IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A.A. (Re),*
2016 BCSC 570

Date: 20130401
Docket: S162587
Registry: Vancouver

In the Matter of
Carter v. Canada (Attorney General), 2016 SCC 4

Re: A.A.

Petitioner

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Petitioner:	S.M. Tucker and A.M. Latimer
Place and Date of Hearing:	Vancouver, B.C. March 23, 2016
Place and Date of Judgment:	Vancouver, B.C. April 1, 2016

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Introduction

[1] Sections 14 and 241(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 prohibit any person from aiding another person to commit suicide by providing that:

> 14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.
>
> …
>
> 241. Every one who
>
> (b) aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[2] On February 6, 2015, the Supreme Court of Canada released judgment in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter 2015*], declaring at para. 147 that:

> Section 241(b) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that 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.

[3] The declaration by the Court was then suspended for 12 months until February 6, 2016, to permit Parliament to create a legislative response to the declaration. On January 15, 2016, on a motion by Canada for a six-month extension of the suspension of the declaration, a majority of the Supreme Court of Canada extended the suspension of the declaration by four months from the date it was set to expire, exempting the province of Quebec from the four-month extension in reasons for judgment indexed at *Carter v. Canada (Attorney General)*, 2016 SCC 4 [*Carter 2016*].

[4] The majority further ordered that, during the four-month extension period, an exemption from the extension was granted to those who wished to exercise their rights so that they could apply to the superior court of their jurisdiction for relief in accordance with the criteria set out in para. 127 of the reasons in *Carter 2015*, which reads:

> 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. "Irremediable," it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. 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.

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Background

[5] The petitioner is an adult woman who suffers from multiple sclerosis.

[6] She seeks the relief contemplated by the Supreme Court of Canada's decision in *Carter 2016* to permit her to end her life by means of a physician-assisted death.

[7] Before filing her petition, the petitioner sought the following orders:

> a) a sealing order providing that all documents filed in the Registry and any order or other document issued by the Court in connection with the anticipated petition in these proceedings be sealed, with the exception of the Court's reasons for judgment; and
>
> b) a confidentiality order providing:
>
> i. that the applicant be identified by the initials "A.A." in the anticipated proceedings, including in any reasons for judgment;
>
> ii. that all hearings in the anticipated proceedings be held in camera; and
>
> iii. for a publication ban in relation to all facts and details that could lead to the identification of the applicant, her family or physicians, except to the extent it is necessary for the petitioner to present the authorization order itself to obtain access to physician-assisted death.

[8] In reasons for judgment indexed at 2016 BCSC 511, I declined to order that the proceedings in this hearing would be held *in camera*, but granted an order that all documents filed in the Registry and any order or other document issued by the Court in connection with the petitioner's anticipated petition in these proceedings be sealed, with the exception of the Court's reasons for judgment. In addition I granted a confidentiality order providing that the applicant be identified by the initials "A.A." in the anticipated proceedings, including in any reasons for judgment and a publication ban in relation to all facts and details that could lead to the identification of the applicant, her family or physicians other than Dr. Wiebe, except to

the extent it is necessary for the petitioner to present the authorization order itself to obtain access to physician-assisted death.

[9] In her petition, A.A. set out a form of the order she sought in the following terms:

1. A.A. comes within the scope of the constitutional exemption granted by the Supreme Court of Canada in *Carter v. Canada (Attorney General),* 2016 SCC 4;
2. Dr. Ellen Wiebe is authorized to provide A.A. with a physician-assisted death, in the form of voluntary euthanasia by lethal injection, at A.A.'s request and in compliance with the guideline issued by the College of Physicians and Surgeons of British Columbia (approved January 21, 2016 and entitled *Interim Guidance - Physician-assisted Dying)* ("College Guideline").
3. A physician licensed for practice with the College of Physicians and Surgeons of British Columbia is authorized to engage in the associated conduct required under the College Guideline in order to enable Dr. Wiebe to provide a physician-assisted death to A.A. in compliance with the College Guideline.
4. A registered nurse holding practising status with the College of Registered Nurses of British Columbia is authorized to assist Dr. Wiebe with the set up for the lethal injection as part of the physician-assisted dying process for A.A.
5. A registered pharmacist holding practising status with the College of Pharmacists of British Columbia is authorized to dispense drugs for A.A. as part of the physician-assisted dying process for A.A.
6. Dr. Wiebe, a physician authorized under paragraph 3, a nurse authorized under paragraph 4, and a pharmacist authorized under paragraph 5 are hereby exempt from the application of s. 14 and 241(b) of the *Criminal Code,* R.S.C. 1985, in relation to the conduct authorized under this order.
7. The death of A.A. as a result of physician-assisted dying authorized pursuant to this order is deemed not be a reportable death for purposes of section 2 of the *Coroners Act,* S.B.C. 2007, c.15.

