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Constitutional Exemptions for Physician Assisted Dying: The First Case of Judicial Authorization in Alberta

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On February 29, 2016, Justice Sheilah Martin of the Alberta Court of Queen's Bench released a decision providing authorization for physician assisted death to HS, an adult woman with amyotrophic lateral sclerosis (ALS). This is thought to be the first case outside of Quebec where a court has confirmed the eligibility of a claimant for a constitutional exemption following the Supreme Court of Canada's decision in *Carter v Canada (Attorney General)*, 2016 SCC 4 (CanLII) (*Carter II*). As I noted in a previous post, in *Carter I* (*Carter v Canada (Attorney General)*, 2015 SCC 5) the Supreme Court struck down the criminal prohibition against physician assisted death (PAD) on the basis that it unjustifiably violated the rights to life, liberty and security of the person in section 7 of the *Charter*. That remedy was suspended for a year to allow the federal government time to enact a new law without leaving a gap in the legislative scheme that might be used to induce vulnerable persons to take their own lives. The Court declined to grant exemptions from the suspension in *Carter I* given that none of the claimants were in need of immediate relief; Gloria Taylor, the only *Carter* claimant who had originally sought an exemption, had died before the Supreme Court hearing (2015 SCC 5 at para 129). In *Carter II*, the Supreme Court extended the suspension of its remedy by 4 months to account for the change in federal government (see Elliot Holzman's post on *Carter II* here). In light of the extraordinary nature of the extension — which permitted an unconstitutional law to remain in effect for an extended time — the Court granted a constitutional exemption to competent adults when they met certain criteria: (1) they clearly consent to the termination of life and (2) they have "a grievous and irremediable medical condition that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition and that cannot be alleviated by any treatment acceptable to the individual." (2016 ABQB 121 at para 2). This post will focus on the role of courts that are called upon to assess claimants' eligibility for constitutional exemptions, as discussed by Justice Martin in the *HS* case.

The application by HS to qualify for a constitutional exemption was heard on an expedited basis on February 25, 2016. Justice Martin described HS as a retired clinical psychologist who worked in the Calgary health care system for 34 years and had an active life. She was in good physical and mental health until she was diagnosed with ALS in April 2013. The disease progressed rapidly, and HS was in the final stages of ALS at the time of the application, with 6 months life expectancy at best. HS was "severely physically disabled", living with significant pain, and was mentally alert but unable to speak, communicating through a device operated through the limited movements she could make with her left hand. HS sought a physician-assisted death "in which two named physicians would provide her with medication to induce death" on private property in Vancouver, British Columbia (at para 14). In her own words, HS described her position as follows (at para 15):

> I am not suffering from anxiety or depression or fear of death. I would like to pass away peacefully and am hoping to have physician-assisted death soon. I do not wish to have continued suffering and to die of this illness by choking. I feel that my time has come to go in peace.

The legal context for Justice Martin's decision was provided by *Carter I* and *Carter II*. She also noted that before *Carter II* was decided, Quebec passed *An Act Respecting End-of-Life Care*, CQLR c S-32, which allows physician-assisted dying in that province under similar circumstances to those considered in *Carter I* (at paras 35-39). A majority of the Supreme Court exempted Quebec from the extension of the suspension in *Carter II*, such that requests for PAD in that province will be governed by the Quebec legislation until the federal government decides upon its legislative response. The majority in *Carter II* also provided a constitutional exemption to those individuals who could meet the criteria set out earlier in this post, effectively shielding them from the ongoing criminal prohibitions.

Justice Martin stressed that the personal constitutional exemption was actually granted in *Carter II* itself, and was not for her to grant (at paras 46-47). This interpretation was supported by the wording of *Carter II* (see 2016 SCC 4 at paras 5-7), as well as the fact that four judges dissented in that case by finding that constitutional exemptions were inappropriate. Moreover, this interpretation of *Carter II* accorded with the majority's concern for fairness and equality between those seeking immediate relief inside and outside of Quebec (at para 56). Justice Martin also noted that even after *Carter I*, it would have been open to other individuals to go to court to seek a constitutional exemption from the ongoing application of the criminal prohibition against PAD during the suspension. Such applications would require a detailed evidentiary record, notice to the relevant Attorneys General, and full constitutional analysis (at para 50). The impact of *Carter II* was to make that sort of "full blown inquiry" unnecessary (at para 57). The role of lower courts following *Carter II* is thus to authorize that individuals meet the criteria for the exemption laid out in that case — in other words, to decide whether they are "inside or outside the group which has already been granted the constitutional exemption" (at para 48).

