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Social Science Evidence in Charter Litigation: Lessons from Carter v Canada (Attorney General)

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Introduction

Carter v. Canada (Attorney General) is a Canadian case that famously struck down the Canadian *Criminal Code* prohibitions on euthanasia and assisted suicide (now known collectively as medical assistance in dying or MAiD).[1] The plaintiffs successfully argued that the prohibitions violated sections 7 and 15 of the Canadian *Charter of Rights and Freedoms* and could not be saved by section 1.[2] This set in motion a chain of events, resulting in Canada's permissive MAiD regime, which has eligibility criteria and procedural safeguards set out in federal legislation.[3]

Of course, the most significant issue in the *Carter* case was that of the status of the *Criminal Code* prohibitions on medical assistance in dying. Indeed, it was precisely because *Carter* challenged those prohibitions that I joined the *pro bono* legal team representing the plaintiffs.[4] But there was another issue that both fascinated, excited, and frustrated me throughout the *Carter* litigation: the issue of the use of expert evidence from social science and humanities researchers.

In this paper, I offer the reflections of an academic who wandered well out of her wheelhouse. While I have graduate training in both philosophy and law, I am not an expert on the use of social science and humanities evidence in litigation. But, through the course of working on *Carter*, I had the opportunity to participate directly in the process of marshalling, preparing, analyzing, and critiquing the evidence. My hope is that, through this paper, I can bring a perspective that may be useful both for practitioners who might (or, I would say, should) be thinking about working with academics, and academics who might (and I hope will) be thinking

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[1] *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; *Criminal Code*, RSC 1985 c C-46, s 241(b) (as it appeared on 16 June 2017).

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. Section 7 protects the right not to be deprived of the right to life, liberty, and security of the person except in accordance with the principles of fundamental justice. Section 15 protects equality. Section 1 of the *Charter* can save legislation that is found to limit *Charter* rights if the government demonstrates that the limits are justified in a free and just society.

[3] Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*,42nd Parl, 1st sess, 2016.

[4] I have previously published articles and a book and given presentations arguing for the decriminalization of assisted dying. See, for example, Jocelyn Downie, "Voluntary Euthanasia in Canada" (1993) 14:1 Health L Can 13; Jocelyn Downie, *Dying Justice: A Case for Decriminalizing Euthanasia and Assisted Suicide in Canada* (Toronto: University of Toronto Press, 2004); Jocelyn Downie & Simone Bern, "Rodriguez Redux" (2008) 16 Health LJ 27; Jocelyn Downie, "Nudging the Law: How to Move Legalized Aid-in-Dying Forward" (World Federation of Right to Die Societies 16th Biennial Conference, Toronto, Ontario, September 2006).

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about getting involved in constitutional litigation that relates to their field of study.

So let's take a short, curated walk through the *Carter* case.

What social science and humanities evidence was introduced in *Carter*?

As noted by Justice Lynn Smith in her trial decision, there were 36 binders of documents, including 116 affidavits, and 18 witnesses were cross-examined on their affidavits.[5]

Of particular relevance to a discussion of the role of social science and humanities evidence in *Charter* litigation, there were 57 experts from Canada, the United States, Netherlands, Belgium, Switzerland, the United Kingdom, Australia, and New Zealand in the disciplines of medicine, nursing, philosophy (particularly ethics), bioethics, law, sociology, disability studies, and psychology.

The expert evidence dealt with a range of issues including the ethics of MAiD, the effectiveness of procedural safeguards against abuse in permissive regimes, the impact of legalization of MAiD on palliative care and the physician-patient relationship, and the feasibility of systems of safeguards in Canada. The following questions were addressed by social science and humanities experts:

- Would Canadian physicians be willing to assist patients with hastening death if it were legal to do so?[6]
- Does current medical practice with respect to end-of-life care make distinctions that are ethically defensible [e.g., requiring respect for refusals of life-sustaining treatment, but prohibiting respect for requests for assisted dying] and is the distinction between suicide and assisted suicide ethically defensible?[7]
- Do physicians provide potentially life-shortening treatments (i.e., Do physicians give potentially life-shortening levels of opioids? Do they provide palliative sedation?)?
- Do physicians practise assisted dying already in Canada?[8]
- Is palliative care widely available and can it address all suffering?[9]
- Does the law [*Criminal Code* prohibition on assisted dying] attempt to uphold a conception of morality that is inconsistent with the consensus in Canadian society?[10]
- What level of compliance have the permissive jurisdictions achieved with respect to their safeguards?[11]

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[5] *Carter v Canada (Attorney General)*, 2012 BCSC 886, 287 CCC 3d (1) at para 114 [*Carter* trial].
[6] *Ibid* at para 318.
[7] *Ibid.*
[8] *Ibid* at paras 203-206.
[9] *Ibid* at paras 188-202.
[10] *Ibid* at para 318.
[11] *Ibid* at paras 646-660.

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- Do the safeguards effectively prevent abuse of vulnerable individuals?[12]
- What inferences can be drawn with respect to the likely effectiveness of comparable safeguards in Canada, given different cultural contexts?[13]
- Has the legalization of MAiD harmed or helped palliative care and physician-patient relationships?[14]
- Is there reason to believe that we could establish a system of safeguards (building on existing practices) that would ensure protection of the vulnerable?[15]

Researchers provided expert evidence on all of these issues from a range of perspectives and reached a range of conclusions.

What happened with the social science and humanities evidence in court?

At trial, Justice Smith did exactly what she said she would do (and as was her job). In her own words:

> I have assessed the weight to be given to the expert opinion evidence, taking into consideration the particular expertise of the witness, whether the opinion was within that expert's scope of expertise, the consistency of the opinion with that of other experts, and the apparent impartiality or partiality of the expert in question.[16]

She also laid out in painstaking detail the evidence that she heard (and read), where it conflicted, and why she was persuaded by one expert over another.

The following set of passages from Justice Smith's decision give a sense of where the social science and humanities evidence ran into trouble, negatively affecting the persuasiveness of the evidence and the weight Justice Smith gave to it.[17]

> ***Partiality***
>
> "Further, [Dr. Hendin's] testimony on cross-examination, and his passion on the topic, left me in some doubt as to his impartiality."[18]
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> ***Reliance on review of secondary sources (vs. being the primary investigators)***
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> "On cross-examination, Dr. Hendin's evidence regarding those examples was

[12] *Ibid* at paras 661-672.
[13] *Ibid* at paras 673-685.
[14] *Ibid* at paras 686-747.
[15] *Ibid* at paras 673-685.
[16] *Ibid* at para 116.
[17] That is, how much value she accorded the evidence in making her judgement.
[18] *Carter* trial, *supra* note 5 at para 664.

significantly weakened. For instance, he agreed that his knowledge of the cases was second-hand, and based in one instance on an article written in Dutch; in another on his viewing of a film."[19]

"The Battin et al. Study was also criticized by some of the defendants' witnesses. Dr. Pereira spoke from his deep and sincere conviction that assisted death is wrong and unnecessary in the light of the availability of modern palliative care. He was straightforward but he did not have the benefit of having conducted empirical research of his own; he basically relied on the work of others, including that of Baroness Finlay. She is a very well-respected palliative care physician who has taken a leading role in the debate about assisted suicide and euthanasia in the United Kingdom. So far as I am aware, she and her collaborators in the critique have not themselves conducted an empirical study. Dr. Hendin is a psychiatrist and a leader in suicide prevention, but has not done the same kind of empirical work."[20] [emphasis added]

Lack of relevant expertise

"[Dr. Pereira] also testified on cross-examination that his interest in the topic of assisted suicide and euthanasia is of recent origin; he has not made a lengthy study of the effectiveness of safeguards."[21]

"I do not give the same weight to the evidence of the psychiatrists whose evidence was tendered by the defendants. Dr. Hendin's expertise is in suicide prevention, not in assessment of competence. Dr. Sheldon's opinion does not appear to be based upon mainstream, evidence-based thinking."[22]

"Dr. Gallagher's experience in palliative care and the treatment of chronic pain is extensive and her opinion about the difficulty in detecting cognitive impairment warrants great respect. However, she does not have the same expertise as do the psychiatrists, particularly on competence assessment."[23]

Publication in low quality journal

"[Dr. Pereira] agreed that his paper was published in a journal with a low ranking among medical journals in terms of its impact within the medical community."[24]

Potential methodological flaws

[19] *Ibid* at 504.
[20] *Ibid* at 664.
[21] *Ibid* at 377.
[22] *Ibid* at 796.
[23] *Ibid* at 797.
[24] *Ibid* at 377.

