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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
PATIENT, Applicant, - and - ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF MANITOBA, PHYSICIAN A, PHYSICIAN B, PHYSICIAN C, PHYSICIAN D, AND WINNIPEG REGIONAL HEALTH AUTHORITY, Respondents.	John Myers and Allison Fenske for the Applicant Sharlene Telles-Langdon for Attorney General of Canada Heather Leonoff, Q.C. and Deborah Carlson for Attorney General of Manitoba Helga Van Iderstine and Jennifer Litchfield for the respondent physicians Daniel Ryall for Winnipeg Regional Health Authority Chris Wullum for media outlets CBC, CTV and Global Judgment Delivered: March 18, 2016

***RESTRICTION ON PUBLICATION**: Pursuant to a court order, there is a publication ban with respect to any identifying information relating to the applicant, the applicant's family, and any physicians, pharmacists, nurses, social workers or other healthcare providers who provide assistance to the applicant. This ban extends to the applicant's age, gender and any description regarding the symptoms of the applicant's diagnosis.*

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] These reasons follow my oral disposition delivered three days ago.

[2] The applicant is an adult who suffers from and is in the final stages of two terminal diseases. As a consequence of those diseases, the applicant is living with and enduring unbearable pain. The applicant's health is rapidly deteriorating. The applicant likely has about one month to live. The applicant now seeks to end his/her life by means of a physician-assisted death pursuant to the Supreme Court of Canada judgment in ***Carter v. Canada (Attorney General)***, 2016 SCC 4, [2016] S.C.J. No. 4 (QL) ("***Carter 2016***"). The unopposed and unchallenged affidavit evidence on this application demonstrates that the applicant's family, attending physicians and psychiatrist all support the application. None of the named respondents expressed any opposition to this application.

[3] In addition to an order allowing the applicant to receive physician-assisted death, the applicant also seeks a confidentiality order to protect the identity of the applicant, the applicant's family and any physicians, pharmacists, social workers or other healthcare professionals who provide assistance to the applicant.

[4] Given the orders sought on this application, the issues for my determination reduce to the following questions:

(1) Should this court make a confidentiality order to protect the identity of the applicant, the applicant's family, and any physicians, pharmacists, social workers or other healthcare professionals who provide assistance to the applicant?

(2) Has the applicant established that he/she meets the criteria set out in ***Carter v. Canada (Attorney General)***, 2015 SCC 5, [2015] 1 S.C.R. 331 ("***Carter 2015***"), qualifying for the constitutional exemption granted by the Supreme Court and thereby allowing the applicant to receive a physician-assisted death?

[5] For the reasons that follow, I have answered both of the above questions in the affirmative. Given the order that flows from my affirmative answer to question 1, these reasons are written so as to ensure the anonymity, the de-identification and the exclusion of any detail that might, in the very unique circumstances of this particular applicant, compromise the confidentiality sought to be protected.

II. OVERVIEW

[6] Pending new legislation, under existing law, it remains a crime in Canada to assist another person in ending their own life. However, two recent Supreme Court of Canada decisions operate to permit physician-assisted death where certain criteria are met.

[7] It should be clear to an informed citizen that this and like applications arising from ***Carter 2016*** are not about the foundational and normative

question surrounding the desirability of physician-assisted death. The principal question on this and similar applications made pursuant to ***Carter 2016*** is confined to whether an applicant has met the required criteria so as to qualify for the constitutional exemption already granted by the Supreme Court in ***Carter 2016*** which allows an applicant to receive a physician-assisted death. However strongly held the differing and opposing views have been and will continue to be respecting this subject generally and the Supreme Court's reasoning more specifically, Canada's high court has in ***Carter 2015*** unanimously and authoritatively pronounced itself. The rule of law and the principle of *stare decisis* now require that the judgment in ***Carter 2015*** and any subsequent legislative refinement be respectfully followed and applied.

[8] In ***Carter 2015***, a unanimous Supreme Court decided that the provisions of the ***Criminal Code***, R.S.C. 1985, c. C-46, which prohibit physician-assisted dying, violate an individual's s. 7 ***Charter*** rights to life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice. As a result, the Supreme Court struck down those provisions of the ***Code*** prohibiting physician-assisted death. Given the complexity of the issue, the Supreme Court suspended the declaration of invalidity respecting the impugned provisions for 12 months ending February 6, 2016. In ***Carter 2015***, the Supreme Court specifically decided to not create a mechanism for personal exemptions during the 12-month period in which the declaration of invalidity was suspended.

[9] A definitive legislative response did not come by February 6, 2016 and such a response is still awaited from the Government of Canada. The challenge remains enormously complex, not only because of the moral and ethical grey zones, but also, for reasons of jurisdiction. The subject matter implicates both the criminal law (federal jurisdiction) and areas of health law (a matter of concurrent jurisdiction). As was noted by the Supreme Court of Canada in ***Carter 2015*** at para. 53:

> ... Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic ... This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. ...

