In the Court of Appeal of Alberta

Citation: Canada (Attorney General) v E.F., 2016 ABCA 155

Date: 20160517
Docket: 1601-0116-AC
Registry: Calgary

Between:

The Attorney General of Canada and The Attorney General of British Columbia

Appellants
(Defendants/Respondents)

- and -

E.F.

Respondent
(Plaintiff/Applicant)

- and -

The Attorney General of Alberta

Not a Party to the Appeal
(Respondent)

Restriction on Publication

By Court Order, there is a ban on publishing information that may identify the names and any other information that may result in identifying E.F., the family members or friends referenced in the filed materials, or the health care professionals involved in this matter.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice M.R. Bast
Dated the 5th day of May, 2016
Filed on the 6th day of May, 2016
(Docket: 1610 00575)

Memorandum of Judgment

The Court:

Background

[1] It is a criminal offence in Canada to provide assistance to someone who wishes to end their own life. The *Criminal Code* prohibits such assistance through the combined operation of s 241(b), which says that everyone who aids or abets a person in committing a suicide commits an indictable offence, and s 14, which says that no person may consent to death being inflicted on them. A constitutional challenge to these provisions in 1993 was unsuccessful; at that time, a majority of the Supreme Court of Canada upheld the blanket prohibition on physician assisted death: *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

[2] Over twenty years later, a second constitutional challenge was successful. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 (*Carter 2015*), a unanimous Supreme Court held that, for some people, ss 241(b) and 14 unjustifiably infringe the rights to life, liberty and security of the person guaranteed by s 7 of the *Canadian Charter of Rights and Freedoms*. Notwithstanding that decision, for the time-being the law remains unchanged. In *Carter 2015*, the Supreme Court suspended its declaration of invalidity for twelve months to allow Parliament time to craft an appropriate legislative response. Due to the federal election and a change of government, no new legislative regime was enacted in the twelve month period of suspension; in January 2016 the government applied to the Supreme Court for an extension of the suspension period.

[3] The Supreme Court granted a four month extension to June 6, 2016: *Carter v Canada* (*Attorney General*), 2016 SCC 4, 331 CCC (3d) 289 (*Carter 2016*). A majority of the court, not wishing to further prolong the suffering of persons whose rights were curtailed by a non-*Charter* compliant law, granted a constitutional exemption to competent adults who consented to the termination of life if their circumstances fit within the parameters set out in *Carter 2015*. The exemption was granted in the following terms at paragraph 6:

> We would ... grant the request for an exemption so that those who wish to seek assistance from a physician in accordance with the criteria set out in para. 127 of our reasons in [*Carter 2015*], may apply to the superior court of their jurisdiction for relief during the extended period of suspension. Requiring judicial authorization during that interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.

[4] Accordingly, those individuals who wish to avail themselves of the constitutional exemption granted by *Carter 2016* are required to apply to the superior court in the jurisdiction in which they live for authorization to end their lives with the assistance of a physician. The judge hearing the application must be satisfied that the applicant's circumstances fit within the criteria

established by the Supreme Court in paragraph 127 of *Carter 2015*. Paragraph 127 is the operative paragraph in the earlier decision, and describes the declaration of invalidity as follows:

> 127. The appropriate remedy is therefore a declaration that s 241(b) and s 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

[5] It is important to note that the application for authorization from the superior court is not an application to be granted a constitutional exemption; the constitutional issues have already been considered and decided by the Supreme Court of Canada, and the exemption has been granted to qualified individuals. The task of the motions judge who hears the application is to ascertain whether the applicant is within the class of people who have been granted a constitutional exemption during the four month period that ends on June 6, 2016. In this regard, we agree with the observations of Martin J in *Re H.S.*, 2016 ABQB 121, 394 DLR (4th) 664 at paragraph 51 that the role of the motions judge "is limited to applying or authorizing an existing constitutional exemption and determining whether a particular person qualifies for that exemption", a task that requires considering whether the individual meets the criteria articulated in *Carter 2015*.

[6] There have been several applications across the country for authorization for physician assisted death; before the motions judge the number of such applications was estimated at between 16 and 20. As far as we are aware, none of those other applications have been opposed and none have been appealed. It appears that the Attorneys General of Canada and of the relevant provinces have generally been served notice of such applications, but the process is not an adversarial one. The first judicial authorization in Alberta was that granted in *H.S.*, in February 2016.