[10] The petition has now been heard, and these reasons for judgment will address the petition and my decision with respect thereto.

Discussion

[11] To my knowledge, this is the fourth application of its kind to come before a superior court in this country. As a result, I have the benefit of the considered judgments of Madam Justice Martin of the Alberta Court of Queen's Bench in *H.S. (Re)*, 2016 ABQB 121 [*Re*

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H.S.], Mr. Justice Perell of the Ontario Superior Court of Justice in *A.B. v. Canada*, 2016 ONSC 1912 [*A.B.*], and Chief Justice Joyal of the Manitoba Court of Queen's Bench in *Patient v. Attorney General of Canada et al*, 2016 MBQB 63 [*Patient*].

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[12] The question on this application is whether the petitioner meets the required criteria so as to qualify for the constitutional exemption already granted by the Supreme Court in *Carter 2016.*

[13] My task is confined to an adjudication or determination respecting whether the petitioner falls within the group of persons to whom the constitutional exemption has already been granted. As described by Madam Justice Martin in *Re H.S.* at paras. 58 – 59, that role is:

> [58] … simply to determine whether a particular claimant meets those articulated criteria. The singular question the Supreme Court has directed the superior courts to answer in this type of application is whether the applicant falls within that group. This limited inquiry is individual- and fact-specific. The motions judge must be mindful of the legal framework and overall constitutional context of the inquiry; it is a rights-rich context. However, there is no opportunity or need to re-litigate the various rights and interests fully considered by the Supreme Court's unanimous decision in *Carter 2015.*
>
> [59] The question, properly understood after *Carter 2016,* is: does this person fall within the group of persons to whom a constitutional exemption has already been granted?

[14] The constitutional exemption articulated in *Carter 2015* is available where:

(1) the individual is a competent adult;

(2) the individual clearly consents to the termination of life;

(3) the individual has a grievous and irremediable medical condition (including an illness, disease or disability); and

(4) the medical condition causes enduring suffering that is intolerable to the individual in the circumstances and cannot be alleviated by any treatments acceptable to the individual.

[15] The petitioner's application is supported by the her own evidence, her spouse's evidence, and further, the affidavits of her family practitioner of decades, and Dr. Ellen

Wiebe, a family practitioner who has agreed to assist the petitioner in the termination of her life.

[16] On the basis of this evidence in these affidavits, I find that the petitioner is experiencing enduring and intolerable pain and distress and that her quality of life has deteriorated dramatically over the last 6 years, to the point that her suffering is now unbearable for much longer.

[17] Turning to the *Carter 2015* criteria for an exemption from the extension of the suspension of invalidity of ss. 14 and 241(b) of the *Criminal Code* provided for in *Carter 2016*, I will address each in turn.

a) Competence

[18] I adopt the analysis of Chief Justice Joyal in *Patient* at para. 65 with respect to the criterion of competence:

> [65] The applicant in the present case submits that "competence" refers to decision-making capacity. The applicant is presumed to be competent. The applicant submits that the common law definition of capacity in the context of making healthcare decisions speaks of "being able to understand the nature, the purpose and consequences of proposed treatment." See *Cuthbertson v. Rasouli*, 2013 SCC 53 at para. 19, [2013] S.C.R. 341. "Treatment" is defined as "anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment…" See *The Health Care Directives Act*, C.C.S.M. c. H27 at s. 1. The Supreme Court acknowledges that administering medication to hasten death clearly constitutes "treatment". See *Cuthbertson*, *supra*.