[10] Prior to February 6, 2016, the date on which its suspension of the declaration of invalidity was to expire, the Supreme Court heard the Government of Canada's application for extension of the suspension. In ***Carter 2016***, all judges of the Supreme Court agreed to grant an extension in respect of the suspended declaration of invalidity on the basis that the Government of Canada needed more time to craft an appropriate legislative response. However, the extension was to be limited to four months, meaning the declaration of invalidity from ***Carter 2015*** will now expire on June 6, 2016. Notwithstanding the agreement by all members of the court concerning the extension of four months, the court did split on what ought to occur during the four-month period, if in Quebec and elsewhere, a person sought physician-assisted death. The four judges in the minority took the position that for the reasons explained in ***Carter 2015*** at para. 125, they would not have exempted Quebec from the extended

suspension or allowed personal exemptions. Conversely, the five-judge majority granted both exemptions.

[11] Given the Supreme Court of Canada's judgment in ***Carter 2016***, the task of a superior court judge in applications such as this one, is confined to an adjudication or determination respecting whether the applicant falls within the group of persons to whom the constitutional exemption has already been granted. In ***H.S. (Re)***, 2016 ABQB 121, [2016] A.J. No. 197 (QL), Martin J. aptly described the role of the superior court motions judge as it now flows from the majority judgment in ***Carter 2016***:

> 57 That the majority have already granted the constitutional exemption as a remedy to the group who qualify under para 127 of ***Carter 2105*** [*sic*] has important implications for the nature and scope of the hearing to be conducted on such applications before the motions judge. The judge is not called upon to conduct a full-blown inquiry as to whether a claimant has established an individual case for a personal constitutional exemption, a balancing exercise that would require the participation of Attorneys General and perhaps other affected parties.
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> 58 Instead, the job of the motions judge is 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***.
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> 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?

Privacy Concerns

[12] In addition to the determination I must make in the present case concerning whether the applicant qualifies for the constitutional exemption

granted by the Supreme Court of Canada in ***Carter 2016*** (allowing him/her to receive a physician-assisted death), I must also address an important preliminary issue respecting confidentiality and privacy. In that connection, the applicant and his/her family do not want their names revealed to the public. They want to spend the remaining time together in privacy and peace. They do not want to be contacted or harassed by anyone who may not agree with the applicant's decision to end his/her life.

[13] The applicant's healthcare team similarly does not want their names revealed to the public. Through various affidavits, the doctors who make up that healthcare team have expressed their concerns about the negative effects on their professional reputations and the risk to their personal safety if their identities become known.

[14] As it relates to the question of confidentiality and privacy of the healthcare team, the applicant submits that because he/she cannot himself/herself end his/her life on the terms desired without the assistance of his/her healthcare team, even with the required court order, the concerns raised by his/her physicians, if not addressed, will impact the ability to access what may be a justified physician-assisted death. According to the applicant, the confidentiality order is necessary to protect not only his/her own privacy, but also, to alleviate the privacy concerns of the healthcare team. Without such an order also attaching to the healthcare team, members of that team may not assist the applicant and the applicant, in turn, will not be able to exercise his/her

constitutional right to a physician-assisted death. In setting out that position with respect to the need for privacy and confidentiality, the applicant contends that the benefits of a confidentiality order as requested, far outweigh any harmful effects on the open court principle and freedom of expression. The applicant submits that the identities of the parties involved and the details of the terminal diseases are only "slivers of information" and that keeping them confidential will not materially impact the public interest or the media's ability to report on the issue of physician-assisted death or the essential details and evidence in this case.

[15] Legal counsel appeared on behalf of the CBC, CTV and Global News. Somewhat surprisingly, counsel for those media outlets advised that he was instructed to not oppose the application for confidentiality. Indeed, the media did not contest or challenge any part or aspect of the requested and sweeping restrictions contemplated in the confidentiality order sought by the applicant.

[16] Apart from the physicians about whose position I have already written, none of the other responding parties oppose the requested restrictions, de-identification or bans on publication.

[17] Notwithstanding the above positions on the issue of privacy and confidentiality, the court did – consistent with its role as gatekeeper and guardian of the open court principle and the public interest – attempt to conduct its own inquiries and analysis in respect of the restrictions sought in the proposed confidentiality order. In addition to my questions posed to counsel at

the hearing, my related analysis in this connection is found at paras. 31 to 61 of this judgment.

[18] Respecting the issue of confidentiality and privacy, it should be noted that at no time did this hearing proceed in camera. The appearances and submissions were made in open court with access unrestricted and with nothing censored or redacted save for those identities and details that were the subject of the proposed confidentiality order which was ultimately granted. All the requested documentary materials which were filed either to initiate and/or support this application, were filed in a way which reflects "a two-record approach". There is a public record which contains pseudonyms and/or initials. There is also a court record for the judge's eyes only which, although otherwise identical to the public record, does not include the redactions represented by the pseudonyms and initials used to protect the privacy concerns earlier mentioned.

[19] My determination in respect of the applicant's request for confidentiality (explained later in this judgment) has now resulted in an order which will permanently seal what I have referred to above as the court record containing no pseudonyms or initials.

