CITATION: I.J. v. Canada (Attorney General), 2016 ONSC 3380

COURT FILE NO.: AD-010/16

DATE: 20160524

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:)
I.J.) Emma Carver for the Applicant
Applicant))
- and - ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, DR. DOE, and DR. DOE Respondents) Joseph Cheng for the Attorney General of Canada
	S. Zachary Green and Padraic Ryan for the Attorney General of Ontario
) Darryl A. Cruz for Dr. Doe and Dr. Doe
) HEARD : May 24, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

- [1] This application for judicial authorization of a physician-assisted death raises the question of whether the medical circumstances of an applicant must necessarily be "terminal" to qualify him or her for the constitutional exemption.
- [2] Pursuant to the Supreme Court of Canada's decision in Carter v. Canada (Attorney General), 2016 SCC 4, which adopted the criteria set out in Carter v. Canada (Attorney General), 2015 SCC 5, I.J. seeks authorization for a physician-assisted death, and he also seeks a declaration that his physician-assisted death would not require the physicians involved to notify the Coroner pursuant to the Coroners Act, R.S.O. 1990, c. C.37. The Respondents, the Attorney General of Canada and the Attorney General of Ontario, take no position on this application. The Respondent physicians support the application.
- [3] For the reasons that follow, I.J.'s application is granted.

B. FACTUAL BACKGROUND

[4] I.J. is almost ninety year old man. Although his medical conditions are not imminently terminal or life-threatening, they are horrific.

- [5] I.J. has: spinal stenosis; discogenic disease; neurogenic claudication; lumbosacral facet osetoarthropathy; spondylolisthesis; rotoscoliosis; major kyphosis; and sacroiliac joint complex pain disorder. He is deformed to the point where he cannot stand erect or sit comfortably. His chin rests on his chest, and he feels like he is being strangled. He has difficulty breathing, swallowing, and speaking. He has pain in all his limbs, his buttocks, his back, his hip, his neck. His skin itches. The condition of his bone and joint pain are worsening, and he is beginning to lose the ability to hold a pen and eating utensils. He can walk with a walker albeit just barely and painfully. His digestive, bowel, and urinary systems are dysfunctional. He is in constant excruciating pain, and the pain is increasing. He has no energy because it is taken up fighting the pain. He has sleep apnea from the pain and the itchiness. Pain medications aggravate his severe constipation and digestive issues. He is exhausted and stressed but he does not want for mental acuity and capacity. He describes the mental anguish that comes from being trapped in a painwracked, constipated, effectively immobile body as an intolerable state of being. He says his life is unbearable. He says that he will starve himself to death if the assisted death application is refused. He says he cannot take this suffering or existence anymore.
- Over the past four years, I.J. has tried various treatments to help alleviate his pain and suffering. The treatments have not provided effective relief. He has had multiple transforaminal epidurals, which are no longer effective. In 2015, he received radiofrequency ablation, which involves applying heat to nerves to shut down the transmission of pain to the brain. This pain relief was only temporary. Other treatments, such as epidurolysis, have not been possible due to the obstruction of I.J.'s spinal canal. Earlier this year, I.J. underwent nerve block procedure to reduce his pain. The procedure only provided relief for a few days, and the excruciating pain in his back and legs returned. There is no chance of some relief other than through the use of narcotics, which is unacceptable to I.J. He is not a candidate for surgery.
- [7] I.J. has, on multiple occasions since March 2016, expressed a strong desire for physician-assisted death. In his meeting with the family physician, I.J. said that he felt positive and relieved about his decision to end his life.
- [8] I.J.'s family physician attests to the fact that I.J.'s pain and suffering has increased significantly over time. The family physician believes I.J.'s condition will continue to progress and worsen over time. The physician states that, in his opinion, I.J. is suffering enduring intolerable pain. Based on his discussions with I.J., the family physician believes that I.J. understands that he has grievous and irremediable medical conditions and that he understands the prognosis, treatment options, and palliative care options for such conditions, as well as the risks associated with a physician-assisted death.
- [9] Psychiatrist #1 attests that I.J. has tried many treatments to alleviate his pain but that none have been effective. Psychiatrist #1 states that I.J. has expressed to him, on multiple occasions, that he is suffering intolerably. Psychiatrist #1 believes that I.J. would carry through with his intention to starve himself to death if unsuccessful on this application.
- [10] Psychiatrist #2 states that it is her opinion that I.J. has grievous irremediable medical conditions that cause suffering. In her notes, she records that I.J. has a number of health problems which, in combination, seriously erode his quality of life. Psychiatrist #2 states that I.J. is done with treatments and is ready to die. Psychiatrist #2 attests that the I.J. shows a good understanding of his medical conditions and understands the process for physician-assisted

death.

- [11] I.J. understands his medical conditions, treatment options and prognosis. He understands that his diseases are incurable and progressive. He has raised the subject of physician-assisted death on multiple occasions with his family physician and psychiatrists and has spoken with several individuals and organizations in the end of life field. His has thought about this for years. He understands that the decision to obtain a physician-assisted death is his alone, and that he may withdraw it at any time. He has been informed of the physician-assisted death process and he understands it.
- [12] I.J.'s children attest to the fact that their father has reached this decision entirely on his own. They are grieving the loss of their father but they support and respect his decision.
- [13] All of the physician affiants support the evidence that I.J. clearly consents to physician-assisted death and that his consent is informed, free, voluntary and clear.