[7] On April 22, 2016, the respondent to this appeal, E.F., brought an application in the Alberta Court of Queen's Bench for judicial authorization entitling her to access physician assisted death. E.F. is a 58 year old woman who endures chronic and intolerable suffering as a result of a medical condition diagnosed as "severe conversion disorder", classified as a psychogenic movement disorder. She suffers from involuntary muscle spasms that radiate from her face through the sides and top of her head and into her shoulders, causing her severe and constant pain and migraines. Her eyelid muscles have spasmed shut, rendering her effectively blind. Her digestive system is ineffective and she goes without eating for up to two days. She has significant trouble sleeping and, because of her digestive problems, she has lost significant weight and muscle mass. She is non-ambulatory and needs to be carried or use a wheelchair. Her quality of life is non-existent. While her condition is diagnosed as a psychiatric one, her capacity and her cognitive ability to make informed decisions, including providing consent to terminating her life, are unimpaired. She deposes that she is not depressed or suicidal, but "simply exhausted after years of suffering indescribable pain". Medical opinion evidence confirms that the applicant is not suffering from

depression and is able to and is voluntarily consenting. Her mental competence is not in dispute. We also note that the applicant's husband and adult children are supportive of her decision.

[8] E.F. gave notice of her application to the Attorney General of Canada, Attorney General of Alberta and Attorney General of British Columbia. British Columbia was included because the physician who is prepared to assist E.F. practices in that province. The application was heard by the motions judge on April 27, 2016, and was opposed by Canada and British Columbia. Alberta appeared in an advisory capacity and took no position on the outcome of the application.

[9] The Attorneys General raised concerns regarding the sufficiency of the evidence before the court, and in particular the sufficiency of the psychiatric evidence. Canada also took the position that the applicant did not come within the criteria set out in *Carter 2015* for two reasons: (1) the applicant's illness, however severe, is not regarded as terminal; and (2) the applicant's illness has at its root a psychiatric condition. The motions judge disagreed with these objections and granted the application on May 5, 2016.

[10] Canada and British Columbia appealed the order to this Court, essentially on the same grounds as those raised before the motions judge. Alberta was not a party to the appeal. The order was stayed until May 9, 2016, and the stay was then extended until further order of this Court. The appeal was heard on an expedited basis. The parties filed their factums and authorities, as well as the transcripts and evidence in the court below, immediately, as directed. The appeal was heard on May 12, 2016.

Issues on Appeal

[11] The appeal raises two legal issues regarding the interpretation of the Supreme Court of Canada's decision in *Carter 2015*: (1) does the constitutional exemption granted in *Carter 2016* apply only to applicants whose medical conditions are terminal?; and (2) are those persons suffering psychiatric conditions and who otherwise comply with the criteria in *Carter 2015* similarly excluded from the ambit of the constitutional exemption?

[12] The appellants also argue that the evidentiary threshold necessary to grant a judicial authorization was not met in this case. They say the medical evidence presented to the motions judge was insufficient to support the conclusion that E.F. has a grievous and irremediable medical condition that causes her enduring suffering that is intolerable to her; in particular, British Columbia argues that there was insufficient psychiatric evidence that E.F's condition is "irremediable".

[13] Neither appellant takes issue with E.F.'s competency or her ability to consent to the termination of her life.

Standard of Review

[14] The Supreme Court of Canada has clearly stated that the absolute prohibition on physician assisted death is unconstitutional. In *Carter 2015*, s 241(b) and s 14 of the *Criminal* Code were

declared invalid in so far as they prohibit a physician assisted death for (1) a competent adult who (2) clearly consents to the termination of life and (3) has a grievous and irremediable medical condition (including an illness, disease or disability) that (4) causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

[15] By granting a constitutional exemption to individuals who meet those criteria, the Supreme Court has directed that, during the four month window that the constitutional exemption is available, superior courts are to act as gatekeeper. The motions judge hearing the application must be satisfied that the applicant comes within the class of individuals to whom the exemption applies. What precisely is involved in the inquiry, and who should be involved, is fresh ground and the law is in its infancy. This is also the first time, as far as we are aware, that any Attorney General has opposed an application of this type, and the first physician assisted death authorization that an Attorney General has appealed.

[16] In these circumstances, the standard of review takes on particular importance and requires us to consider the role of the motions judge in the application for authorization, and of this Court on review.