III. EVIDENTIARY FOUNDATION FOR THIS APPLICATION

[20] Prior to proceeding with a brief outline of the essential and salient facts which constitute the background and context for the applicant's request, I will note the affidavit evidence that has been adduced on this application and from which relevant and material facts can be found. The manner in which I list the

affidavits reflects the confidentiality determination that I have made and which I explain later in these reasons.

[21] The following affidavits in their redacted form, form the evidentiary foundation for this application:

(1) affidavit of Patient affirmed March 13, 2016;

(2) affidavit of Patient's spouse, affirmed March 13, 2016;

(3) affidavit of Physician A, affirmed March 13, 2016;

(4) affidavit of Physician B, affirmed March 13, 2016;

(5) affidavit of Physician C, affirmed March 13, 2016;

(6) affidavit of Physician D, affirmed March 13, 2016.

[22] I note that Physician D, in addition to being a physician, is also a specialist psychiatrist and is duly authorized and licensed to practise psychiatry by the College of Physicians and Surgeons of Manitoba.

IV. THE UNCONTESTED AND UNCHALLENGED FACTS ARISING FROM THE AFFIDAVITS

[23] The applicant lives with his/her spouse in Winnipeg. The applicant has been diagnosed with two terminal diseases. One of the diagnosed diseases causes progressive loss of function and death. Currently there are no treatments available to alter the course of this disease. Respecting the second terminal disease, there are currently no treatments available that are acceptable to the applicant.

[24] The applicant is experiencing enduring and intolerable pain and distress due to the effects of both diseases. His/her quality of life has significantly

deteriorated and he/she is receiving palliative care. The applicant will not be able to leave the hospital and likely has about one month to live.

[25] The applicant is fully informed about all aspects of his/her medical condition, treatment and palliative care options. He/she is physically incapable of ending his/her life without assistance and has made a free and voluntary decision to seek out a physician-assisted death. In suffering what he/she contends is a grievous, intolerable and irremediable medical condition, he/she wishes to spend his/her remaining days in privacy and die with the dignity and the company of family. It is important to the applicant and the family that they not be subjected to public attention they believe would likely result if any identifying information about them was disclosed.

[26] As part of the unchallenged and uncontradicted affidavit evidence, the applicant expresses concern that if the identities of the treating physicians and other members of the healthcare team are made public, they may, as some have suggested, be reluctant to be involved in the applicant's physician-assisted death. If that occurs, the applicant asserts that he/she will not be able to exercise his/her constitutional right to die with dignity.

[27] In addition to the privacy concerns expressed by way of affidavit by the applicant and the applicant's spouse, there are also privacy concerns expressed in the affidavit evidence on the part of the physicians who form part of the applicant's healthcare team. In that regard, Physician A, Physician B and Physician C have assessed the applicant to determine the applicant's eligibility for

physician-assisted death. They have also assessed the applicant's competency in relation to the obtaining of the applicant's consent. Physician A and Physician C have also reviewed the applicant's medical records and discussed the applicant's care with the applicant's specialists. Physician A, Physician B and Physician C are aware and have asserted in their affidavits that physician-assisted death is a controversial subject not only among the general public, but among physicians in Manitoba. Many physicians are not willing to offer this service due to fears about negative impacts on their professional reputation and risk to their personal safety. Physician A, Physician B and Physician C are three of a group of physicians in Manitoba willing to offer this service, but they all share the same professional and personal concerns were their names to be made public. They assert that if the names of physicians involved in a physician-assisted death are not kept confidential, it will reduce the likelihood that they will be willing to provide this service.

[28] Physician D, the applicant's treating psychiatrist, is also aware that physician-assisted death is controversial and often highly divisive among the general public and other physicians. Physician D believes there could be professional and personal consequences if Physician D's name or the names of other healthcare professionals were made public and is requesting that that not occur in respect of the application. In addition, Physician D has expressed that confidential and personal relationships with patients, including the applicant, must be taken very seriously. In that context, as a psychiatrist, Physician D

reminds the court that Physician D's name would not normally be publicly associated with a patient.

[29] Physician D also expresses concern that if his/her name became public, it would impair Physician D's therapeutic relationship with other patients because they might think that Physician D had counselled physician-assisted death in the applicant's case. Had Physician D known that Physician D's name might be revealed in one of the first physician-assisted death cases in Canada, Physician D would have seriously questioned whether the needed counselling for the applicant could have been provided.

[30] Notwithstanding those portions of the affidavits of Physicians A, B, C and D expressing concerns as it relates to what they say is the needed confidentiality, all of those same physicians, to one extent or another, provide evidence supportive of this application. Those affidavits address the criteria that must be satisfied in order to access the constitutional exemption now available pursuant to ***Carter 2016***. I will address those criteria and the connected evidence when I deal with what has been identified earlier as the second question or issue as set out at para. 4.

V. ANALYSIS AND DECISION RE: ISSUE 1

ISSUE 1: Should this court make a confidentiality order to protect the identity of the applicant, the applicant's family, and any physicians, pharmacists, social workers or other healthcare professionals who provide assistance to the applicant?