C. DISCUSSION AND ANALYSIS

- [14] I am satisfied by the evidence that: (1) I.J. is a resident of Ontario; (2) he commenced his application after having been fully informed about his medical conditions, diagnosis, prognosis, treatment options, and palliative care options; (3) he is aware that his request for an authorization for a physician-assisted death may be withdrawn at any time; (4) he is aware that if the authorization is granted, the decision to use or not use the authorization is entirely his to make; and (5) he consents without coercion, undue influence, or ambivalence to a physician-assisted death.
- [15] I am satisfied that there are physicians willing to assist I.J. in dying if a physician-assisted death were authorized by court order and that the physicians believe that providing assistance would clearly be consistent with I.J.'s wishes and that they understand that the decision to use or not use the authorization is entirely I.J.'s to make.
- [16] I find as a fact that I.J. meets the criteria set out by the Supreme Court of Canada in Carter v. Canada (Attorney General), 2015 SCC 5, and Carter v. Canada (Attorney General), 2016 SCC 4, for a physician-assisted death.
- [17] In A.B. v. Canada (Attorney General), 2016 ONSC 1912, I described the criteria that must be satisfied for the court to authorize a physician-assisted death; namely: (1) the person is a competent adult person; (2) the person has a grievous and irremediable medical condition including an illness, disease or disability; (3) the person's condition is causing him or her to endure intolerable suffering; (4) his or her suffering cannot be alleviated by any treatment available that he or she finds acceptable; and, (5) the person clearly consents to the termination of life. With respect to the second criterion, I stated that a grievous medical condition connotes that the person's medical condition greatly or enormously interferes with the quality of that person's life and is in the range of critical, life-threatening, or terminal.
- [18] In A.B. v. Canada (Attorney General), supra, while I said that it would be sufficient that a person's grievous medical condition was life-threatening or terminal, I did not say that a terminal illness was a necessary precondition for a constitutional exemption. The gravamen of a grievous and irremediable medical condition is not whether the illness, disease, or disability is terminal but the grievousness is the threat the medical condition poses to a person's life and its interference with the quality of that person's life.

- [19] There is no requirement in *Carter v. Canada (Attorney General)*, 2015 SCC 5, or *Carter v. Canada (Attorney General)*, 2016 SCC 4, that a medical condition be terminal or lifethreatening.
- [20] In Canada (Attorney General) v. E.F., 2016 ABCA 155, the applicant was a 58-year-old woman with a psychogenic movement disorder that caused her severe and constant pain, muscle spasms, a dysfunctional digestive system, sleep and eating disorders, ambulatory incapacity and no quality of life. None of these awful circumstances were terminal, and the Alberta Court of Appeal addressed the point of the nature of a grievous and irremediable medical condition directly, and the Court agreed with the application judge and concluded that the constitutional exemption granted in Carter v. Canada (Attorney General), 2016 SCC 4, does not require the applicant's medical condition to be terminal.
- [21] However, whether or not a person's illness, disease, or disability will end in death remains relevant to determining whether it is a grievous illness, disease, or disability. The imminence of death may not be determinative, but it is something to consider in determining whether a person has a grievous and irremediable medical condition including an illness, disease or disability.
- [22] In determining whether a person satisfies the criteria for a physician-assisted, death, the proximity or remoteness of death and the duration of suffering are relevant factors that must be considered in the unique and special circumstances of any applicant for a physician-assisted death. Each application is personal to the applicant and the court must consider the applicant's unique and special circumstances: *Canada (Attorney General) v. E.F., supra,* at para. 25.
- [23] I respect the candour, caution, and uprightness of I.J.'s counsel in drawing attention to the circumstance that I.J.'s medial conditions may perhaps not be terminal in the technical sense, but the analysis of length of life and remaining lifespan is artificial to his particular and special circumstances. I.J. is now almost ninety years old, and Statistics Canada indicates that the average lifespan of a Canadian male born in the 1920s was 60 years. His life will terminate with his distressful list of ailments. For present purposes, the analysis of the facts particular to I.J. reveal that his medical conditions have already terminated any quality to his life and that he satisfies the criteria for a physician-assisted death.
- [24] Turning to the matter of a declaration that if I.J. proceeds to use the constitutional exemption, it would be unnecessary for the physicians to notify the Coroner pursuant to the Coroners Act, I adopt the analysis set out in A.B. v. Canada (Attorney General), supra. Although that case concerned a disease and not a collection of dire medical conditions, the analysis applies to the circumstances of the immediate case, and once again the declaration should be granted.

D. CONCLUSION

- [25] For the above reasons, I grant:
 - a. An order declaring that I.J. meets the requisite criteria in order to permit him to avail himself of the constitutional exemption authorizing a physician-assisted death;
 - b. An order declaring that the circumstances of I.J.'s death, as authorized by this court's order, do not constitute any of the circumstances in s. 10 of the *Coroners*

Act, and anyone completing the death certificate is authorized to complete the applicant's death certificate indicating death from the applicant's underlying medical conditions as the cause of death;

- An order declaring that I.J. and any healthcare provider, including physicians, nurses and pharmacists, who provides I.J. with treatment or other services in connection with the physician-assisted death authorized by this order is exempt from the application of sections 241(b) and 14 of the Criminal Code, R.S.C. 1985, c. C-46; and,
- An order that for the purposes of s. 61 of the Family Law Act, R.S.O. 1990, c. F.3, the applicant's death will not be due to the fault or neglect of any healthcare provider who provides the applicant with treatment or other services in accordance with this order.

Perell, J.

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