[17] The first two issues on appeal - whether the criteria set out in *Carter 2015* and, therefore, the constitutional exemption granted in *Carter 2016*, include only those with terminal illnesses, and whether they can apply to those with psychiatric conditions – require us to consider the proper interpretation and application of the Supreme Court's decision in *Carter 2015*. These are questions of law to which a standard of review of correctness applies.

[18] The appellants submit that the third issue is also subject to a standard of review of correctness. They say that issue requires us to assess whether the evidence presented to the motions judge satisfied the necessary legal standard, and that little or no deference is owed to the decision of the motions judge on this point. In support of this proposition, Canada relies on *Carter v Brooks*, 2 OR (3d) 321, [1990] OJ No 2182, and *R v Shepherd*, 2009 SCC 35, [2009] 2 SCR 527. Canada also argues that where a motions judge is not asked to weigh conflicting evidence, make credibility findings, or assess *viva voce* evidence, the usual principles that lead to a deferential review are not engaged. Moreover, Canada submits that the nature of this inquiry, which it characterizes as the granting of a constitutional exemption as a remedy for a *Charter* violation, demands heightened appellate scrutiny. We disagree that these factors require a stricter level of appellate scrutiny of the evidentiary issue raised on this appeal.

[19] The standard of review on this issue, as with the other issues, would generally be governed by *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. The application before the motions judge was essentially an exercise in fact finding and applying those facts to the law as set out in *Carter 2015*. As such, the decision is entitled to deference on review. Absent palpable and overriding error, an extricable error of law, or a complete misapprehension of the evidence, appellate intervention in such decisions is not warranted.

[20] The deferential approach to decisions of this type is not curtailed simply because the exercise undertaken by the motions judge did not involve weighing conflicting evidence or assessing credibility. Courts have long since ceased relying on the presence of credibility findings as the justification for showing deference to the weighing of evidence by a trier of fact; discretionary decisions of lower courts are generally entitled to deference on appeal: see *Hyrniak v Mauldin*, 2014 SCC 7 at paragraph 81, [2014] SCC 7; *Wolfert v Shuchuk*, 2003 ABCA 109 at paragraph 9, 41 Alta LR (4^{th}) 5. For example, the weighing of evidence on a summary judgment motion is subject to review for reasonableness: see *Balm v Aikins MacAuley & Thorvaldson LLP*, 2012 ABCA 96 at paragraph 14, 533 AR 402. Where there is evidence to support the findings made by a chambers judge, this Court will be reluctant to interfere: *De Shazo v Nations Energy Co*, 2005 ABCA 241, 367 AR 267; *DeSoto Resources Ltd v Encana Corp*, 2011 ABCA 100 at paragraph 19, 513 AR 72.

[21] There is a strong trend to accord deference in circumstances where previously little was given. Recent decisions of the Supreme Court of Canada have expanded on the rationale behind this trend. Deference is required to reflect the proper roles of each level of the judicial hierarchy. It is proper and fitting for the court of first instance to make findings of fact and apply the law. The appellate court is not to usurp the role of the trial court and take it upon itself to retry the case. Rather, appellate intervention is focused on error correction where the error is germane to the decision and to law clarifying or law making: see, for example, *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633. Appellate courts do not reweigh evidence. If there is evidence to support a decision, deference is accorded.

[22] Finally, Canada submits that the standard of review must be higher in this case because we are dealing with a constitutional exemption. The argument goes that it is necessary to rigorously scrutinize the decision because of its constitutional significance and because of the finality of the relief sought.

[23] We disagree. We must consider in a practical manner what is involved in the judicial authorization exercise. As was mentioned previously, we agree with the observations of Martin J in *H.S.*, wherein she concluded that the majority in *Carter 2016* has already granted a constitutional exemption to the group of individuals who meet the criteria set out in paragraph 127 of *Carter 2015*. As she noted at paragraph 48, "the role of authorizing courts is to hear individual applications and determine whether a particular claimant is inside or outside the group which has already been granted the constitutional exemption". We agree that the motions judge is not called upon to inquire into whether a claimant has established an individual case for a personal constitutional exemption; the task of the authorizing court is limited to determining whether a particular claimant satisfies the criteria established in *Carter 2015* so as to qualify for the exemption already granted by the Supreme Court.

[24] Accordingly, the constitutional dimensions and debate inherent in the granting of a personal constitutional exemption do not form part of the inquiry in an application under *Carter 2016*. The authorization hearings are not intended as requests for exemptions. These are not

individual constitutional challenges. The question the Supreme Court has directed the superior courts to answer in these applications is whether the applicant falls within the identified group. This limited inquiry is individual and fact-specific.