As indicated by Justice Martin, the Supreme Court "did not prescribe particular procedures or evidence for the superior courts to consider in conducting the requisite … inquiry" into the claimant's application to qualify for an exemption (at para 62). Although the Chief Justices in Ontario and British Columbia have released protocols for how to deal with these applications, Alberta has not yet done so. Justice Martin found that these other provincial protocols, along with the procedures in the Quebec legislation, could provide guidance, but she was ultimately bound to follow her interpretation of *Carter* (at paras 63-65). Similarly, the reports issued to date on the options for legislative responses to *Carter* by various government bodies could provide "background and context", but they "address different and larger questions, compared with the more narrow focus of individual judicial authorizations" based on *Carter II* (at para 67).

With this background in mind, Justice Martin considered the proper approach to issues of notice, confidentiality, and evidence before turning to the *Carter* criteria. HS had given notice of her application to the Attorneys General of Canada, Alberta and British Columbia, who participated in the hearing at differing levels. Justice Martin found that there was merit in HS's position that this notice was by way of courtesy rather than requirement because the constitutional issues had been dealt with already in *Carter I* and *Carter II*. However, "there is practical merit to providing notice to allow the Attorneys General the opportunity to make submissions in the public interest" (at para 71). She also found that no notice was required to HS's family members residing outside Canada. HS had no children and her spouse and closest friend had been notified of the

proceedings and were present in court (at para 72). A number of organizations representing health care providers had written to the Chief Justice of Alberta to request notice of applications such as that of HS, but Justice Martin held that these organizations had no role to play on the merits of the application. They might, however, play a role in assisting the court to craft an appropriate order in circumstances where the criteria for a constitutional exemption are met (at paras 73-75).

Overall, Justice Martin held that sufficient notice had been provided by HS to the relevant parties. While she provided some guidance for future courts on the question of notice, it appears that much will depend on the facts of individual cases.

As for confidentiality concerns, there were several aspects and angles to consider. Justice Martin indicated that these issues ideally should be addressed in the originating application so that the court can identify the need for any preliminary orders, but because HS's application was novel and time sensitive she was prepared to deal with the issues when they were raised (at paras 77-79). Counsel for HS requested that the proceedings be held *in camera*, that the court file and documents be sealed, that a publication ban be granted, and that initials be used to protect the identities of HS and the physicians involved in the case. On the other hand, a representative of the media argued that the public had a right to know the details of the application, and a lawyer who represents physicians argued that he ought to be permitted to watch the hearing so as to advise his clients in future applications of this nature (at para 77).

Justice Martin granted HS's request for a closed courtroom, finding that her privacy, dignity and autonomy interests outweighed the benefits of an open court, which could also be addressed by providing a written judgment in this case to provide accountability and transparency (at paras 81-82). In addition, weighing the common law criteria for a publication ban, she held that a ban was necessary in the interests of justice and that the salutary effects of a ban outweighed its deleterious effects in this case (at para 84, citing *Dagenais v Canadian Broadcasting Corp*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835, *R v Mentuck*, [2001] 3 SCR 442, 2001 SCC 76 (CanLII) and *Re Vancouver Sun*, 2004 SCC 43 (CanLII), 2 SCR 332). She also noted that although the *Alberta Rules of Court*, Alta Reg 124/2010, provide for confidentiality protections on certain grounds, courts retain the discretion to depart from these general rules in appropriate cases. She exercised her discretion to order the sealing of the court file and use of initials to describe the parties, as requested by HS (at paras 85-86).

