

Draft Federal Legislation to Amend the Criminal Code to be Consistent with
Carter v. Canada (Attorney General) 2015 SCC 5
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An Act to amend the Criminal Code as it relates to Physician-Assisted Suicide and the Review Boards provisions [NTD: We will be asking each provincial criminal review board to make a determination with respect to an Application for Physician-Assisted Suicide and review the matter after it's finalized]

SUMMARY

[NTD: include summary here once legislation is finalized]

Her Majesty, by and with the advice and Consent of the Senate and House of Commons of Canada, enacts as follows:

- (a) The following be added to s.14:
“except as provided in s.241.1.”
- (b) Section 21 unchanged being “aiding and abetting.”
- (c) Section 22 unchanged being “counselling.”
- (d) The following be added to s. 241(b):
“except as provided in s. 241.1.”
- (e) The heading preceding s.241.1 shall be:
“Physician-Assisted Suicide.”
- (f) The following new section be added following s.241:

241.1(1) Interpretation

“Adult” means a person of the age of majority in the province or territory in which he or she resides;

“Application” means a formal Request that includes a Patient’s medical records, Witness attestations and Reports submitted to the Review Board for consideration of Physician-Assisted Suicide;

“Assistance” means the provision of knowledge, means or both;

“Assisted Suicide” means the act of intentionally killing oneself with the Assistance of an Assisting Physician who provides the means;

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“Assisting Physician” means the Physician involved directly in Physician-Assisted Suicide;

“Responsible Physician” means the Physician who has primary responsibility for the care of the Patient and treatment of the Patient's Irremediable condition and has a sufficient Patient relationship to allow him or her to provide relevant information concerning the requirements of Physician-Assisted Suicide;

“Competent” means the capacity to understand the subject-matter in respect of which a decision must be made and able to appreciate the reasonably foreseeable consequences of that decision or lack of decision;

“Consulting Physician” means a Physician who is qualified by specialty or experience to form a professional opinion about the matter on which he or she has been consulted;

“Counselling” means one or more consultations as necessary between a Patient and a person, whether or not a member of a regulated health profession, who, through training or experience, is in the opinion of the Responsible or Consulting Physician able to address with the Patient the causes of the Patient’s potential Vulnerability;

“Free Request” means a Request made voluntarily (i.e., without coercion or undue influence) to the Review Board; **[NTD: This will link up to s.672.38 of the Criminal Code]**

“Grievous” means a condition or disease which notwithstanding receipt of Medically Necessary treatment, qualified Counselling or available treatment, is capable of causing extreme suffering that a reasonable Patient may consider to be intolerable;

“Informed Consent” means an express choice made after the Patient has been provided with sufficient information to evaluate the risks and benefits of Physician-Assisted Suicide and other alternative courses of actions, including, but not limited to, home care, comfort care, hospice care and pain control, that a reasonable Patient in the same circumstances would require in order to make a decision about the course of action; and the Patient received responses to his or her Requests for additional information about those matters;

“Irremediable” means a terminal disease that is incurable and has been medically confirmed by a Physician, and will by evidence-based medicine and using reasonable judgment, produce death within 12 months;

“Medically Necessary” means treatment, including palliative care, that is fully funded by the respective provincial or territorial government and is delivered based on the Patient’s need, not their ability to pay;

“Patient” means a resident as that term is defined in the *Canada Health Act* under the care of a Physician;

“Personal Representative” means a neutral individual assisting the Patient file an Application with the Review Board or if the Patient does not have a Personal Representative, an Advisor appointed on Request by the Review Board; **[NTD: this could be a patient advocate or someone from legal aid]**

“Physician” means a doctor of medicine licensed to practice medicine under the laws of the province or territory in which he or she practices and in good standing with the applicable provincial or territorial college;

“Prognosis” means predicting the likely outcome of Patient’s current standing including an estimate of when the disease or illness will cause death;

“Proportionate Palliative Care” means palliative care appropriate to the needs of the Patient whether or not such care is available to the Patient;

“Request” means a wish to proceed with Physician-Assisted Suicide asked for by a Patient in writing;

“Reports” means documents drafted by the Consulting Physician, Responsible Physician, and Counsellor sent to the Review Board as part of the Application for Physician-Assisted Suicide;

“Review Board” has the meaning set out in s.672.38; **[NTD: s.672.38 will need to be revised to address this proposed legislation]**

“Vulnerable” means a Patient making a Request who in the opinion of the Patient’s Responsible or Consulting Physician may be experiencing some or all of the following, any one of which could induce a person to commit suicide:

- (a) Lack of access to Medically Necessary treatment including Proportionate Palliative Care;
- (b) Lack of access to alternative services necessary for the Patient to lead an independent, dignified and comfortable life;
- (c) Lack of the opportunity to come to terms with the Patient’s prognosis;
- (d) Lack of awareness of how persons with an illness or condition comparable to that of the Patient have nevertheless come to live meaningful and dignified lives;
- (e) Social isolation, loss of independence, poverty, fear of becoming a burden on others, or a self-image weakened by anticipated exclusion, disadvantage or discrimination; or

- (f) Diminished competency due to a psychiatric or psychological disorder or depression capable of causing impaired judgment;

“Witness” means an individual of the age of majority under applicable provincial or territorial laws who is not a relative (by blood, marriage, or adoption), an owner, operator or employee of the health care facility in which the person making the Request is receiving treatment, or a resident, a Physician involved in the care of the Patient, or at the time of acting as a Witness entitled to any portion of the estate upon death under any will or by operation of law.

s.241.1(2) Initiating a written Request for an Application by a Patient for Physician Assistance to commit Suicide

- (a) An Adult Patient who is Competent, free from coercion and undue influence may make a written Application to a Review Board set out in subsection 672.38 (1) to be permitted to commit Suicide with Physician Assistance.
- (b) A copy of the complete Application shall be simultaneously transmitted to the Public Guardian and Trustee of the province or territory.
- (c) An Application to the Review Board shall include a Report from the Patient’s Responsible Physician, a Report from at least one Consulting Physician, a Report from the Counsellor, if such a referral has been made by the Responsible Physician or Consulting Physician, Witness attestations, and the Patient’s medical record containing at a minimum, a record of all Requests made by the Patient for Physician Assistance to commit Suicide, and all revocations of any such Request.
- (d) No Patient shall qualify under the provisions of Physician-Assisted Suicide solely because of age or disability.
- (e) Any person who pursuant to ss. (14) receives a verbal or written revocation of the Patient’s Request for Physician-Assisted Suicide shall advise the Patient’s Responsible Physician and notify the Review Board as soon as reasonably possible, and the revocation shall terminate the Request for all purposes.

s.241.1(3) Form of the written Request

- (a) A valid Request for Physician-Assisted Suicide shall be signed and dated by the Patient in the presence of the Responsible Physician and witnessed by at least two individuals who, in the presence of the Patient, attest that to the best of their knowledge and belief the Patient is Competent, acting voluntarily, and is not being coerced to sign the Request.
- (b) The Request shall include a statement by the Patient that he or she has not been induced or coerced to seek Physician-Assisted Suicide, and shall be accompanied by reasons, stated in the Patient’s own words, why the suffering he or she is experiencing is resulting from his or her medical illness or condition and is considered to be intolerable and likely to be enduring.

- (c) Before the Application is forwarded to the Review Board and the Public Guardian and Trustee, both the Patient and the Responsible Physician shall confirm in writing that it is complete to the best of their knowledge.
- (d) The Witnesses shall be persons who are not:
 - 1. A relative of the Patient by blood, marriage or adoption;
 - 2. An owner, operator or employee of a health care facility where the Patient is receiving medical treatment or is a resident, except as stated in subsection 4; or
 - 3. A person acting as a Witness would be entitled to any portion of the estate of the qualified Patient upon death under any will or by operation of law.
- (e) The Patient's Responsible Physician at the time the Request is signed shall not be a Witness but shall record his or her presence at the signing in the Patient's medical record.
- (f) If the Patient is a Patient in a long term care facility at the time the written Request is made, one of the Witnesses shall be an individual designated by the facility and having the qualifications specified by the Ministry of Health of the applicable provincial jurisdiction.

s.241.1(4) Responsible Physician responsibilities

The Responsible Physician shall:

- (a) Make the initial determination of whether the requesting Patient appears Competent to provide Informed Consent and to be acting voluntarily, and confirm whether or not there appears to be a causal connection between the Patient's condition or disease and the suffering he or she has identified as being intolerable;
- (b) Ensure that the Patient is making an Informed decision, such that he or she informs the Patient of:
 - 1. His or her medical diagnosis, including a determination of whether or not the Patient suffers from a disease or condition that is Grievous and Irremediable and an identification of any Medically Necessary treatment, including Proportionate Palliative Care, that could alleviate some or all of the suffering experienced by the Patient;
 - 2. the reasons why the treatment identified as Medically Necessary is not available to the Patient and the circumstances under which it could be made available;
 - 3. His or her Prognosis based on receiving or refusing the Medically Necessary treatment identified, including a statement indicating whether the Patient's death is imminent;

