician or other person assists in a suicide without a court order, the legislation should deny them the right of immunity from prosecution.

Where a court order has been properly secured, Parliament should provide the following immunities for participants that naturally follow:

A. Immunity from charges under the Criminal Code;
B. Immunity from malpractice claims;
C. Immunity from ethics complaints;
D. Immunity from administrative prosecutions.

In addition, Parliament should provide that no life insurance or pension may be denied or other financial disability imposed as a consequence of the classification of the death as a suicide, where a court order has been issued authorizing medical assistance in suicide.

IV. CONCLUSION

The decisions of the Supreme Court of Canada in Carter v. Canada on February 6, 2015 and on January 16, 2016 provide a sound guide for Parliament. I have identified a number of other recent decisions of the Supreme Court of Canada that provide further direction. Parliament would be wise to stay within the four corners of these decisions. If the legislation goes further than contemplated by the Supreme Court, then Parliament runs the risk of placing the lives of

the vulnerable at risk. Furthermore, even if Parliament were convinced at this time that further exceptions to the Criminal Code might be justified, it would be more responsible to implement the model outlined by the Supreme Court and address potential extensions after Parliament has the benefit of observing over time the impact of this dramatic change in the law.

GERALD CHIPEUR, QC