

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

**HIS MAJESTY THE KING**

Appellant  
(Respondent)

– AND –

**B.F.**

Respondent  
(Appellant)

- AND -

**ATTORNEY GENERAL OF CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION and  
INCLUSION CANADA**

Interveners

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**FACTUM OF THE INTERVENER  
CANADIAN CIVIL LIBERTIES ASSOCIATION**  
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I: OVERVIEW

1. The question on this appeal is one of statutory interpretation, and as such, discerning Parliament's intent: what is the relationship between s. 222 (homicide) and s. 241 (aiding suicide) of the *Criminal Code*? The Court of Appeal held that the trial judge erred because he instructed the jury that it did not matter whether the accused injected her mother with a lethal dose of insulin, or whether her mother voluntarily injected herself. In the trial judge's view, either conduct would amount to attempted murder. The Court of Appeal applied well-settled law to conclude that the trial judge failed to adequately distinguish between attempted murder and aiding a suicide attempt.

2. The Court of Appeal reached this conclusion by applying familiar canons of statutory interpretation to give effect to Parliament's intent. From the first *Criminal Code of Canada*, suicide has been treated separately from homicide. To put it simply, homicide relates to the killing of **another** while suicide (and assisting it) relates to the killing of **oneself**. The Court of Appeal reinforced this long-standing distinction and concluded that where the accused provides a substance to someone who intends to die when they voluntarily consumed that substance, the accused would be guilty of aiding suicide but not murder (so long as the accused has not overborn the victim's freewill). This focus on personal autonomy is consistent with Parliament's choice in moving away from the old English model of treating both suicide and murder as homicides.

3. Creating criminal offences is exclusively Parliament's domain. Parliament has never merged or modified this distinction, despite a lengthy legislative re-consideration of the assisted suicide provisions after the *Carter* case. If Parliament wanted to change the law, it could have done so with definitive language which left no doubt of its intention to treat assisting suicide as a legally available route to murder. Having not done so, it is not for the courts to expand the scope of criminal liability to address what is perceived as an unreasonable outcome on the particular facts of this case or other factual hypotheticals. To hold otherwise would fail to respect the principle of restraint and Parliament's role in creating offences. Separately, the Crown's proposal, if accepted, would fail to give clear notice of the legal boundaries of murder.

4. The CCLA takes no position on the facts.

## PART II: CCLA POSITION ON QUESTIONS IN ISSUE

5. The Appellant states the questions in issue as follows:

(i) Is legal causation limited to only the immediate or most proximate causes?

**CCLA’s position:** No, but the intention to commit suicide is an intervening act of personal autonomy that severs the chain of legal causation. As Justice Arbour stated in *R. v. Nette*, “Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person **should** be held responsible in law for the death that occurred (emphasis added).”<sup>1</sup> When a person intends to die by their own hand, an accused who assists them should not be liable for murder. While the accused has committed a legal wrong and would be guilty of aiding suicide, they have not committed the most serious moral wrong recognized in our society: murder.

(ii) Did the Court of Appeal err in its articulation of the interplay between the offences of assisting suicide and murder? In particular, did the Court of Appeal err by inserting additional elements that must be satisfied for an act that may assist suicide to constitute the *actus reus* of murder?

**CCLA’s position:** No. The Court of Appeal properly applied long-standing principles of statutory interpretation, including the principle of restraint, and did not expand the scope of criminal liability beyond Parliament’s intended reach. The distinction between assisting suicide and murder has been legislated since the first *Criminal Code* and Parliament has never expressed a contrary intention.

## PART III: STATEMENT OF ARGUMENT

### A. Parliament has established a clear distinction between murder and suicide

6. Parliament and the courts each occupy complementary roles in developing the criminal law. Parliament drafts criminal law legislation, creates offences, and sets out available penalties. The courts interpret these criminal laws, applying the principles of statutory interpretation of penal statutes (such as the presumption of restraint). As Justice Cromwell observed, “...apart from criminal contempt,

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<sup>1</sup> *R. v. Nette*, 2001 SCC 78, [2001] 3 SCR 488, at para. 41.

there can be no liability for common law crimes.”<sup>2</sup> If Parliament wishes to change the *Criminal Code* in response to the courts’ interpretation, it is free to do so.