[19] As I have stated above, the petitioner is an adult. In the circumstances of the present case, the petitioner's capacity has been confirmed by both of the physicians who provided affidavits. Each physician acknowledged that the petitioner is fully competent. While both commented that the petitioner has experienced depression in the past; that condition was successfully treated with medication. Both of the doctors have confirmed that in each of their views, the petitioner is able to reasonably assess the treatment options available to her and that she is competent to choose the course of action that best suits her needs and wishes.

[20] The views of these physicians are shared by the petitioner's husband.

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[21] I therefore find that the petitioner has the competency and capacity to consent to the termination of her life.

b) Consent

[22] I accept that the petitioner understands:

a) her medical condition, diagnosis, prognosis, care options;

b) the risks associated with her treatment and the care options;

c) the risks associated with a physician-assisted death; and

d) the process that will be used to provide the physician-assisted death.

[23] The petitioner's physicians have formed and expressed their opinions that her consent to physician-assisted death is one which is informed, free, voluntary and clear.

[24] The petitioner's husband also addresses her request for assistance in preparing for a physician-assisted death and her choice to seek a physician-assisted death.

[25] The petitioner has sworn that she understands fully that this is her decision and that it is a decision which she can change at any point in time. She has sworn, and I accept, that her decision to obtain a physician-assisted death was made freely and voluntarily, without influence or coercion by anyone.

[26] I am satisfied that the petitioner has carefully and thoughtfully come to her decision to seek a physician-assisted death and that she fully and freely consents to the termination of her life.

c) Grievous and Irremediable Medical Condition that Causes the Petitioner Enduring Suffering that is Intolerable to Her in the Circumstances of her Condition

[27] Mr. Justice Perell explained the meaning of a grievous and irremediable medical condition in *A.B.* at para. 25:

> [25] With respect to the second criterion, a grievous medical condition connotes that the person's medical condition greatly or enormously interferes with the quality

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> of that person's life and is in the range of critical, life-threatening, or terminal. An irremediable medical condition connotes that the medical condition is permanent and irreversible. …

[28] As indicated above, the petitioner has been diagnosed with multiple sclerosis. The evidence establishes that her condition is a grievous and irremediable medical condition, in that it greatly interferes with the quality of her life, it is at a critical stage, and is permanent and irreversible. She has clearly stated to her husband, to her treating physician, to Dr. Wiebe, and in her affidavit filed with the court that she is suffering from enduring and intolerable pain. Her husband attested that he has watched her suffer through enormous pain and that her quality of life has consistently deteriorated.

[29] *Carter 2015* also specifically recognizes that a patient is not required to undertake treatments that are not acceptable to the patient. In the present case, the petitioner affirms that there are no treatments available that could acceptably alleviate her symptoms. I am satisfied that her suffering cannot be alleviated by any treatment that is acceptable to her.

[30] *Carter 2015* requires that to justify an exemption from the suspension of the declaration of invalidity of ss. 14 and 241(b) of the *Criminal Code*, the petitioner's grievous and irremediable condition must cause enduring suffering that is intolerable in the circumstances.

[31] During the oral submissions I raised with counsel for the petitioner a concern that the proposed period until June 6 of this year within which the petitioner sought to be exempted from the extension of the suspension of the declaration of invalidity of ss. 14 and 241(b) of the *Criminal Code* was inconsistent with a finding that her condition was intolerable as required by *Carter 2016.*

[32] I was advised that the full time period proposed was not expected to be necessary, and since the oral submissions, the petitioner has confirmed that a shorter period would be sufficient. I accept her evidence that for personal reasons, she wishes to have a period until May 4th of this year within which to access a physician-assisted death.

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[33] In the result, I am satisfied that the petitioner meets all the criteria under para. 127 in *Carter 2015*. She is accordingly permitted a physician-assisted death up to and including the 4th day of May 2016, if she so chooses.

d) Relief Ordered

[34] The petitioner has abandoned the third and seventh terms of the order sought in her petition, and those terms will therefore not be ordered.

[35] Sections 14 and 241(b) of the *Criminal Code* do not address the ability of an individual to take his or her life, but rather the ability of a person to consent to have death inflicted on her, or to aid or abet a person to commit suicide.

[36] In order to provide the petitioner with the remedy she seeks, it is necessary to relieve not only the petitioner but those whose help she seeks from the extension of the suspension of invalidity of ss. 14 and 241(b) of the *Criminal Code* provided for in *Carter 2016*.