> "In cross-examination, Professor Starks agreed that there could have been recall bias in the interview subjects, and that some of the sources used to recruit families for the study were patient advocacy organizations."[25] [emphasis in original]
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> "The authors note various limitations to the study. These include the fact that the low response rate makes it difficult to generalize the results; a survey of the non-responders indicated they were slightly less supportive of euthanasia than responders, indicating a slight response bias; there may be a recollection bias on the part of the physician, particularly with respect to requests from more than a year earlier."[26] [emphasis added]
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> "given that the interviews were conducted with the physicians about their own adherence and non-adherence to the law, the possibility of social desirability bias cannot be excluded."[27] [emphasis added]

Why the use of social science and humanities evidence mattered in *Carter*

There are two main reasons why *Rodriguez v. British Columbia (Attorney General)*[28] was an unsuccessful *Charter* challenge to the *Criminal Code* prohibitions on assisted dying in 1993 and *Carter* was a successful *Charter* challenge to the exact same *Criminal Code* prohibitions on assisted dying 22 years later.

First, the jurisprudence had changed, most especially with respect to the principles of fundamental justice under section 7 of the *Charter* (in particular those related to overbreadth and gross disproportionality).[29] New principles had been articulated by the time of *Carter* that hadn't been available in *Rodriguez* and they proved lethal to the prohibition on assisted death.

Second, and this goes to why social science and humanities evidence matters in *Charter* litigation, the facts in the world about the issues outlined above were different. The result in *Carter* was different because the social science and humanities evidence submitted by the plaintiffs persuaded the court that the facts of the world had changed sufficiently between *Rodriguez* and *Carter*; that there was no morally defensible distinction between assisted dying and end of life practices that were legal and widely practised;[30] that the slippery slope (from voluntary euthanasia to nonvoluntary or involuntary euthanasia) had not manifest in permissive regimes;[31] and that procedural safeguards could be put in place to

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[25] *Ibid* at 445.
[26] *Ibid* at 549.
[27] *Ibid* at 557.
[28] [1993] 3 SCR 519. [1993] SCJ No 94.
[29] *Carter* trial, *supra* note 5 at paras 974-1008.
[30] *Ibid* at 1336.
[31] *Ibid* at 1241.

protect the vulnerable.[32] Social science and humanities evidence was thus absolutely central to the determination of the case.

What lessons can be drawn from *Carter* for social science and humanities researchers (and lawyers and other law reformers who would like to harness social science and humanities research)?

For litigators

Litigators should get training on how to be critical consumers of social science and humanities research. They need to be able to assess reliability and validity as well as appreciate the complexity, nuance, and uncertainty of social science and humanities research. Training can ensure that litigators are able to figure out when they need evidence (e.g., when is it an empirical rather than a legal, conceptual, or analytical claim?[33]), who to ask for evidence,[34] when it is good quality evidence that is worth submitting, [35] and how to challenge reliability and validity of the other side's evidence (e.g., understanding the methodology,[36] quality of journals (by looking at factors such as reputation, rankings, impact factors),[37] peer review (how to tell if articles and grants are peer reviewed and why it matters),[38] ways of assessing the reputation of a researcher (e.g., degrees, rank, chairs, grants, etc.),[39] and how and why to check footnotes in potential experts' papers[40]).

Litigators should look to researchers for help even before the litigation starts.