[31] To protect the privacy interests identified in the related submissions, the applicant seeks, amongst other orders, an order that reads as follows:

> There shall be a publication ban with respect to any identifying information relating to the Applicant, the Applicant's Family, and any physicians, pharmacists, nurses, social workers or other healthcare providers who provide assistance to the Applicant, in particular the publication ban extends to the Applicant's age, gender and any description regarding the symptoms of the Applicant's diagnosis.
>
> [see para. 3 of order dated March 15, 2016]

[32] To the extent that any such confidentiality order can be justified, authority for the accompanying restrictions can be found in the following: ***The Court of Queen's Bench Act***, C.C.S.M. c. C280, ***Court of Queen's Bench Rules***, Man. Reg. 553/88, and the common law.

[33] Section 77(1) of ***The Court of Queen's Bench Act*** gives this court the power to order a document be sealed and not form part of the public record. Queen's Bench Rule 2.03 permits this court to dispense with compliance with Queen's Bench Rules "… where and as necessary in the interest of justice …". This would include dispensing with the rules requiring forms and pleadings set out in the full names of the parties. In addition, this court has inherent jurisdiction under the common law to order a publication ban of confidential information when necessary and when the salutary effects of the publication ban outweigh its deleterious effects. See ***Dagenais v. Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835 at 878; ***Sierra Club of Canada v. Canada (Minister of Finance)***, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 45.

[34] Restrictions which limit the potential to communicate otherwise public information emanating from a courtroom or a court proceeding, risk compromising the "open court principle". It is well established that access to the

judicial process by the public and the media is "the very soul of justice". See ***Sierra Club of Canada***, *supra*, at para. 74. As Martin J. in ***H.S. (Re)*** stated at para. 80:

> The Court is very mindful of the important reasons underlying the open court principle. The Supreme Court of Canada has held that this principle is "a hallmark of a democratic society", that it ensures "that justice is administered in a non-arbitrary manner, according to the rule of law" and that it is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter*": see ***Dagenais v Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835, ***R v Mentuck***, [2001] 3 S.C.R. 442, 2001 SCC 76 and ***Re Vancouver Sun***, 2004 SCC 43, 2 S.C.R. 332.

[35] I accept the applicant's submission that although it is a "hallmark of a democratic society", the open court principle is not absolute and "there are exceptions to the general rule that the courts must be open to all". See ***Apotex Fermentation Inc. v. Novopharm Ltd.*** (1995), Man.R. (2d) 241 (C.A.), [1994] M.J. No. 357 (QL) at para. 30. As has been submitted by the applicants, curtailing access to the public and limiting the right to freedom of expression are at times justified for the purposes of protecting "social values of superordinate importance to society…". See ***Histed v. Law Society of Manitoba***, 2005 MBCA 106, 195 Man.R. (2d) 224 at para. 22.

[36] In recognizing and reaffirming the important interests animating the open court principle, this court must simultaneously attempt to reconcile those interests with other important societal interests and individual rights. Yet even in that task, this court is properly reminded that the Supreme Court of Canada has cautioned against always characterizing a publication ban as a conflict between competing rights. It was recognized by Lamer C.J. in ***Dagenais***, *supra*, at pages

882-883, that publication bans may in fact be consistent with the right to a fair hearing because they may, in some instances, increase the chances that, for example, a witness will testify without fear of publicity and/or otherwise protect vulnerable witnesses and the privacy interests of individuals and their families.

[37] When any issue arises respecting any and all discretionary orders that limit freedom of expression and freedom of the press in relation to legal proceedings, it is the ***Dagenais/Mentuck*** test that governs. See ***Dagenais***, *supra*, and ***R. v. Mentuck***, 2001 SCC 67, [2001] 3 S.C.R. 442. The test provides courts a discretion to order a publication ban when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[38] The first part of the test as expressed above addresses the issue of necessity. The second part of the test can be seen to address the issue of proportionality.

[39] To establish necessity under the first part of the test, there must be a "serious risk well grounded in the evidence". See ***Sierra Club of Canada***,

supra, at para. 45. As noted in ***A.B. v. Bragg Communications Inc.***, 2012 SCC 46 at para. 15, [2012] 2 S.C.R. 567, "while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernible harm." ***A.B. v. Bragg*** was a cyber bullying case. In that case, the lower courts found that there was little if any direct evidence of specific harm to A.B. should her identity be made public. However, the Supreme Court recognized that children are inherently vulnerable and that Canadian law has for some time attempted to protect the privacy of young people, particularly in the justice system.

[40] As it relates to proportionality under the second part of the ***Dagenais/Mentuck*** test, it would seem that the more minimal the effects of a publication ban are on the open court principle and the exercise of the right of freedom of expression, the easier such a restriction is to justify. See ***Sierra Club of Canada***, *supra*, at para. 75.