[37] At the hearing of this petition, counsel for the petitioner advised the Court that she had revised the final paragraph of the order sought to reflect the fact that the medical professionals assisting A.A. were to be declared exempt from *Carter 2016*'s extension of the suspension of the declaration of invalidity of ss. 14 and 241(b) of the *Criminal Code*, rather than from the application of the provisions themselves.

[38] In *PHS Community Services Society v. Attorney General of Canada,* 2008 BCSC 661, var'd 2010 BCCA 15, aff'd 2011 SCC 44, drug users within the confines of the Vancouver Safe Injection Site ("Insite"), were not liable to prosecution for possessing a controlled substance contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] pursuant to exemptions by the Federal Minister of Health under s. 56 of the *CDSA*. The initial exemptions, based on necessity for a scientific purpose, were granted for a term of three years and subsequently extended twice.

[39] When further extensions appeared unlikely, Mr. Justice Pitfield was asked to provide a declaration that ss. 4(1) and 5(1) of the *CDSA* infringed s. 7 of the *Charter* and were of no force and effect. At para. 159 of his reasons for judgment, Pitfield J. determined:

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> I suspend the effect of the declaration of constitutional invalidity until June 30, 2009. In the interim, and in accordance with the direction of the Supreme Court of Canada in *R. v. Ferguson*, 2008 SCC 6, 228 C.C.C. (3d) 385 at para. 46, I grant users and staff at Insite, acting in conformity with the operating protocol now in effect, a constitutional exemption from the application of ss. 4(1) and 5(1) of the *CDSA*.

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[40] I am prepared to grant a similar order in this case granting the petitioner and those whose help she seeks the relief contemplated in *Carter 2016*, specifically, an exemption from the extension of the suspension of invalidity of ss. 14 and 241(b) of the *Criminal Code*.

[41] The fourth and fifth terms of the order sought in the petition grant permission for an unnamed pharmacist and an unnamed nurse to assist Dr. Wiebe with the planning and conduct of the physician-assisted death. At the hearing of this petition, I declined to authorize the assistance of such unnamed individuals. I have since received the affidavits of two pharmacists and two nurses who are prepared to provide the assistance needed, and will authorize those specific individuals to provide that assistance.

[42] The individuals who intend to rely upon my order must be named in the order if they are to have such an exemption, but the order will, as requested, be maintained in the sealed file in this case, except to the extent it is necessary for the petitioner, or those who are authorized to assist her, to present the authorization order itself for her to obtain access to a physician-assisted death.

Conclusion

[43] In conclusion, I have determined that A.A. meets the requirements set out in *Carter 2015*, and therefore comes within the class of persons to which the Supreme Court of Canada granted a constitutional exemption from the extension of the suspension of the declaration of invalidity of ss. 14 and 241(b) of the *Criminal Code* in *Carter 2016*. I therefore make the following declarations and orders:

a) A.A. comes within the scope of the constitutional exemption granted by the Supreme Court of Canada in *Carter v. Canada (Attorney General),* 2016 SCC 4.

b) Dr. Ellen Wiebe is authorized to provide A.A. with a physician-assisted death, in the form of voluntary euthanasia by lethal injection, at A.A.'s request and in

compliance with the guideline issued by the College of Physicians and Surgeons of British Columbia (approved January 21, 2016 and entitled *Interim Guidance - Physician-assisted Dying*).

c) Either of the two registered nurses who have sworn affidavits in these proceedings is authorized to assist Dr. Wiebe with A.A.'s physician-assisted death.

d) Either of the two registered pharmacists holding practising status with the College of Pharmacists of British Columbia, who have sworn affidavits in these proceedings, is authorized to dispense drugs for A.A. as part of the physician-assisted dying process for A.A.

e) Dr. Wiebe, either of the two registered nurses who have sworn affidavits in these proceedings and either of the two registered pharmacists who have sworn affidavits in these proceedings, in relation to the conduct allowed under this order, are hereby exempt from the suspension of the declaration of invalidity of ss. 14 and 241(b) of the *Criminal Code*, R.S.C. 1985, c. C-46, made by the Supreme Court of Canada in *Carter v. Canada*, 2015 SCC 5, and extended in *Carter v. Canada*, 2016 SCC 4.

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The Honourable Chief Justice Hinkson