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[32] *Ibid* at 854-883.
[33] Jocelyn Downie, "Health Care Ethics Experts in Canadian Courts" (2001) 9:3 Health Law Review 19.
[34] For example, by searching the Social Science Research Network (SSRN), which is a research network that allows authors to upload papers directly in order to expedite and increase the dissemination of research.
[35] See, for example, John Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches*, 3d ed, (Thousand Oaks: Sage Publications, 2009); Earl Babbie & Lucia Benaquisto, *Fundamentals of Social Research*, 1st Can ed (Toronto: Nelson 2002); Ted Palys & Chris Atchison, *Research Decisions: Quantitative and Qualitative Perspectives*, 4th ed (Toronto: Nelson, 2008).
[36] *Ibid*.
[37] A good overview of journal rankings (including links to critiques) can be found at "Journal ranking," *Wikipedia*, online: <en.wikipedia.org/wiki/Journal_ranking>.
[38] To tell whether a journal is peer-reviewed, see "How can I tell if a journal is peer reviewed or refereed?" *McMaster University*, online: <library.mcmaster.ca/faq/how-can-i-tell-if-a-journal-peer-reviewed>; See also Charles Jennings, "Quality and value: The true purpose of peer review" (2006) 50:32 *Nature*, online: <www.nature.com/nature/peerreview/debate/nature05032.html?foxtrotcallback=true>.
[39] Abby Haynes et al, "Identifying Trustworthy Experts: How do Policymakers Find and Assess Public Health Researchers Worth Consulting or Collaborating With?" (2012) 7:3 PLoS One, online: <www.ncbi.nlm.nih.gov/pmc/articles/PMC3293848/>.
[40] See e.g. Jocelyn Downie, Kenneth Chambaere, & Jan Bernheim, "Pereira's attack on legalizing euthanasia or assisted suicide: smoke and mirrors" (2012) 19:3 Current Oncology 133, which is a response to claims made by Jose Pereira that were not supported by the research cited in his footnotes (Jose Pereira, "Legalizing euthanasia or assisted suicide: the illusion of safeguards and controls" (2011) 18:2 Current Oncology 38). Jose Pereira was a witness for the Crown in *Carter v Canada* and the weaknesses in his testimony were exposed through cross-examination on his paper.

Researchers can help with framing the case and seeing issues that will require social science and humanities evidence.

Litigators should involve researchers as consultants throughout the trial and appeal processes on the issue of the use of research. Researchers can help litigators find experts and can help translate their research into effective affidavits. They can also provide critical analysis of the opposite side's expert evidence that can be used to prepare for cross-examination.

Litigators should also involve researchers as sources of expert evidence. It is important to remember that the principal investigator or heavily involved co-investigator can be a more persuasive expert witness than someone who is simply reporting on the empirical research conducted by others.

For researchers when they are asked to provide expert evidence in court proceedings

It is critically important that researchers understand their role in litigation. Researchers are allowed to have been an advocate in the past and are allowed to be an advocate outside the courtroom. But their role in the courtroom is not that of an advocate. Indeed, researchers will have to swear in their affidavit that they are aware of their duty as an expert witness to assist the court and not to be an advocate for any party.[41]

It is essential for researchers to confine themselves to their area of expertise. This can prevent uncomfortable challenges to expertise when being cross-examined and undermining the evidence given within the area of expertise.

It is also important for researchers to be very clear on what they can say to whom during the time they are acting as an expert (e.g., communications with counsel, other experts, media, etc.) — there are legal and strategic limits that will not necessarily be obvious to academics.[42]

It is worth acting as an expert in *Charter* litigation. By doing so, researchers can make a direct contribution to society as they help to inform judges' complex decisions. Researchers can also contribute to protecting rights whether working for those challenging legislation (e.g., for the plaintiffs in the assisted dying challenge) or those defending it (e.g., for the government in the challenge to Medicare[43]).