[25] In our view, the limited and fact specific nature of the inquiry demands that deference be paid to those fact-findings. Moreover, each authorization, if granted, is personal to the applicant. Each is specific to that person and their unique circumstances. This is the antithesis of precedential.

[26] Thus, we conclude that the third issue on appeal, whether the evidence was sufficient in the circumstances for the motions judge to conclude the *Carter 2015* criteria are met, should be reviewed on a standard of palpable and overriding error. We agree, however, that if there was no evidence to support a particular finding, this would amount to an error in principle warranting appellate intervention.

Issue 1: Did the motions judge err in law in concluding that the constitutional exemption granted by the Supreme Court in *Carter 2016* is available to those who are not terminally ill?

[27] Canada argued that, despite the absence of any reference to terminal illness in paragraph 127, the declaration of invalidity applies only to those persons who are at or very near the end of life. This argument was rejected by the motions judge. She held that the Supreme Court in *Carter 2015* did not expressly limit the right to dying individuals or those with medical conditions that are terminal, life-threatening, or that reduce one's life expectancy.

[28] Canada acknowledges that nowhere in paragraph 127 is there a reference, express or otherwise, to the "illness, condition or disability" of the applicant being terminal, nor to the applicant being at or near the end of life. A legislative background document published by the Canadian government and provided to the court by counsel for Canada notes that the declaration describes a broad right, that the terms used to describe it, such as "grievous and irremediable medical condition", are not defined but could include conditions that are not life-threatening or terminal, and that the declaration is framed largely in terms of subjective criteria[1].

[29] In support of its narrower reading of the *Carter 2015* criteria, Canada refers to the last two sentences in paragraph 127:

> The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

[30] Canada argues that these statements modify the terms "grievous and irremediable" and indicate the court's intention to limit the scope of the declaration to the facts of Ms. Taylor's case.

[1] Canada, Department of Justice, *Legislative Background: Medical Assistance in Dying (Bill C-14)*, (Ottawa: Department of Justice Canada) at 29.

Ms. Taylor, one of the plaintiffs in *Carter 2015*, was suffering from ALS and it was accepted that her illness was grievous, irremediable and ultimately terminal. Canada says the terminal nature of Ms. Taylor's condition modifies the court's broadly worded declaration.

[31] Canada also relies on several other passages in *Carter 2015* where the court refers to "people like Ms. Taylor". Canada suggests these references must be taken to mean that the right to physician assisted death is being considered only with respect to individuals with similar types of progressive degenerative illnesses in an advanced stage. Finally, Canada points to certain paragraphs where the court compares medical assistance in dying to forms of 'end of life' care that are only available to individuals who are terminal.

[32] In our view, and for the reasons that follow, the motions judge was correct in rejecting this submission. The analysis includes consideration of the actual language chosen by the court in making the declaration in paragraph 127, consideration of whether the final sentences in that paragraph were intended to limit or modify the declaration, and consideration of the decision as a whole. Ultimately, we must consider the purpose, context and underlying principles articulated in *Carter 2015* to determine whether the Supreme Court intended to implicitly limit the declaration as suggested.

[33] As Canada fairly conceded, the language of the declaration itself is broad and rights based. Nowhere in the descriptive language is the right to physician assisted death expressly limited only to those who are terminally ill or near the end of life. Canada accepts that a dictionary definition of "grievous and irremediable" medical condition could include conditions that are not life-threatening or terminal.

[34] We do not accept the argument that the subsequent sentences in paragraph 127 reflect an intention to further limit the right, or to establish narrower or different criteria that conform to the specific facts of Ms. Taylor's case. Rather, we read those sentences as clarifying that the criteria established in the declaration respond to the circumstances before the court. The court is noting that there may be other circumstances, not before the Court in *Carter 2015*, where a person who does not satisfy the *Carter 2015* criteria, for example a mature minor, may seek a declaration of invalidity. The court is careful to state that it is not opining on the merits of applications that may be made in the future.

[35] We also do not accept that the references in the decision comparing physician assisted death to forms of "end of life care" support Canada's position. Physician assisted death is about terminating one's life, ergo the comparison to "end of life care".

[36] Finally, Canada's argument is not supported by the words of the decision as a whole, nor by the principles articulated in the decision. The first paragraph of *Carter 2015* is instructive, as it sets out the context for the decision that follows:

> It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously irremediably ill cannot seek a physician's assistance in

> dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

[37] The cruelty in the situation is there regardless of whether the illness causing the suffering may be classified as terminal.