On the question of evidence, there was again no guidance from the Supreme Court in *Carter II*, so it was up to Justice Martin to determine what evidence she considered sufficient for the purposes of the application. She noted that it was the claimant's burden to satisfy the court that she met the criteria for PAD based on "any form of admissible, authentic and reliable evidence" (at para 88). Justice Martin contrasted the evidentiary thresholds for PAD applications in British Columbia, Ontario and Quebec, which have differing requirements on the quantity, nature and form of the evidence. She was ultimately bound by *Carter* and found that it permitted her (and other judges hearing these applications) to take a flexible approach to the evidence as dictated by individual cases. Justice Martin determined that the following evidence was sufficient for the purposes of HS's application (at para 89):

- Two affidavits from HS, dated February 19 and February 23, 2016
- Statements attached to the initial affidavit of HS from her treating physician and one of the physicians who agreed to assist her death

- Medical records and statements from other physicians from the Calgary ALS and Motor Neuron Disease Clinic, again attached to the initial affidavit of HS
- A letter from HS's best friend of 38 years and a letter from HS to her counsel describing her life, both attached to the affidavit.

Justice Martin indicated that it would be preferable to have sworn affidavits from the physicians, but noted that introducing the statements as exhibits to an affidavit was nevertheless an acceptable practice. She also found that it was not necessary to have an affidavit or statement from a psychiatrist or psychologist, noting that none of the provinces with protocols have such a requirement (although Ontario recommends it), nor had the Supreme Court established this as a requirement in *Carter* (at paras 90-91, 96).

In the end, Justice Martin found that HS had demonstrated that she met the *Carter* criteria for PAD on the basis of admissible, authentic and reliable evidence. More specifically:

- HS was a competent adult person, as shown by the statements of her physicians and friend and her own engagement in the court proceedings (at paras 95-97). Justice Martin found that she need not decide whether possible depression would affect a finding of competence, since the evidence showed that HS was not depressed (at paras 97-101);
- HS clearly consented to the termination of her life, as shown by her affidavit and the letters from her friend and from the Calgary ALS Clinic. This evidence indicated that HS had been considering PAD for some time, had discussed this option with her spouse and friends, had considered other options and the risks of PAD, had undertaken counselling, and was not subject to any external pressure to agree to PAD (at paras 103-108);
- HS had a grievous and irremediable medical condition, ALS, based on *Carter* and the evidence of HS's assisting physician (at paras 109-110);
- HS's condition caused her enduring, intolerable suffering, as shown by her affidavits and the statements of the Calgary ALS Clinic, her physicians and friend (at paras 111-113); and
- HS's suffering could not be alleviated by any treatment acceptable to her, as shown by statements from physicians at the Calgary ALS Clinic (which HS stopped attending as there was nothing further they could do) and her own affidavits, where HS stated that "it is not acceptable to me to live sedated to the point of unconsciousness until I choke on my own bodily fluids" (at para 116).

Justice Martin also addressed two other important issues associated with HS's application.

First, in response to questions from the Attorney General of British Columbia about the geographic scope of her order, Justice Martin indicated that it would apply not only in Alberta, but throughout Canada, based on HS's mobility rights, the *Charter's* status as the supreme law of Canada, and the fact that the exemption is from a federal criminal prohibition (at para 122). Moreover, the Supreme Court in *Carter II* stated that those seeking PAD should apply "to the superior court of their jurisdiction." Justice Martin interpreted this to mean the applicant's home province, and noted that if HS had brought her application in British Columbia she may have faced opposition based on her Alberta residency (at para 123).

Second, Justice Martin indicated that there had been "much debate" about who was covered by the Supreme Court's use of the term "physician-assisted death" (at para 124). In HS's case, it was not necessary to determine whether nurses, nurse practitioners and /or technicians were included, because HS's plan did not involve these professionals in her death. However, because HS's plan was based on the ingestion of medications to bring about her death, Justice Martin clarified that "licensed pharmacists who prepare and provide medications are necessarily and definitionally protected" under the term PAD (at para 126). Pharmacists who prepare and provide medications prescribed for use in PAD are thus exempt from the ongoing criminal prohibitions, as are the physicians themselves.

Justice Martin's decision has been widely reported in the media, along with the subsequent development that HS exercised her right to PAD in Vancouver on March 1 (see e.g. here). In my view, Justice Martin struck the appropriate balance in her approach to the issues of notice, confidentiality and evidence, respecting the rights of HS as well the practitioners involved and the broader public interest (including potentially vulnerable members of the public). She applied the Supreme Court's decisions in *Carter* in a way that was practical and respected the proper role of the courts that will be hearing applications for authorization of PAD. Justice Martin's detailed decision will be of great assistance to those who participate in future *Carter* applications, especially in those jurisdictions without their own protocols or legislation.