4. The probable result of taking the medication to be administered, in the event the Patient's Request is granted by the Board;
 5. The alternative courses of action that could alleviate the Patient's suffering, whether or not readily available, including, but not limited to Counselling, home care, comfort care, hospice care and pain control, including options for accessing them; and
 6. The right to revoke the Request at any time, whether verbally or in writing.
- (c) Refer the Patient to at least one Consulting Physician with expertise related to the source of the suffering identified by the Patient for clinical advice;
 - (d) Refer the Patient for Counselling if the Patient may be Vulnerable;
 - (e) Advise the Patient that next-of-kin may be contacted or assign this responsibility to the Counsellor;
 - (f) Draft a Report to accompany the Application for the Review Board detailing: (i) the basis for perceiving the Patient is Competent; (ii) the information that was provided to the Patient and a confirmation that in the opinion of the Physician it was sufficient for the Patient to make an informed decision; (iii) the basis for concluding the condition or disease is Grievous and Irremediable, including a Prognosis regarding the date by which death is expected; (iv) Medically Necessary Treatment or alternative services were recommended; (v) the basis for a referral to Counselling, if applicable, and (vi) the independence of the Patient's request and the role of the next-of-kin in accessing alternatives;
 - (g) Where the Responsible Physician contacts the next-of-kin, he or she shall attempt to determine what if any impact family members had on the voluntariness of the Patient's Request and establish whether the family was willing and able to support the Patient in accessing Medically Necessary treatments and alternative services. This information shall form part of the Responsible Physician's Report to the Review Board;
 - (h) Inform the Patient that he or she has an opportunity to rescind the Request at any time and in any manner, and offer the Patient an opportunity to rescind at the end of the 30 day waiting period and again at the 15 day waiting period; **[NTD: The details can only be finalized once we take into consideration the Review Board process.]**
 - (i) Ensure that all appropriate steps are carried out in accordance with **[NTD: once the legislation is finalized, we can cross-reference]** prior to the Patient making an Application to the Review Board; and
 - (j) Confirm that all responsibilities under this Section have been performed.

s.241.1 (5) Consulting Physician confirmation

After the Patient informs the Responsible Physician that he or she wishes to commit Suicide with Physician Assistance, at least one Consulting Physician shall:

- (a) Examine the Patient and his or her relevant medical records and develop an independent position, in writing, as to whether or not the Patient is suffering from a Grievous and Irremediable medical disease or condition;
- (b) Examine the Patient and his or her relevant medical records and determine if Medically Necessary treatment exists that in their opinion could alleviate or help alleviate the suffering described by the Patient;
- (c) Refer the Patient for Counselling if, in his or her independent opinion, the Patient may be Vulnerable;
- (d) Draft a Report to accompany the Application for the Review Board detailing, in the Consulting Physician's independent opinion: (i) whether or not the Patient is Competent, and the basis for this conclusion; (ii) the information that was provided to the Patient and a confirmation that it was sufficient for the Patient to make an informed decision; (iii) the basis for concluding the condition or disease is Grievous and Irremediable, including a Prognosis regarding the date by which death is expected; (iv) Medically Necessary Treatment or alternative services were recommended; and (v) the basis for a referral to Counselling, if applicable; and
- (e) Confirm that all responsibilities under this Section have been performed.

s.241.1 (6) Counselling referral

- (a) Counselling, whether publicly or privately funded, shall be made available if:
 - 1. The Patient makes an oral or written Request; or
 - 2. In the independent opinion of the Responsible Physician or the Consulting Physician, a Patient may be Vulnerable.
- (b) The Counsellor shall draft a Report to accompany the Application for the Review Board detailing: (i) whether the Patient attended and completed the recommended course of Counselling; (ii) the sources of Vulnerability addressed with the Patient; (iii) the impact the Counselling had on the suffering experienced by the Patient; and (iv) whether the Patient accessed the treatments and alternative services available that could alleviate his or her suffering.
- (c) Where the Responsible Physician assigns responsibility to the Counsellor for informing the Patient's next-of-kin of the Request for Physician-Assisted Suicide, the Counsellor shall attempt to determine what impact family members had on the Patient's Request and

establish whether the family was willing and able to support the Patient in accessing Medically Necessary treatments and alternative services.

