Jewish Physicians’ Freedom Of Conscience And Religion And The Carter Case
Canada’s Criminal Code

• s. 14 of the CCC states “No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given”.

• s. 241 of the CCC states “Everyone who Counsels a person to commit suicide, or Aids or abets a person to commit suicide. Whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years”.
Rodriguez v. British Columbia (Attorney-General)

• 1993 decision

• Constitutional validity of the criminalization of physician assisted suicide challenged.

• the SCC confirmed the criminal sanctions as they related to physician-assisted suicide, while justifying their ruling by citing the protection of the sanctity of life.
Carter Decision – Trial - BCCA

• Challenge brought in 2011 by the families of Kathleen Carter, an 89 year old woman suffering from spinal stenosis, and Gloria Taylor, a 64 year old woman suffering from ALS.

• They challenged those provisions of the Canadian Criminal Code (CCC) that criminalizes physician assisted suicide.

• At trial, in 2012, Justice Smith ruled that the Criminal Code provisions prohibiting physician-assisted suicide contravened the constitutional rights that ought to be afforded to the seriously ill.

• At the court of appeal - based on the Rodrigues case, the trial decision was overturned, but that was not the end of the litigation.
Carter - SCC

• The question before the SCC was: “Whether the criminal prohibition that puts a person to this choice [of taking their own life prematurely, or suffering until death from natural causes] violates her Charter rights to life, liberty and security of the person [s. 7] and to equal treatment by and under the law [s. 15].

• **Life, liberty and security of person  Section 7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

• **Equality Rights - Equality before and under law and equal protection and benefit of law – section 15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Carter – SCC - Charter

• SCC decided that the current criminal legislation forces individuals to make a choice between either intolerable suffering or a premature natural death.

• By decriminalizing assisted suicide, the SCC rejected the notion that the right to life requires an absolute prohibition on assisted suicide.

• Carter stands for the proposition that a “right to live” is not a “duty to live”.

In particular, the SCC found that depriving someone of the right to life, liberty and security of the person (as codified in s. 7) did not accord with the principles of fundamental justice. It was determined that the criminal sanctions were overbroad, as they rejected absolutely someone’s right to take their own life, without considering those most extreme circumstances, in which such fatal decisions may be necessary.
Carter - SCC

• SCC set out a test that gravely ill individuals had to meet in order to have the right to legally seek an assisted death within the medical context. The test states that if a competent adult:
  • clearly consents to the termination of his/her life; and
  • has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to that person in his/her condition,
then they can seek to have a physician assist in their death.
Halacha and physician-assisted suicide

• Speak to our local Orthodox Rabbi – I am only a lawyer.

• In the Encyclopedia of Jewish Medical Ethics, by Avraham Steinberg, “Some rabbinic authorities’ state that in certain specific instances of great suffering it is permitted to take one’s own life. However, the majority of rabbinic decisors disagree with this view.”

• The preservation and sanctity of life has always been regarded as a cardinal value in Judaism, and there are a plethora of rules found in Jewish law (Halacha) and jurisprudence which are designed to ensure that all measures are always taken to ensure the protection of life.
Reconciling Rights Of Patients And Physicians Whose Faith Forbid Them To Assist Patients To Commit Suicide?

• There is now a potential conflict between physicians’ freedom of conscience and religion and the rights of patients to physician assisted suicide.

• Many physicians in Canada believe it to be contrary to their conscience and faith to assist someone in terminating their life, even in the face of prolonged suffering.
Reconciling Rights Of Patients And Physicians Whose Faith Forbid Them To Assist Patients To Commit Suicide?

• Should doctors who, on religious grounds, refuse to assist someone committing suicide be nervous about the state compelling their participation in this practice? In Carter, The SCC directly addressed this issue.
Reconciling Rights Of Patients And Physicians Whose Faith Forbid Them To Assist Patients To Commit Suicide?

• 132 In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. **What follows is in the hands of the physicians’ colleges, Parliament, and the provincial legislatures.** However, we note — as did Beetz J. in addressing the topic of physician participation in abortion in *R. v. Morgentaler* — that a physician’s decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the Charter rights of patients and physicians will need to be reconciled. (Emphasis added)
Legislative And Regulatory Response To Carter

• A special parliamentary committee’s report recommends Parliament draft a physician-assisted dying law.
• Report is not binding – it is a report that Parliament may adopt in whole or in part.
Process be initially limited to persons 18 years or older, followed by a process that would allow for “competent mature minors,” which would come into force within three years following the implementation of the law.

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<td>• Can a person who does not have the capacity to make a will or manage property like a minor clearly consent?</td>
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<td>• Unable to anticipate circumstances – cannot consent</td>
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<td>or after a diagnosis of a grievous or irremediable condition, but before the suffering becomes intolerable.”</td>
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<td>• Before? That’s not what Carter says.</td>
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<td>That physical or <em>psychological suffering</em> that is enduring and intolerable to the person in the circumstances of his or her condition should be recognized as a criterion to access medical assistance in dying.</td>
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Legislative And Regulatory Response To Carter

• On medical professionals who object to participating in the process, the report concludes that the government should work with medical regulatory bodies and the provinces to set up a process that respects freedom of conscience and the needs of a patient – but, crucially, says there is a need for a referral process.

• “At a minimum, the objecting practitioner must provide an effective referral for the patient.”

• What options are open to a person of faith who refuses to make such a referral?
Legislative And Regulatory Response To Carter

• It will depend on how the law reads and the challenges that follow.

• Beetz J. in addressing the topic of physician participation in abortion in R. v. Morgentaler — that a physician’s decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. **Rather, we underline that the Charter rights of patients and physicians will need to be reconciled. (Emphasis added)**

• *R v. Morgentaler* does not explicitly require doctors to make referrals to abortion providers. However, where doctors limit the health services that they provide on the basis of their conscience or religion, this may impede access to care in a way that violates patient rights under the Charter
Legislative And Regulatory Response To Carter

• The position adopted by the College of Physicians and Surgeons on a doctor’s obligation to refer patients could just as easily be applied to assisted Physician assisted suicide as abortion.

• Arguably The OMA could set up a referral service much like the Law Society of Upper Canada has a referral service for lawyers.
Legal Question & Loose Ends

• Do Physicians have right to refuse to give referral
  • Section 2(a) Freedom of Conscience and Religion – Charter

• 2. Everyone has the following fundamental freedoms:
  (a) freedom of conscience and religion;
Legal Question & Loose Ends

• Charter protects Canadians’ right to life, liberty and security of both doctor and patient.
• If doctors’ religious beliefs affect patients’ Charter rights then a court might impose a limit on physicians’ religious rights.
• Denying referrals could prevent patients for choosing PAD.
• B (R) v Children's Aid Society of Metropolitan Toronto (1994), [1995] 1 SCR 315

226 Just as there are limits to the ambit of freedom of expression (e.g., s. 2(b) does not protect violent acts: .... so are there limits to the scope of s. 2(a), especially so when this provision is called upon to protect activity that threatens the physical or psychological well-being of others. In other words, although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, ....Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.]
Legal Question & Loose Ends

• Bottom line –
• An Orthodox Jew who refuses to make a referral for PAD faces a secular legal system that will try to balance physicians’ religious rights with patients’ right to liberty and security of the person.
• If a court finds that the refusal to provide referrals causes physical or psychological harm to patients the court may rule against the doctor who refuses to comply with hospital or college regulations to make a refusal.