[38] It is important to bear in mind the principles that were at stake in *Carter 2015*. The court was called upon to consider whether the blanket prohibition against physician assisted death violated a person's *Charter* rights under ss 7 and 15. The trial judge had concluded that all three aspects of s 7, life, liberty and security of the person, were negatively affected by the prohibition. She described the liberty interest at stake as "the right to non-interference by the state with fundamentally important and personal medical decision-making": paragraph 1302; she found that security of the person was infringed by restriction of a person's control over her bodily integrity, and the right to life was engaged insofar as the prohibition might force someone to take her own life earlier than she might if she had access to physician assisted death.

[39] The Supreme Court agreed that s 7 was breached and that the blanket prohibition was overbroad and could not be justified by the concerns raised by the government at trial. The court agreed with the trial judge's finding that the risks could be limited through a carefully designed and monitored system of safeguards. The court's carefully crafted declaration of invalidity reflected that conclusion. The court held that, in circumstances where a competent adult consents to terminating her life and where she has a grievous and irremediable medical condition that causes enduring suffering that is intolerable to her, the blanket prohibition impermissibly infringes on personal autonomy over important personal and medical decisions and infringes on one's bodily integrity in a manner that is unjustified under the *Charter*.

[40] Any attempt to read in or infer additional limitations to those expressly set out in paragraph 127 must respect the balance of competing values struck by the court – balancing the sanctity of life, broadly speaking, and society's interest in protecting the vulnerable, against the *Charter* rights of an individual to personal autonomy without state intervention, including autonomy over personal decisions regarding one's life and bodily integrity. Given the importance of the interests at stake, it is not permissible to conclude that certain people, whose circumstances meet the criteria set out in the *Carter 2015* declaration and who are not expressly excluded from it, nevertheless can be inferentially excluded. It is not appropriate, in our view, to revisit these issues, which were considered at length and decided by the Supreme Court in *Carter 2015*, at authorization hearings conducted under it.

[41] In summary, the declaration of invalidity in *Carter 2015* does not require that the applicant be terminally ill to qualify for the authorization. The decision itself is clear. No words in it suggest otherwise. If the court had wanted it to be thus, they would have said so clearly and unequivocally. They did not. The interpretation urged on us by Canada is not sustainable having regard to the fundamental premise of *Carter* itself as expressed in its opening paragraph, and does not accord

with the trial judgment, the breadth of the record at trial, and the recommended safeguards that were ultimately upheld by the Supreme Court of Canada.

[42] We note that this position was maintained on appeal only by Canada and was not supported by British Columbia.

Issue 2: Did the motions judge err in law in concluding that individuals whose medical condition is psychiatric in nature are not precluded from the constitutional exemption granted in *Carter 2016*?

[43] Canada took the position before the authorizing judge, and before us on appeal, that because the applicant's medical condition has its origins in a psychiatric condition, she is precluded from access to physician assisted death under the terms of *Carter 2015*. British Columbia did not support this position on appeal.

[44] Canada acknowledged the breadth of the wording in paragraph 127 and agreed that an exclusion for psychiatric illness cannot be found expressly in that declaration. Canada makes several points: (i) the balance of paragraph 127 modifies the criteria because it relates exclusively to the case before the court, which did not involve a psychiatric condition, (ii) paragraph 111 of *Carter 2015* excludes psychiatric conditions from the operation of the declaration of invalidity, and (iii) all post *Carter 2016* jurisprudence (specifically, reported judicial authorization decisions) support this view.

[45] The first argument is the same as that put forward on the preceding issue, and we reject it for the same reasons.

[46] The third argument is easily disposed of. As the motions judge correctly pointed out, the judicial authorizations that have been granted by courts across Canada following *Carter 2016* are all specific to the unique circumstances of the individual applicants. None dealt with the medical condition before us because none of the individuals seeking the authorizations had that condition. This argument is without merit.

[47] With respect to the second argument, Canada submits that paragraph 111 of *Carter 2015* expressly states that psychiatric conditions fall outside the parameters of the declaration. That paragraph reads:

> Professor Montero's affidavit reviews a number of recent, controversial, and high-profile cases of assistance in dying in Belgium which would not fall within the parameters suggested in these reasons, such as euthanasia for minors or persons with psychiatric disorders or minor medical conditions. Professor Montero suggests that these cases demonstrate that a slippery slope is at work in Belgium. In his view "[o]nce euthanasia is allowed it becomes very difficult to maintain a strict interpretation of the statutory conditions."