- (d) No medication to end a Patient's life shall be administered until the person Counselling the Patient determines that the Patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.
- (e) The Counsellor shall confirm in writing that all responsibilities under this Section have been performed

s.241.1(7) Next-of-kin Notification

The Responsible Physician shall advise the Patient that the next-of-kin will be informed of his or her Request for Physician-Assisted Suicide and will be asked to provide information concerning the Patient, and that this information shall form part of the Application.

s.241.1(8) Public Guardian and Trustee

- (a) Upon receipt of an Application, the Public Guardian and Trustee shall exercise the powers of the office to conduct such investigation as is deemed necessary, including contacting the Patient's next-of-kin, and based on the Application and the results of the investigation, advise the Review Board of whether an oral hearing is warranted.
- (b) When there is an oral hearing, the Review Board shall notify the Public Guardian and Trustee to participate as a full party in the proceeding, with power *inter alia* to summon persons to give oral testimony, introduce documentary evidence, examine persons giving oral testimony and make submissions.

s. 241.1(9) Medical Record Documentation requirements for the Application

The Responsible Physician shall ensure that the following be documented and filed in the Patient's medical record that shall be provided together with the Request and the Reports to the Board by the Patient or Personal Representative:

- (a) Any oral Requests by a Patient for Physician-Assisted Suicide, including any previous Requests;
- (b) All written Requests by a Patient for Physician-Assisted Suicide;
- (c) The Responsible Physician's diagnosis and Prognosis, including a determination of whether the person is suffering from a Grievous and Irremediable condition;
- (d) The Responsible Physician's determination as to whether or not the Patient is Competent to make the Request;
- (e) The Responsible Physician's opinion on whether the Patient is acting voluntarily and has made an Informed decision;

- (f) A record of all Medically Necessary treatment, including palliative care capable of alleviating some or all of the suffering experienced by the Patient, including an indication of whether the treatment was accepted or refused by the Patient and if accepted, whether or not the treatment was available and administered, and the observed consequence of receiving treatment on the Patient's suffering;
- (g) One or more of the Consulting Physician's diagnosis and Prognosis, and verification that the Patient is Competent and has made an Informed decision;
- (h) The date, names and contact information of the Witnesses who attested to the Patient's Request for Physician-Assisted Suicide;
- (i) Any recommendations for the Patient to inform their next-of-kin, and whether or not to the knowledge of the person making the recommendation, the next-of-kin was informed;
- (j) A Report of the outcome and determinations made during Counselling, if performed;
- (k) The Responsible Physician's offer to the Patient to rescind his or her Request at the time of the Patient's initial Request, second Request and immediately before applying to the Review Board for a determination on Assisted Suicide; **[NTD: to finalize once Review Board criteria are established]**
- (l) A record of any verbal or written revocation statements to the Request made by the Patient; and
- (m) A note by the Responsible Physician indicating that all requirements under **[NTD: once finalized we can cross-reference]** have been met.

s.241.1(10) Application to Review Board

- (a) A Patient or Personal Representative shall make a written Application to the Review Board that includes the requirements set out in s.241.1(2)(2), including the Reports and the Witness attestations.
- (b) An Application does not require an oral hearing unless:
 - 1. The Patient chooses a hearing;
 - 2. The Public Guardian and Trustee or the Board makes a determination that a hearing is required; or
 - 3. A third-party makes an objection to the Review Board concerning the Patient's choice to undergo Physician-Assisted Suicide.
- (c) The Board may follow an expedited process where the Responsible or Consulting Physician provides information indicating that the Patient is experiencing intense suffering caused by a sudden and unforeseeable deterioration in the Patient's condition or illness.

- (d) The Board shall determine that an oral hearing is required where any of the following is apparent based on the Application, Request, the Witness attestations and the Reports submitted where:
1. The Patient has refused consent to either a treatment identified by a Physician as being Medically Necessary, or to attend and complete Counselling with a Counsellor to whom the Responsible Physician or Consulting Physician has made a referral;
 2. A Physician expresses in their Report that the Patient's condition is not Grievous or Irremediable;
 3. A Request has been initiated and withdrawn or has been previously rejected by the Board; or
 4. The Patient's disease or condition is identified as being Irremediable, however a Physician is of the opinion that the disease or condition is unlikely to cause death within a twelve month period from the date of the Request.

s.241.1(11) Order from the Review Board

- (a) The Board, having reviewed the record filed with the Request, and based on the evidence received at the oral hearing, if any, shall make one or more of the following orders:
1. Grant the Request following a determination that the Patient is Competent and is suffering from a Grievous and Irremediable condition or illness that is the cause of suffering considered to be intolerable by the Patient;
 2. Deny the Request;
 3. Adjourn the Request and direct that members of the Patient's next-of-kin be notified of the Request and the proceeding before the Review Board, with a Request for their participation;
 4. Adjourn the Request with a direction that the Application or course of Counselling is incomplete and needs to be completed before an amended Application is re-submitted;
 5. Adjourn the Request with a direction that a Physician or Counsellor appear and give testimony before the Board; or
 6. Adjourn the Request with a direction that further evidence is required by the Board before it is prepared to make an order.
- (b) A Patient having received an order to proceed with Physician-Assisted Suicide will have an Assisting Physician appointed by <@> **[NTD: We imagine that there will be a body of physicians willing to perform this task]** to administer the dose of medication causing death.

