



Will We See Change in Our Lifetimes?

Three Challenges Come Before the BC Courts

We are pleased to report that three cases have recently been brought forward which, in varying ways, challenge the existing laws that prohibit assistance in dying. We will, of course, be following all of these cases with great interest and sharing our knowledge, contacts and resources to help them succeed. For now, we thought it might be useful and interesting to provide you with a very brief overview of each of the cases.

1. *Russel Ogden, Elring Christensen, Laurence Cattoire, John Lowman and Paul Zollmann on behalf of the Farewell Foundation for the Right to Die v. Attorney General of Canada* (**Farewell Foundation Civil Claim**)
2. *Russel Ogden, Elring Christensen, Laurence Cattoire, John Lowman and Paul Zollmann on behalf of the Farewell Foundation for the Right to Die v. British Columbia Registrar of Companies* (**Farewell Foundation Society Act Claim**)
3. *Lee Carter, Hollis Johnson, Dr. William Shoichet and British Columbia Civil Liberties Association v. Attorney General of Canada* (**BCCLA Civil Claim**).

Procedure

A group of individuals, on behalf of the Farewell Foundation, have launched two actions in the BC Supreme Court. The first (the Farewell Foundation Society Act Claim) is an appeal under the Society Act of the decision of the Registrar of Companies to deny their application to register the foundation as a non-profit society (on the grounds that its proposed activities are illegal). The second (the Farewell Foundation Civil Claim) is a civil claim seeking declarations that the section of the *Criminal Code* that prohibits counselling, aiding or abetting a person to commit suicide violates the *Canadian Charter of Rights and Freedoms* and that “the proposed activities of the Farewell Foundation are not contrary to the laws of Canada.”

The BCCLA has launched a civil claim in the BC Supreme Court seeking declarations that multiple sections of the *Criminal Code* are unconstitutional and violate the *Charter*. The BCCLA is challenging not only the section of the *Criminal Code* that prohibits counselling, aiding or abetting a person to commit suicide, but also the sections of the *Criminal Code* that would make it an offense for a doctor or nurse to actively assist in hastening a patient’s death. The BCCLA also argues that there is immunity from the challenged sections of the *Criminal Code* for physician assisted dying on the grounds that assisted dying is a health (rather than criminal) matter and, as such, is within provincial (rather than federal) jurisdiction.

Procedural Issues

Before even getting to the substantive challenges of persuading the courts that the *Criminal Code* prohibitions assisted suicide and euthanasia are unconstitutional (whether as violations of the Charter or on jurisdictional grounds), all of these cases also face some procedural challenges.

The Farewell Foundation Society Act Claim is what is generally referred to as a "judicial review" in which a judge is asked to review the correctness of a decision by an administrative body (here the Registrar of Companies). Some procedural disadvantages of this process include the fact that the legal principles are often unclear regarding what the court can determine, whether it can decide constitutional questions, and whether it can substitute its own decision for that of the Registrar or must send the matter back to the Registrar for reconsideration.

Both the Farewell Foundation and the BCCLA Civil Claims will also need to demonstrate to the court that the plaintiffs in the claims have standing (standing is a legal term which refers to the ability of a party to demonstrate sufficient connection to and harm from the law that is being challenged). If a court finds that the plaintiffs in a case do not have standing, the case is struck (that is, it simply fails at that point without ever getting to the substance of the claims). Individual plaintiffs must show that they are or will be harmed by the law. Alternatively, they can argue for what is known as "public interest standing".

The BCCLA Claim includes two individuals who participated in an assisted suicide, a physician who, if it were legal, would provide assistance (in certain limited circumstances), and an organization claiming public interest standing. The Farewell Foundation Civil Claim includes individuals who seek to engage in assisted suicide actions (as providers or recipients in the unspecified future) through the Farewell Foundation (should it be allowed to register as a non-profit).

One of the key differences between the claims is that the BC Civil Liberties' Claim envisions a medical model where assistance to hasten death would be rendered by a medical practitioner or a person acting under the general supervision of a medical practitioner. The Farewell Foundation Claims would not restrict permissible assistance to medical practitioners.

Ultimate Implications

There are also some key differences between the Farewell Foundation Claims and the BCCLA Claim in relation to the ultimate implications of success in court.

The BCCLA Claim envisions a medical model where assistance to hasten death would be rendered by a medical practitioner or a person acting under the general supervision of a medical practitioner. The Farewell Foundation Claims would not restrict permissible assistance to medical practitioners.

The BCCLA Claim would limit the provision of physician-assisted dying to individuals who are mentally competent and are grievously and irremediably ill. The Farewell Foundation Claims would require that the individual be a member of the Farewell Foundation and be of sound mind, but would not otherwise limit the eligibility criteria.

The Farewell Foundation Civil Claim challenges only the assisted suicide provision of the *Criminal Code*. If it succeeds, it will not have any effect on the *Criminal Code* prohibition on euthanasia. The BCCLA Claim challenges multiple sections of the *Criminal Code* (those restricting assisted suicide as well as those restricting euthanasia). If it succeeds, it would set the stage for allowing assisted suicide as well as assisted dying even if the individual is unable to self-administer or swallow medication.

Please watch your inbox, mailbox and our website for updates as we keep you up-to-date with the latest developments in these three cases.