[41] In ***Sierra Club of Canada*** at para. 86, the court noted that when assessing the impact of a confidentiality order on the public interest, the court should consider the nature and the scope of the information sought to be protected. In that regard, I note the examples provided by the applicant. In ***A.B. v. Bragg***, *supra*, at paras. 28-29, the applicant sought to protect any information that could reveal her identity. The Supreme Court of Canada noted that an individual's identity is only a "sliver of information" and keeping it confidential has a minimal impact on the open court principle and freedom of the

press. The applicant also noted that in ***Sierra Club of Canada***, the Supreme Court of Canada placed emphasis on the fact that the protected information was "confidential in nature" and "accumulated with a reasonable expectation of it being kept confidential" (see para. 60). Similarly, in ***DiMartino v. DiMartino***, 2013 MBQB 60 at para. 24, 296 Man.R. (2d) 153, this court placed emphasis on the fact that the records in question were protected under ***The Child and Family Services Act***. In that case, prior to the granting of a permanent order sealing the records, the court looked to ***The Child and Family Services Act*** for guidance on how to uphold confidentiality "as a central or governing principle while at the same time permitting an appropriate degree of transparency and public scrutiny of the court process" (see para. 24). For other cases involving similar confidentiality orders, see ***Fontaine v. Canada (Attorney General)***, 2014 MBQB 122 at para. 5, 307 Man.R. (2d) 1; ***Doe (Trustee of) v. Awasis Agency of Northern Manitoba*** (1990), 67 Man.R. (2d) 260 (Q.B.); and ***Apotex Fermentation Inc.***, *supra*.

[42] In any assessment respecting the duration of a confidentiality order, it should be understood that such an order may be of a limited or more permanent duration. See ***Toronto Star Newspapers Ltd. v. Ontario***, 2005 SCC 41 at para 3, [2005] 2 S.C.R. 188; ***R. v. Mentuck***, *supra*, at para. 59; and ***DiMartino***, *supra*, at paras. 30-31.

[43] As it relates to the confidentiality issue, I have had an opportunity to review the recent decisions from the limited number of physician-assisted death

cases arising in other jurisdictions. In that regard, separate and apart from the present application, there appears to be at the time of this application only two other individuals in Canada who have applied for a constitutional exemption to allow physician-assisted death. The courts in both those cases granted the applicant's request for confidentiality orders to protect their identity and the identity of the families and healthcare professionals.

[44] The applicant in ***H.S. (Re)***, *supra*, requested an in camera hearing, a sealing order, a publication ban and permission to use initials to protect her identity and the identity of her physicians and other individuals involved. That was the first application of its kind in Alberta and it would appear that the applicant did not request the confidentiality order until the actual hearing. In considering the request, Martin J. noted at para. 79 that "it is preferable for matters of confidentiality to be addressed when the Originating Application is filed to allow the motions judge to consider whether there is any need for preliminary orders." In considering the ***Dagenais/Mentuck*** test, Martin J. acknowledged the importance of the open court principle and freedom of expression in general. However, she concluded as follows:

> 81 … I determined that Ms. S.'s privacy, dignity and autonomy were the more important interests and the hearing was held *in camera*. This application pertains to Ms. S.'s medical state and to the fundamental life choice she wishes to make. Nothing could be more personal and, in my view, the need to protect Ms. S.'s privacy outweighs the benefit of an open courtroom in the circumstances of this case. I also note that the subject of the hearing, being her medical diagnosis and current physical condition, falls within the category of information that ordinarily would be protected under privacy legislation.

[45] The second known case to date is the case of ***A.B. v. Canada (Attorney General)***, 2016 ONSC 1571, [2016] O.J. No. 1171 (QL). That case involved an applicant applying to the Ontario Superior Court of Justice for confidentiality orders that would allow him and his physicians to be identified anonymously. Confidentiality orders would also ban publication of his identity and that of his family and physicians and would seal the evidence, documents, pleadings and motion record. Unlike the Alberta case, the applicant did not seek an in camera hearing. In an effort to assist the court and minimize the deleterious effects of the confidentiality orders, the applicant made a number of proposals including filing a redacted application record with explanations as to what information had been removed.

[46] In ***A.B. v. Canada***, McEwen J. determined that both parts of the ***Dagenais/Mentuck*** test had been satisfied. He determined that a confidentiality order was needed so as to "ensure that the applicant, his family, physicians and other health care professionals, are not deterred from participating in a ***Carter*** application for fear of unwanted publicity and media attention." It was also noted that a confidentiality order "strikes the appropriate balance between public interest in open court proceedings and the salutary effects of a confidentiality order in this case." McEwen J. invoked ***Bragg Communications*** to support his conclusion that "cases involving physician-assisted dying warrant such restrictions, certainly to the extent of the moderate request being made by the applicant." The court went on to note the relevance

of the fact that A.B. was seeking only to redact identifying information and that such an approach represented "a very reasonable and moderate position concerning issues of confidentiality" (at para. 20). I note that in ***A.B. v. Canada***, McEwen J. rejected a number of arguments made by various media outlets who opposed the applicant's request. Those arguments included the submission that the media would not be able to make meaningful submissions based only upon a redacted record.