- (c) The Board shall report the Request, the nature of the suffering identified by the Patient, whether the Patient was unable or unwilling to access Medically Necessary treatment or alternative services, its order, together with forwarding the Report of the Assisting Physician, if any, to [NTD: Identify the federal authority responsible for gathering Criminal Justice statistics, that will be responsible for compiling and publishing data on the operation of the Section in the form of an Annual Report to Parliament].

s.241.1 (12) Informed decision

No Assisting Physician shall directly administer the medication causing death to a Patient unless he or she has confirms that the Patient made a voluntary and Informed decision. Immediately prior to administering the dose triggering death, the Assisting Physician shall verify that the Patient is making an Informed decision.

s.241.1 (13) Assisting Physician Responsibilities

The Assisting Physician shall:

- (a) Ask the Patient whether they would like to rescind his or her Request for Physician-Assisted Suicide;
- (b) Administer the medication causing death; and
- (c) Report the Physician-Assisted Suicide to the Review Board.

s.241.1 (14) Right to rescind Request

A Patient may rescind his or her Request at any time and in any manner (oral or written) without regard to his or her mental state. Physician Assistance may not be provided to aid a Patient to commit Suicide without the Responsible Physician, Consulting Physician, Counsellor, if any and Assisting Physician offering the Patient an opportunity to rescind the Request.

s.241.1 (15) Insurance or annuity policies

The sale, procurement, or issuance of any life, health, or accident insurance or annuity policy or the rate charged for any policy shall not be conditioned upon or affected by the making or rescinding of a Request, by a person, to end his or her life by Physician-Assisted Suicide. Neither shall a Patient's act of ingesting medication to end his or her life in by Physician-Assisted Suicide have an effect upon a life, health, or accident insurance or annuity policy.

s.241.1 (16) Billing - Physicians

An Assisting Physician shall not submit his or her accounts under any provincial or territorial health insurance plan for performance of the services for Physician-Assisted Suicide.

s.241.1 (17) Offences and penalties

- (a) A person commits an offence if he willfully falsifies or forges a declaration made under this Act with the intent or effect of causing the person's death. A person guilty of an

offence under this subsection shall be liable, on conviction, to imprisonment for a term not exceeding twenty-five years.

- (b) A person commits an offence if he encourages, coerces or unduly influences a Patient to choose Physician-Assisted Suicide. A person guilty of an offence under this subsection shall be liable, on conviction, to imprisonment for a term not exceeding twenty-five years.
- (c) A Witness commits an offence if he willfully puts his name to a statement he knows to be false. A person guilty of an offence under this subsection shall be liable on conviction to imprisonment for a term not exceeding five years.
- (d) A person commits an offence if he willfully conceals or destroys a declaration or revocation made under this Act. A person guilty of an offence under this subsection shall be liable on conviction to imprisonment for a term not exceeding five years.
- (e) A Physician or Counsellor with responsibilities in relation to an Application or an order of the Board commits an offence if he or she willfully fails to submit the information required under **[NTD: once finalized we can cross-reference]**. A person guilty of an offence under this subsection shall be liable on conviction to imprisonment for a term not exceeding five years. **[NTD: We have to think of what this will look like in actuality. Should it be the Assisting Physician submitting the information to the Review Board or the Attending Physician?]**
- (f) An Assisting, Responsible or Consulting Physician involved in the care of a Patient commits an offence if he takes any part whatsoever in assisting a Patient to die or in giving an opinion in respect of such a Patient, or acts as a Witness if he has grounds for believing that he will benefit financially or in any other way as the result of the death of the Patient. A person guilty of an offence under this subsection shall be liable on conviction to imprisonment for a term not exceeding five years.

s.241.1 (18) Inconsistencies

- (a) Where there is any inconsistency or conflict between this section and any other provision of this Act or any other federal legislation, this section prevails to the extent of the inconsistency or conflict.

The following revisions to be made to s.672.38:

- (a) A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and concerning matters related to Physician-Assisted Suicide and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province. **[NTD: This needs to be considered in light of all the other relevant provisions in the criminal code dealing with the Review Boards.]**