7. This respect is essential to enhancing democracy and the rule of law under the Canadian system. Consistent with its constitutional role, “creating and defining crimes is for Parliament; the courts must not expand the scope of criminal liability beyond that established by Parliament.”<sup>3</sup> This ensures that the courts do not have the final word, enhancing democratic debate. Cory J. articulated it this way:

[A] great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation .... This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.<sup>4</sup>

8. This question in this case is ultimately one of statutory interpretation: what is the relationship between s. 222 (murder) and s. 241 (assisting suicide) of the *Criminal Code*? The task of this Court is to discern Parliament’s intent through the ordinary application of the principles of statutory interpretation (such as the principle of restraint). It is not to create a new crime where there was none before.

9. The distinction between murder and suicide was laid out in the first *Criminal Code*, enacted in 1892. In the 1892 *Code*, homicide was defined as “the killing of a human being **by another**, directly or indirectly, by any means whatsoever (emphasis added).”<sup>5</sup> This was an apparent rejection of English law, which treated suicide as “form of felonious homicide that offended against both God and the

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<sup>2</sup> *R. v. D.L.W.*, 2016 SCC 22, at para. 18.

<sup>3</sup> *R. v. D.L.W.*, 2016 SCC 22, at para. 18; see also Kent Roach, *Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures* (2001), 80 *Canadian Bar Review* 481, at p. 484.

<sup>4</sup> *Vriend v. Alberta*, [1998] 1 SCR 493, at para. 139.

<sup>5</sup> *The Criminal Code, 1892*, s. 218, CCLA’s Book of Authorities, Tab 1, p. 2

King's interest in the life of his citizens."<sup>6</sup> In rejecting the English approach, the *Code* created a fundamental distinction between the killing of another (homicide) and the killing of oneself (suicide).

10. Consistent with the distinction between homicide and suicide, suicide was addressed separately and apart from the homicide provisions of the 1892 *Code*. Section 237 criminalized counselling, aiding or abetting suicide (much like the current s. 241). Section 238 criminalized attempted suicide, with a maximum penalty of two years' imprisonment. The offence of attempted suicide was repealed in 1972, reflecting a growing recognition that suicide should be viewed through the lens of public health and social support, and not the criminal law.

11. The distinction between the killing of oneself and the killing of another is evident today. Not only has society has taken a more compassionate view of self-harm but has also emphasized respect for personal autonomy in decisions to end one's life. This was evident in the recent debates and litigation surrounding medical assistance in dying.

12. When s. 241 of the current *Code* was challenged in *Carter*, the Court struck down the offence to the extent that it limited medical assistance in dying.<sup>7</sup> In response, and consistent with its role, Parliament enacted new legislation to create exemptions from s. 241 for medically assisted suicide, provided that the statutory provisions had been followed. If the proper procedures are not followed, a person who assists with a suicide is guilty of assisted suicide under s. 241 and liable for up to 14 years in prison.

13. At no point in the legislative debates, or in the *Carter* decision, did the court or Parliament consider that the same person could be liable for murder. At no point in the Hansard debates did any parliamentarian suggest that a doctor or nurse who failed to follow the legislation would be guilty of murder. Indeed, this Court in *Carter* expressly stated that there was no need for it to consider the constitutionality of s. 222 (culpable homicide) because it did not prohibit the provision of assistance in dying.<sup>8</sup> The Court was no doubt correct, given the clear distinction in the Criminal Code, between murder and suicide since 1892.

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<sup>6</sup> *Rodriguez v. B.C. (A.G.)*, [1993] 3 SCR 519, at p. 596, per Sopinka J.

<sup>7</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331.

<sup>8</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, at para. 20.