[47] Based on the unchallenged and unopposed affidavit evidence, the positions of all the parties, and on an application of the governing principles, I have determined that there is sufficient justification to grant the confidentiality order as requested. In my view, such an order is necessary in the particular circumstances of this case to prevent the serious risk to the exercise of the applicant's ***Charter*** right and there are no apparent reasonable alternative measures that will do so. It is also my view that in this case, the salutary effects of the order outweigh the deleterious effects. The relevant restrictions and prohibitions will be contained and reflected in the broader order attached as an appendix to this judgment.

[48] In explaining my decision to grant the requested confidentiality order, it is important at the outset to underscore how any such application for confidentiality and the related analysis will and must be very fact specific. Applications for confidentiality will by definition, to varying degrees, have implications for the application of the open court principle. As such, even with

the cumulative force of precedent in like cases, confidentiality orders cannot become perfunctory simply because of the admittedly delicate and private nature of the information that surrounds hearings such as these.

[49] Although in most cases there would seem to be absolutely nothing served by identifying an applicant or his/her family, in a different case, the combination of very unique facts, the open court principle, the position of the parties (and/or media) and the application of the ***Dagenais/Mentuck*** test may lead to a confidentiality order much different and more narrow than the one granted in the present case. For example, what position might a court take in a case involving an applicant suffering from a severe depression, whose psychiatrist has provided by way of an affidavit what the applicant purports is the necessary and supporting evidence to satisfy the ***Carter*** criteria? In such a potentially provocative and controversial scenario - where the boundaries of the ***Carter*** criteria may be exceeded - is there not a societal and public interest, perhaps different than that in the present case, so as to cause the acknowledged privacy interests to play out somewhat differently in the context of both parts of the ***Dagenais/Mentuck*** test? In contemplating that question, however hypothetical, it is important for courts to remember that as a consequence of ***Carter (2016)***, the Supreme Court requires superior courts in this transition period leading up to June 6, 2016, to engage in nothing short of an adjudication or at the very least, a determination based upon evidence. In an area as potentially controversial and fluid as that related to the interpretation and

application of the ***Carter*** criteria and the subject of physician-assisted death, the legitimating objectives of accountability and transparency may in some unique cases prior to June 6, 2016, require levels of openness that could discomfit both applicants and physicians.

[50] In the present case, the evidence establishes that the applicant's situation does indeed meet the requirements for a confidentiality order that allows the applicant, the family and the healthcare team to remain anonymous. Exercising my discretion under ***The Court of Queen's Bench Act***, the ***Court of Queen's Bench Rules*** and the common law, I will be ordering a limited publication ban and a limited sealing order so as to allow the use of initials or pseudonyms in the pleadings. In the unique and particular circumstances of this case, the publication ban will also extend to the applicant's age, gender and any description regarding the symptoms of the applicant's diagnosis. I make those limitations having accepted the applicant's submission that because of the comparatively rare nature of one of the terminal diseases and its combination with the second terminal disease, that combination along with the applicant's age and gender will make it more likely than not that the applicant's identity will be discerned by certain individuals in the community who may already know that the applicant suffers from the one particularly rare terminal disease.

[51] I have made the determination I have based on my conclusion that the confidentiality order is, pursuant to ***Dagenais/Mentuck***, both necessary and proportional.

The confidentiality order is necessary

[52] I accept the submissions of the applicant that there are few decisions more personal and private than the one the applicant has made to apply for a physician-assisted death. In the particular circumstances of this case, I also accept that the applicant's right to privacy to end his/her life ought to be respected in a way so as to ensure that his/her identity is not disclosed. If the applicant's identity is disclosed, I recognize that the applicant and the applicant's family may not be able to spend their remaining days in private in a way so as to provide a death with the dignity sought.

[53] In considering the necessity of confidentiality in this case, I am mindful of the fact that the applicant seeks to keep confidential only personal information that is already confidential under ***The Personal Health Information Act***, C.C.S.M. c. P33.5. With some exceptions, this act would normally prohibit the use or disclosure of personal health information without consent. I note that apart from what has to be acknowledged as the fact of this application and the filing of the needed substantiating medical evidence, the applicant has not formally waived his/her rights of privacy respecting his/her personal health information, nor his/her expectation of doctor/patient confidentiality with respect to the applicant's health.

[54] As part of the applicant's own argument for preserving his/her own privacy, I accept the link made by the applicant as between his/her privacy rights in this case and the privacy concerns of the applicant's healthcare team, were

the names of that healthcare team to be revealed. In their affidavit evidence, the applicant's physicians raise concerns that disclosure of their identity could give rise to professional and perhaps personal harm. In the circumstances of this case, while I cannot assess the extent to which those subjective concerns are justified, I can accept the fact of those concerns. In other words, justified or not, those concerns do exist and are truly held by the physicians. Given the absence of any opposition to any part of the applicant's order for confidentiality (inclusive of the healthcare team), it is not necessary in this case to determine whether the evidence adduced by the physicians constitutes sufficiently direct and compelling evidence of a specific harm faced by the physicians. It will suffice to note what I believe is an objectively discernible harm to the applicant as a result of sincerely held concerns on the part of the physicians. In that regard, I am in agreement with McEwen J. in ***A.B. v. Canada***, *supra*, that it is reasonable to believe that based on their concerns, physicians will be reluctant to assist terminally ill patients if they are publicly identified. In the particular circumstances of this case, given the imperatives of time, such reluctance could neuter the applicant's ability to realize what the Supreme Court has determined is a constitutional right.