It is also worth acting as an expert <u>for free</u>. This is particularly true for plaintiffs in *Charter* cases. Academics already have a paid full-time job and acting as an expert in

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[41] E.g. *British Columbia Supreme Court Civil Rules* SOR/BC Reg. 168/2009 rule 11-2.
[42] See e.g. The Advocates' Society, "Position Paper on Communications with Testifying Experts" (June 2014), online: <www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/The_Advocates_Society_Position_Paper_on_Communications_with_Testifying_Experts.pdf>.
[43] See e.g. *Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2017 BCSC 258.

one's field of social science and humanities research in a *Charter* case can be seen as part of that job — it is knowledge mobilization, something that is now widely recognized as a significant part of the role of academics. In addition, *Charter* litigation is extremely expensive. Without *pro bono* researchers as expert witnesses, many plaintiffs would not be able to litigate for their rights.[44]

For researchers wanting their work to be used and useful in court in constitutional cases

Researchers should do what they should do regardless of whether they are acting as expert witnesses in *Charter* litigation. That is, they should do rigorous academic work. However, if they want to be involved in *Charter* litigation, then they also need their work to be accessible. It is important not just to write rigorous academic papers and books, but also to write plain language summaries and communicate through websites, blogs, and the media. Not all judges are like Justice Smith (herself an academic and established researcher before going to the bench). If you can't be understood, you can't be persuasive. In addition, researchers need to be findable. If a lawyer starts thinking about taking a case on X, who will they find quickly by searching online (and not through subscription-based repositories)? Accessible work enables lawyers to find researchers and, from there, find their full body of work.

Researchers should also engage in the social science and humanities research that will be necessary for *Charter* litigation before the litigation starts. For example, Colleen MacQuarrie is a professor of psychology at the University of Prince Edward Island. She was aware that a *Charter* challenge was going to be necessary to change the provincial government's policy to not provide access to abortion in any health care facility on the Island. A *Charter* challenge would require evidence of the harms suffered by PEI women as a result of the policy. She therefore gathered the evidence prior to the *Charter* challenge being launched.[45] The evidence was critical in the PEI government's decision to abandon its policy on the night before its response to the challenge was due.[46]

For researchers wanting to work on advancing Charter cases (not giving evidence)

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[44] This point arguably applies less to acting as an expert for the government as it has far greater resources than individuals and it is their responsibility to defend their legislation.

[45] E.g. "About," *The Sovereign Uterus*, online: <thesovereignuterus.wordpress.com/about/> and *Abortion Access Now PEI v Government of PEI (Minister of Health and Wellness)* (5 January 2016), Charlottetown (PEISC) (notice of application).

[46] Women's Legal Education and Action Fund & AANPEI, media release, "LEAF and AANPEI welcome announcement the PEI government will end its discriminatory abortion policy" (31 March 2016), online: LEAF <www.leaf.ca/leaf-and-aanpei-welcome-announcement-that-pei-government-will-end-its-discriminatory-abortion-policy/>. Gail Harding, "P.E.I. Premier Wade MacLauchlan says abortion lawsuit required timely response," *CBC News* (01 April 2016), online: <www.cbc.ca/news/canada/prince-edward-island/premier-wade-maclauchlan-abortion-1.3516128>.

Social science and humanities researchers can be involved in *Charter* litigation without acting as expert witnesses. They can be experts advising the litigators on the collection and use of social science and humanities evidence. They can advise what social science and humanities evidence is needed and who is best qualified to give evidence. They can use their networks and persuade colleagues to serve as experts (especially *pro bono*); they can help to make the evidence accessible/comprehensible; they can anticipate who the "other side" might call (and so can prepare in advance); and they can critique the evidence produced by the "other side" (e.g. preparing the litigators for cross-examination).

Researchers do need to be aware that participating in *Charter* litigation can be unbelievably time-consuming, time-sensitive, and stressful. However, it is incredibly rewarding as it is fascinating, challenging, intellectually stimulating, and contributes to positive social change — or prevents change that harms the vulnerable.

Conclusion

Social sciences and humanities research can certainly make valuable contributions to *Charter* litigation and social science and humanities researchers can be useful expert witnesses in the context of *Charter* litigation. As *Carter v. Canada* illustrated, if litigators and researchers are fully aware of its potential uses, benefits, limits, and pitfalls, then the power of social science and humanities evidence can be harnessed to effectively serve the goal of protecting and promoting *Charter* rights and freedoms.