14. It would have been open for Parliament to fundamentally re-draw the relationship between murder and suicide in the *Criminal Code* when it responded to the *Carter* decision. But it did not do so, signaling Parliament's intention to maintain the distinction between the killing of another and the killing of oneself.<sup>9</sup>

15. Even when the assisted suicide/murder distinction appears unpalatable for factual scenarios at the margins, the courts cannot create new versions of murder. Judicial restraint dictates that expanding the reach of the criminal law is Parliament's domain. The court should not re-interpret the law in a way that undermines Parliament's intent. This precept is well entrenched: "judges are not to change the elements of crimes in ways that seem to suit the circumstances of a particular case."<sup>10</sup> There will be conduct that while anti-social is simply not captured by a criminal prohibition (of course, in this case, the conduct at issue is captured by the assisting suicide provisions). In such cases, the court's role is to draw attention to the issue. Parliament's role—since the codification of the criminal law—is to review and respond, by changing the law or maintaining the *status quo*.

16. This Court's decision in *R. v. D.L.W.* provides an example of the court respecting its role and not expanding the scope of criminal law beyond Parliament's intent, even when there were strong policy reasons for doing so. In that case, Cromwell J. considered the definition of "bestiality" and whether penetration was an essential element of the offence. The *Criminal Code* did not, at the time, define bestiality. At the time the offence was created (as buggery with an animal), there was no doubt that the penetration was an essential element of the offence: "Any lawyer who was asked in 1892 whether the offence of buggery with an animal required penetration would have replied in the

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<sup>9</sup> Section 227(1) of the *Criminal Code*, passed by Parliament as part of the post-*Carter* MAID regime, states that "no medical practitioner or nurse practitioner commits culpable homicide if they provide a person with medical assistance in dying in accordance with section 241.2." This provision ensures that a medical professional who directly causes the person's death (by injecting them with the physical agent of death, for example), would not be liable under s. 222. It does not address the situation at the heart of this case, when a person injects *themselves* with the physical agent of death.

<sup>10</sup> *R. v. D.L.W.*, 2016 SCC 22, at para. 3.

affirmative.”<sup>11</sup> In subsequent amendments, Parliament did not signal a clear departure from this standard, and thus, did not change the well-understood legal meaning of bestiality.<sup>12</sup>

17. Following *R. v. D.L.W.*, Parliament re-considered the offence of bestiality. It defined bestiality for the first time, making clear that it included any contact with an animal for a sexual purpose, not just penetration. And Parliament also took the opportunity to amend the penalty provisions, creating new prohibition orders to prevent a person convicted of bestiality from owning or living with animals.<sup>13</sup>

18. By casting the legal question as one of causation, the Appellant does not grapple with the distinction which Parliament laid down between murder and suicide. If accepted, it would create a new common-law route to murder. If the Court was asked in 1892 whether someone was guilty of murder for assisting another with their suicide, the answer would be a resounding “no.” If the law is to change, it is for Parliament to change it, not the courts.

#### **B. The Court of Appeal’s interpretation respects the principle of restraint**

19. The Appellant submits that “assisting suicide and murder can be complementary” and that “the same conduct could, depending on the proper contextual causation analysis, be criminalized as either assisted suicide or murder.”<sup>14</sup>

20. This submission ignores the history of the murder and assisting suicide provisions and runs afoul of the principle of restraint in interpreting penal statutes.

21. The criminal law is “a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment.”<sup>15</sup> And, as the majority of this Court held in *R. v. Hutchinson*, “[o]ur jurisprudence has consistently confirmed that in interpreting criminal law provisions, the twin watchwords of restraint and clarity must inform the inquiry.”<sup>16</sup>

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<sup>11</sup> *R. v. D.L.W.*, 2016 SCC 22, at paras. 47-48.

<sup>12</sup> *R. v. D.L.W.*, 2016 SCC 22, at paras. 99, 115, 123.

<sup>13</sup> *An Act to amend the Criminal Code (bestiality and animal fighting)*, S.C. 2019, c. 17, at s. 1.

<sup>14</sup> Appellant’s Factum, at para. 99.

<sup>15</sup> *R. v. Greenwood (1991)*, 8 C.R. (4th) 235 (Ont. C.A.), at pp. 246-247

<sup>16</sup> *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 42.