The confidentiality order is proportional

[55] I have concluded, based upon the application of the second part of the ***Dagenais/Mentuck*** test, that the salutary effects of a confidentiality order

outweigh any deleterious effects on the rights and interests of the public in respect of the right to free expression and the administration of justice.

[56] I have no difficulty accepting that the applicant's health is rapidly deteriorating and while he/she may be at peace with his/her decision, there is undoubtedly the accompanying anxiety knowing that he/she is facing the end of life. I am persuaded that the contemplated confidentiality order, in the circumstances of this case, does give the applicant the assurance that he/she will not suffer from any additional stress related to disclosures that may reveal the applicant's identity. The confidentiality order should reassure the applicant's family that they will be able to spend their last days together as they choose.

[57] I am also persuaded that the confidentiality order contemplated reassures the applicant's healthcare team that they too will be protected from any of the consequences that they identified might dissuade them from assisting the applicant, thereby permitting the applicant to exercise his/her constitutional right. This reassurance to the physicians will ensure their assistance to the applicant. In any event, in my view, the identification of the physicians would not, in the specific circumstances of this application, provide anything integral or essential to the public's understanding of the determinations I must make respecting the applicant's satisfaction of the ***Carter*** criteria.

[58] I note that the physicians involved and named as respondents are only before the court by virtue of the applicant's request for a medical service which needs to be provided by a physician. The consequent risk of any revelation of a

physician's name is rooted in and isolated to this four-month extension period during which applicants are required to come before a superior court. Presumably, following June 6, 2016, future physician involvement in physician-assisted death will occur in another forum which will play out following obviously privileged communications as between the patient and his/her physicians and any other authorizing medical personnel. It is not difficult to understand why physicians might seem somewhat displeased by the apparent unfair exposure and loss of anonymity simply because of their ill-timed involvement during the four-month period prior to June 6, 2016.

[59] When I examine the deleterious effects of a confidentiality order in this instance, I note that the applicant is not seeking an in camera hearing that would ban the public and the media from the hearing. In the present case, the applicant sought simply to protect his/her identity and those of his/her family and healthcare providers. It is not unreasonable to argue, as the applicant has, that this "sliver of information" does not in the unique and particular circumstances of this case unduly restrict the media's exercise of its freedom of expression, nor does it cloak a legitimate public interest in undue secrecy.

[60] Given the nature of the information sought to be protected and the context, I have determined that the confidentiality order need be permanent.

[61] Let me conclude my discussion of the confidentiality aspects of this application by saying that notwithstanding my discretionary determination to grant the order, there are parts of this confidentiality order with which the court

is uneasy given their impact on the open court principle which I have acknowledged is not absolute. It will suffice to repeat, that these applications will be fact specific and future applications may give rise to determinations different than the ones I have made in the present case. It may not be in every case that confidentiality or anonymity will be assured as it relates to age, gender, the underlying disease/diagnosis, or the identity of the physicians who substantiate their support with affidavit evidence. There are no shortcuts in the related fact specific analysis and every case will be decided on its facts.

VI. ANALYSIS AND DECISION RE: ISSUE 2

ISSUE 2: Has the applicant established that he/she meets the criteria set out in Carter 2015, qualifying for the constitutional exemption granted by the Supreme Court of Canada and thereby allowing the applicant to receive a physician-assisted death?

[62] The Supreme Court of Canada in ***Carter 2016*** granted the constitutional exemption from ss. 14 and 241(b) of the ***Criminal Code*** to individuals who satisfy the criteria articulated in ***Carter 2015***. The constitutional exemption 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.

[63] The question of whether an applicant meets the requisite criteria for physician-assisted death is a factual inquiry and it should be limited to the applicant's individual circumstances. In the present case, the application is supported by the applicant's own evidence, his/her spouse's evidence, and further, the affidavits of Physician A, Physician B, Physician C and Physician D.

[64] Based upon the unchallenged and unopposed evidence that I have thoroughly reviewed, I have determined that the applicant does meet the criteria for a physician-assisted death.

The applicant is a competent adult

[65] The applicant in the present case submits that "competence" refers to a 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] 3 S.C.R. 341. "Treatment" is defined as "anything that is done for a therapeutic, preventive, 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*.

[66] In Manitoba, ***The Health Care Directives Act*** uses "capacity" to describe a person's ability to understand information relevant to making a

decision and their ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision. See ***The Health Care Directives Act***, s. 2.

[67] In the circumstances of the present case, the applicant's capacity has been confirmed by all the physicians who provided affidavits. Each physician acknowledged that the applicant is fully competent.