[48] The Court then went on to deal with the recently introduced opinion evidence of Professor Montero in paragraph 112, saying:

> We are not convinced that Professor Montero's evidence undermines the trial judge's findings of fact. First, the trial judge (rightly, in our view) noted that the permissive regime in Belgium is the product of a very different medico-legal culture. Practices of assisted death were "already prevalent and embedded in the medical culture" prior to legalization (para. 660). The regime simply regulates a common pre-existing practice. In the absence of a comparable history in Canada, the trial judge concluded that it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on the Belgian evidence (para. 680). This distinction is relevant both in assessing the degree of physician compliance and in considering evidence with regards to the potential for a slippery slope.

[49] Canada's reliance on paragraph 111 is misplaced. As is apparent from the paragraph that follows, the argument takes the statement out of context. In any event, the language of paragraph 111 does not serve to exclude all psychiatric conditions from the court's declaration of invalidity. Rather, the court is saying that the concerns raised in Professor Montero's evidence have been addressed by the safeguards put in place in the court's description of the declaration of invalidity at paragraph 127.

[50] In rejecting this argument the motions judge stated, at pages 57-58 of the transcript:

> These parameters or criteria require the person invoking the exemption to be (a) a competent adult, (b) who clearly consents to the termination of life, (c) who has grievous irremediable medical condition (including an illness, disease or disability), and (d) whose medical condition causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.
>
> Paragraph 127 goes on to state that the scope of the declaration was intended to respond to the factual circumstances of that case and that the Supreme Court of Canada in *Carter (2015)* makes "no pronouncement on other situations where physician assisted dying may be sought".
>
> The wording in paragraph 127 is intended to be broad and non-specific and this view is supported by the last two sentences of that paragraph which I have just referred to. *Carter (2016)* makes no changes to the parameters or criteria.
>
> In my view, the comment by the Supreme Court that the three groups of persons referred to in paragraph 111, "would not fall within the parameters of these reasons" suggests that the criteria identified at paragraph 127 already addressed the slippery slope concerns raised by Professor Montero.

[51] The motions judge explained her view: the "minors" referred to in paragraph 111 would not fall within the parameters or criteria set out in paragraph 127 because the exemption applies only to adults. Similarly, those with "minor medical conditions" would be excluded because of the requirement that the medical condition be "grievous and irremediable" and cause enduring and intolerable suffering. The motions judge correctly noted that the term medical condition is not defined in paragraph 127, and there are no criteria expressly excluding psychiatric disorders. The criteria do, however, require the adult applicant be competent and clearly consent to the ending of her life. On this point, the motions judge said, "these two criteria provide the necessary safeguards with respect to the vulnerability issues which may arise for persons with psychiatric disorders in the same way that requiring the individual to be an adult safeguards minors."

[52] The motions judge held that the wording of paragraph 127 ensures that persons with a psychiatric disorder are not deprived of exercising their rights, provided they can establish that they are both competent and clearly consent. She stated: "The wording of paragraph 127, which is determinative in applications for physician assisted death such as this, does not prevent persons with psychiatric disorders from availing themselves of the constitutional exemption provided all of the criteria are established". We agree.

[53] It is important to note that this issue was very much a focus of debate in *Carter 2015*, as is obvious from a review of the decision and the evidentiary record. As has been discussed, the court in *Carter 2015* was tasked with striking a balance between the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition, and the sanctity of life and the need to protect the vulnerable. The court's decision was premised on competent individuals being entitled to make decisions for themselves in certain circumstances. The court recognized that there was a need to protect the vulnerable from abuse or error, but determined that a properly administered regime is capable of providing that protection.

[54] The specific issue of whether those suffering from psychiatric conditions should be excluded from the declaration of invalidity was very much part of the debate and the record before the Supreme Court. For example, at paragraph 114, the court discussed Canada's position regarding the risks associated with the legalization of physician assisted death in these terms:

> In [Canada's] view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

[55] In the next paragraph the Court stated:

> The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

[56] The court concluded, at paragraph 116, " … the individual assessment of vulnerability (whatever its source) is implicitly condoned for life and death decision making in Canada", and accepted that "it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity".