22. The principle of restraint is essential to ensure certainty and fair notice. As explained by the Court in *Mabior*, “[it] is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act.”<sup>17</sup>

23. This principle, sometimes referred to as the ‘presumption’ of restraint, is a part of purposive statutory interpretation: “the presumption is a conversation starter rather than stopper: by directing the decisionmaker to presume, *in the absence of interpretive evidence to the contrary*, that Parliament did not intend to target this sort of conduct... (emphasis in original).”<sup>18</sup>

24. Related to the principle of restraint is that if Parliament wants to change the law, they must do so expressly: “it is open to Parliament to change the law in whatever way it sees fit, [but] the legislation in which it chooses to make these alterations known **must be drafted in such a way that its intention is in no way in doubt** (emphasis added).”<sup>19</sup>

25. This means that Parliament must be clear and explicit about any changes to the law: “If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.”<sup>20</sup> This approach respects the distinct roles of the courts and the Parliament while ensuring that people have fair notice of what “constitutes punishable conduct.”<sup>21</sup>

26. There has been no clear and explicit language in amendments to the *Criminal Code* since 1892 to suggest that Parliament has changed the law and done away with the distinction between the killing of oneself and the killing of another. Nor can the Appellant point to any case in which the *Code* has been interpreted in the manner that it now proposes.

27. If the distinction between s. 222 (homicide) and s. 241 (assisting suicide) is collapsed, virtually anyone who assists suicide by providing the physical agent of death would be liable for murder because (1) they would have committed an unlawful act (violating s. 241) and (2) they would have meant to cause the person’s death (or cause them bodily harm that they know is likely to cause death,

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<sup>17</sup> *R. v. Mabior*, 2012 SCC 47, [2012] 2 SCR 584, at para. 14.

<sup>18</sup> Michael Plaxton, *The Presumption of Restraint and Implicit Law* (2020), 65 McGill Law Journal 3, at p. 480.

<sup>19</sup> *R. v. T. (V.)*, 1992 CanLII 88, [1992] 1 S.C.R. 749 at p. 764.

<sup>20</sup> *Marcotte v. Deputy Attorney General for Canada*, 1974 CanLII 1 (SCC), [1976] 1 S.C.R. 108, at p. 115.

<sup>21</sup> *R. v. D.L.W.*, 2016 SCC 22, at para. 59.

and is reckless about whether death ensues) in accordance with that person's own wishes to commit suicide.

28. For example, anyone who provides the physical agent of death and does not comply with the MAID regime may also commit a culpable homicide, including murder. If a doctor skips getting a necessary signature under s. 241.2(3)(b) in a misguided effort to speed up the process, for example, or does not ensure that a second opinion from a different medical practitioner has been obtained, under s. 241.2(3)(f), they could be liable not only for assisting suicide as Parliament clearly intended but also for murder (a possibility never contemplated by Parliament), and subject to mandatory life imprisonment.<sup>22</sup>

29. This interpretation fails to respect the principle of restraint and fails to provide clarity to the law. The presumption of restraint does not “reflect any moral or political judgment about the sorts of conduct Parliament ought to criminalize.” Rather, “it reflects only the respectful judgment that, whatever Parliament intended to criminalize, it perforce intended to guide citizens in some fashion.”<sup>23</sup>

30. Parliament's guidance to date has been clear: assisting suicide is a different crime than murder. It has different elements and a distinct history, rooted in different policy considerations. Absent clear language from Parliament that it intended the act of assisting suicide to also constitute a form of culpable homicide, this argument should be rejected. Collapsing the distinction between murder and suicide is an issue that warrants a significant policy debate, and as such, should be left for Parliament.

31. Instead of providing clarity, collapsing the distinction between murder and assisting suicide—if accepted—will increase confusion and place unreviewable power in the hands of prosecutors. It would be for the prosecutor to decide the scope of criminal liability: a charge of murder, a charge of assisted suicide, or both.

32. This result—not seen in the jurisprudence since at least the first *Criminal Code* was enacted in 1892—would leave it up to prosecutors to choose whether to advance a murder prosecution, with a

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<sup>22</sup> Assuming the accused did not have a reasonable but mistaken belief about any fact that is an element of the exemption in accordance with s. 241(6) of the *Criminal Code*.