[68] It is worth noting that Physician D assessed the applicant from the perspective of a physician whose specialty is psychiatry. In that regard, Physician D did note that the applicant experienced reactive depression and anxiety when diagnosed with one of the terminal diseases approximately two years ago. The applicant explains that he/she dealt with some depression and anxiety in the face of that disease in a positive and proactive way, including following a treatment regime with Physician D. For the purposes of this application, Physician D notes at para. 8 of his/her affidavit that the applicant is able to reasonably assess the treatment options available and that he/she is competent to choose the course of action that best suits his/her needs and wishes.

[69] It need also be observed that Physician D took the added step of having consulted with Physician A, Physician B and Physician C, each of whom was of the opinion that the applicant was not actively depressed or suffering from any severe depressive episodes or other psychiatric illnesses that may have shaped the applicant's decision for requesting physician-assisted death.

[70] Finally, I note that the applicant's spouse has also confirmed in his/her personal view, the applicant is fully capable of making his/her own decisions. That view on the part of the applicant's spouse is formed on the basis of what is asserted as the applicant and the spouse's close, personal and longstanding relationship, including the numerous conversations about the applicant's wishes respecting physician-assisted death.

[71] I have concluded that there is in fact nothing on the evidence that calls into question either the applicant's competence or capacity.

The applicant clearly consents to the termination of life

[72] I am satisfied that the applicant fully and freely consents to the termination of his/her life. The applicant has attested that the decision to obtain a physician-assisted death was made freely and voluntarily and that he/she has not been influenced or coerced by anyone.

[73] It is similarly clear that the applicant understands his/her medical condition, diagnosis, prognosis, palliative care options and the risks associated with the treatment and palliative care options and any risks associated with a physician-assisted death. The applicant demonstrates similar understanding of the process that will be used to provide the physician-assisted death.

[74] I am satisfied that the applicant's decision to seek a physician-assisted death has not been entered into lightly. His/her desire for a physician-assisted death seems to be longstanding. The applicant has been contemplating this decision since his/her diagnosis with one of the diseases two years ago. The

applicant asserts that he/she understands fully that this is his/her decision and that it is a decision which he/she can change at any point in time.

[75] It is also the opinion of the applicant's physicians that the applicant's consent to physician-assisted death is one which is informed, free, voluntary and clear.

[76] Finally, on the issue of the applicant's clear consent, I note the applicant's spouse's affidavit which confirms the applicant's family's lengthy discussion about the progression of the applicant's medical condition. In that context, the applicant's spouse's affidavit addresses the applicant's request for assistance in preparing for a physician-assisted death and the applicant's ongoing determination in seeking out such end of life.

The applicant has a grievous and irremediable medical condition (including an illness, disease or disability)

[77] The applicant in the present case has been diagnosed with two different medical conditions. The evidence establishes that each condition alone would be considered a grievous and irremediable medical condition. The medical condition is terminal and the prognosis involves a life expectancy that has been estimated to be less than one month.

The applicant is experiencing enduring suffering that is intolerable in the circumstances and cannot be alleviated by treatment that is acceptable to the applicant

[78] The applicant has clearly stated to family, to treating physicians and in his/her affidavit filed with the court, that he/she is suffering from enduring and intolerable pain. That evidence is supported by the applicant's spouse who

affirms that he/she has watched the applicant suffer through enormous pain and watched as the applicant's quality of life has rapidly deteriorated. The evidence before me has established that the applicant's suffering cannot be alleviated by any treatment that is acceptable to him/her.

[79] While requiring that the grievous and irremediable condition must cause enduring suffering that is intolerable in the circumstances, ***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 applicant affirms that there are no treatments available that could alter one of the diseases. In respect of the other disease which is aggressive and in relation to which the applicant has been given weeks to live, the applicant discussed possible treatment options available with multiple physicians and specialists. In that regard, the applicant seems to acknowledge and understand that the few options available would have what the applicant says in his/her submission are "highly individualized" effects. At para. 1 of the applicant's affidavit, I note the following:

> … Some [treatments] could possibly prolong my life for only a few months and none of the available treatment will serve to improve my condition. I continue to suffer the effects of [disease 1] in addition to [disease 2]. I do not want any treatments that could prolong my suffering.

[80] The affidavit evidence from the physicians clearly demonstrates that the physicians involved in the applicant's care have had ongoing and in depth conversations with the applicant respecting all available treatment and pain management options. Despite what may have been some benefit from some of those treatment options, it is equally clear that the applicant continues to suffer

and any relief has been less than meaningful. The applicant has continued to express that he/she continues to suffer. The applicant has accordingly continued to express his/her ongoing desire for access to physician-assisted death.

[81] Based on the evidence before me, I have no difficulty concluding that the applicant's two terminal diseases, when taken together, have caused and continue to cause the applicant to experience enduring suffering that is intolerable in the circumstances and which cannot be alleviated by treatment that is acceptable to the applicant.

[82] In the result, I am satisfied, based on the evidence before me, that the applicant meets all the criteria under para. 127 in ***Carter 2015***. The applicant is accordingly permitted a physician-assisted death if the applicant so chooses.

_____ C.J.Q.B.