[57] In discussing minimal impairment, the court accepted the trial judge's finding that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence and ambivalence could all be reliably assessed as part of that process: paragraph 106.

[58] At paragraph 107, the court considered the risk to vulnerable populations and accepted the trial judge's finding that there was no evidence from permissive jurisdictions that people with disabilities or those from socially vulnerable populations are at heightened risk of accessing physician assisted death.

[59] As can be seen, in *Carter 2015* the issue of whether psychiatric conditions should be excluded from the declaration of invalidity was squarely before the court; nevertheless the court declined to make such an express exclusion as part of its carefully crafted criteria. Our task, and that of the motions judge, is not to re-litigate those issues, but to apply the criteria set out by the Supreme Court to the individual circumstances of the applicant. The criteria in paragraph 127 and the safeguards built into them are the result of the court's careful balancing of important societal interests with a view to the *Charter* protections we all enjoy. Persons with a psychiatric illness are not explicitly or inferentially excluded if they fit the criteria.

Issue 3: Was the evidence before the motions judge sufficient to permit her to come to the conclusion that the applicant meets the criteria set out in *Carter 2015* so as to be included in the class of people to whom the constitutional exemption applies?

[60] Before the motions judge and on this appeal, the appellants took issue with the sufficiency of the evidence presented on the application. For British Columbia, the alleged insufficiency goes to the irremediability of the applicant's medical condition. British Columbia says that, in a case

that involves a relatively poorly understood psychiatric condition for which treatment results can vary, there should be an evidentiary requirement to provide the court with direct evidence from a psychiatrist with expertise in the condition who has seen the applicant. Such evidence is necessary, British Columbia says, to establish that the condition is irremediable; that no further treatment options, acceptable to the individual, are available: see *Carter 2015* at 127.

[61] The motions judge considered but ultimately rejected this argument.

[62] The evidence provided by the applicant's attending physician, who has been treating her for 28 years, was that E.F. was diagnosed with severe conversion disorder nine years ago, she has been seen by several psychiatrists and at least one neurologist, and has tried several treatments, none of which has succeeded in mitigating her symptoms. Her condition has remained largely unchanged for the last four years. The motions judge was satisfied that the applicant's treating physician was capable of providing admissible and reliable evidence based on the applicant's various diagnostic tests and the results of referrals.

[63] Physician B, a medical doctor with 40 years' experience who is competent to provide physician assistance in dying, deposed that, in her opinion, there are no further treatment options for the applicant that would offer any hope of improvement in her condition, or meaningful reductions in her symptoms. She stated: "Given the length of time the symptoms have been present, the treatment history and her lack of response, I considered her condition to be irremediable".

[64] That opinion was echoed in the evidence of Physician C, a psychiatrist with expertise in the applicant's condition, who reviewed E.F.'s medical file, although he did not examine her. Physician C did not suggest that E.F. should try any particular further treatment. His opinion was clearly stated: "… that the applicant is suffering intolerable pain and physical discomfort, that her symptoms are irremediable and that she is capable of consent". He explained that, although some patients with conversion disorder can be successfully treated, there are other patients who "do not respond to treatment and develop a chronic unremitting course without resolution of symptoms. The longer the symptoms persist the worse is the prognosis. This is the case with the applicant". There is no reason to think that this experienced specialist would have rendered that opinion if he were not satisfied with the medical information he was provided, or if there was a treatment option that could or should be tried by the applicant. The motions judge was entitled to accept the opinion of Physician C on this point, as she did**.**

[65] On the issue of whether the applicant suffers from a grievous and irremediable medical condition, the motions judge found as follows:

> The evidence … establishes that none of the multitude of traditional or non-traditional treatments, therapies, or trials that the applicant has undergone for over nine years since the onset of her medical condition has remedied the applicant's medical condition or made it right. The evidence clearly establishes that the physical symptoms suffered by the applicant as a result of her medical condition

> deprive her of any quality of life. The fact that the applicant's medical condition is diagnosed using the DSM-5 or the fact that it has a psychiatric component cannot be permitted to overshadow the real horrific physical symptoms that the applicant is most definitely experiencing on a continual and daily basis.
>
> There is no question that the physical symptoms caused by the applicant's severe conversion disorder greatly and enormously interfere with the quality of her life and that they have resisted all treatment. I am completely satisfied the applicant's medical condition is both grievous and irremediable.

[66] These conclusions were available to the motions judge on the evidence before her and we see no error in her reaching these conclusions.