<sup>23</sup> Michael Plaxton, *The Presumption of Restraint and Implicit Law* (2020), 65 McGill Law Journal 3, at p. 490.

maximum of life in prison, or an assisting suicide provision, where the maximum sentence is 14 years. This would give the Crown a “trump card” in negotiating pleas in a way that “endangers the fairness of the criminal process” and carries with it the “increased possibility that wrongful convictions could occur under such conditions.”<sup>24</sup> This warning by McLachlin C.J. in *R. v. Nur*, made in the sentencing context, applies equally here.

### C. The Court of Appeal’s decision respects Parliament’s intent

33. The Court of Appeal’s focus on the free-will of the person attempting suicide respects Parliament’s long-standing choice to distinguish between suicide and murder. If they genuinely intended to die from the voluntary self-administration of a substance, for example, then the act itself is one of attempted suicide, not murder.<sup>25</sup>

34. The focus on the *genuine* intention to commit suicide is an essential feature of the distinction between murder and suicide in the *Criminal Code*. By distinguishing between the killing of oneself and the killing of another, the first question is whether the person really intended to kill themselves. It is in this context that the Court of Appeal focused on the “victim’s freewill in choosing suicide.” If an accused interferes with this freedom of choice, overbearing the deceased’s will and ability to exercise personal autonomy, then the accused could be guilty of murder. To find the accused guilty of assisting suicide in such circumstances would be absurd; on any ordinary understanding of the law, this is homicide.<sup>26</sup>

35. Characterizing the underlying act is key to respecting Parliament’s intent: is the death (or attempted death) a homicide or a suicide? If the death is the killing of the another, then it is a homicide. If the death is the killing of oneself, with assistance or otherwise, then it is a suicide.

36. To hold otherwise would be to push the interpretation of the *Criminal Code* beyond what was intended by Parliament and beyond what has been judicially recognized since the distinction between

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<sup>24</sup> *R. v. Nur*, 2015 SCC 15, [2015] 1 SCR 773, at para. 96.

<sup>25</sup> *R. v. B.F.*, 2024 ONCA 511, at para. 44.

<sup>26</sup> The only question at that point would be whether it is culpable homicide, and if so, whether it is manslaughter, second-degree murder or first-degree murder.

homicide and suicide was legislated in the first *Code*. Not only would this run afoul of the need for clarity and fair notice in interpreting penal provisions, but it would undermine the role of Parliament in creating criminal offences. By contrast, the Court of Appeal’s decision—supported by the jurisprudence to date on this issue—respects the respective roles of Parliament and the courts.

**PART IV: COSTS**

37. The CCLA does not seek costs and asks that no costs be ordered against it.

**PART V: ORDER REQUESTED**

38. The CCLA does not seek any orders and makes no submissions on case sensitivity.

**ALL OF WHICH is respectfully submitted this 2nd day of May, 2025.**



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**PART VII: TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Paragraph(s)</u></b>
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5, [2015] 1 SCR 331	12, 13, 14
<i>Marcotte v. Deputy Attorney General for Canada</i> , 1974 CanLII 1 (SCC), [1976] 1 S.C.R. 108	25
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Michael Plaxton, <i>The Presumption of Restraint and Implicit Law</i> (2020), 65 McGill Law Journal 3	23, 29
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<i>An Act to amend the Criminal Code (bestiality and animal fighting)</i> , S.C. 2019, c. 17 / <a href="#">EN</a> / <a href="#">FR</a>	<a href="#">s. 1</a> <a href="#">art 1</a>
<i>The Criminal Code, 1892</i> , S.C. 1892, c. 29	ss. 218, 237, 238
<i>Criminal Code</i> , R.S.C. 1985, c C-46 / <a href="#">EN</a> / <a href="#">FR</a>	ss. <a href="#">222</a> , <a href="#">227(1)</a> , <a href="#">241</a> , <a href="#">241.2</a> arts, <a href="#">222</a> , <a href="#">227(1)</a> , <a href="#">241</a> , <a href="#">241.2</a>