[67] Although the direct psychiatric evidence suggested by British Columbia might be desirable, there is no need to make it an absolute evidentiary requirement. In some cases, such a requirement could impose an undue burden on the applicant. There are other ways to establish irremediability. The evidence led in this case supported the conclusions drawn. Ultimately, it is the task of the motions judge, acting as gatekeeper, to decide whether there is sufficient evidence in the circumstances of a particular case to authorize physician assisted death. There is no doubt the motions judge was aware of the gravity of that authorization.

[68] Canada also argues that the evidence of the applicant's diagnosis and treatment is vague and "stale". Physician A's affidavit evidence, although brief, is clear on the nature of the applicant's diagnosis and in her opinion that there are no additional treatments that can be offered. That evidence cannot properly be described as stale. The physician has been, and remains, involved in the applicant's treatment and in the various referrals; Physician A is in a position to provide evidence as to the course of the applicant's condition, and its current state.

[69] This ground of appeal is therefore dismissed.

Additional Issues

The proper role of the Attorney General on authorization applications

[70] Given that this is the first appellate decision on *Carter 2015* judicial authorizations, we consider that it may be helpful to comment on the appropriate role of the Attorneys General in this type of case. Notice to the Attorneys General is, as noted in *H.S.*, not required. Nevertheless, it has become the practice on these applications to give such notice. Martin J commented that, from a practical perspective, the presence of the Attorneys General can be helpful in crafting terms of the orders, particularly given the steep learning curve being experienced by all those involved in the process. It may also be helpful to have the Attorney General appear in an advisory role, for example, to point out to the motions judge if a particular application has a different dimension than applications that were previously granted. This is the role adopted by Alberta before the motions judge; Alberta also did not participate in the appeal of her decision.

[71] Ultimately, however, the Supreme Court of Canada did not intend this to be an adversarial process. This is the reason proffered by the appellants for not conducting cross-examinations on any of the affidavits filed by the respondent. But one is left to wonder what the appropriate role of the Attorney General really is. It is the superior courts, not the Attorneys General, that are tasked with being the gatekeeper in an authorization application. Can it be said to be in the public interest to have the Attorney General of Canada assume the role of adversary when she is not satisfied that the application meets the *Carter 2015* criteria? We do not think so. It is the role of the motions judge to carefully review the evidence before her and determine, on a balance of probabilities, whether the criteria in *Carter 2015* have been met.

[72] We are also left to wonder why it is considered necessary to put an applicant to the test on appeal, particularly where, as here, one of the primary issues is fact-finding. The Attorneys General have not offered any compelling reason for challenging the trial judge's findings. Moreover, although draft legislation, in the form of Bill C-14, is currently in the legislative process, there is no legislation that is the subject of constitutional review. Issues that might arise regarding the interpretation and constitutionality of eventual legislation should obviously wait until the legislation has been enacted.

Did the motions judge err in directing that the applicant's physician assisted death could take place in another jurisdiction?

[73] British Columbia argues that a superior court should not authorize a physician assisted death that will take place in another jurisdiction if special circumstances do not exist to show why that is necessary. This argument was not raised in the court below and, in the absence of a proper evidentiary record, we decline to address it for the first time on appeal.

Appeal of the partial publication ban granted by the motions judge

[74] Before the motions judge, the applicant had requested an *in camera* hearing, a sealing order, and a publication ban. The Attorneys General objected, on the basis that the proper notice had not been given to the media. Given the time sensitive nature of the matters before her, the motions judge proceeded to consider the confidentiality orders. Being sensitive to the concerns regarding protecting the open court principle, she declined to close the hearing to the public, and also declined to order the court records sealed. She did, however, order a partial publication ban prohibiting publication of names or information that could identify the applicant, her friends and family, or the medical professionals involved in the application.

[75] The partial publication ban was raised as a ground of appeal in the Notice of Appeal, but it was not pursued at the hearing before us. We will therefore not comment further on it, except to note that the partial publication ban remains in place.

Conclusion

[76] The objections taken by the appellants do not find support in the *Carter* decision or in the evidence. The stay is lifted and the appeal is dismissed.

Costs

[77] The parties are invited to make submissions as to costs and, in particular, why the appellants ought not be required to pay full indemnity costs to the respondent on the appeal.

Appeal heard on May 12, 2016

Memorandum filed at Calgary, Alberta
this 17th day of May, 2016

Authorized to sign for: Costigan J.A.

Paperny J.A.

Rowbotham J.A.

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