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A Terminal Dispute? The Alberta Court of Appeal Versus the Federal Government on Assisted Death

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Case and Legislation Commented On: *Canada (Attorney General) v E.F.*, 2016 ABCA 155 (CanLII); Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, 42nd Parliament, 1st Session (as amended by the Standing Committee on Justice and Human Rights)

Anyone not familiar with the controversy surrounding assisted death got a taste of it last week during the debate over Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, which culminated in Elbowgate in the House of Commons. Also last week, in the first appellate decision to consider assisted dying post-*Carter*, the Alberta Court of Appeal weighed in on the criteria for constitutional exemptions during the suspension of the declaration of invalidity of the criminal provisions which prohibit assisted death (see *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII) (*Carter* 2015) and *Carter v Canada* (*Attorney General*), 2016 SCC 4 (CanLII) (*Carter* 2016); and for posts on those decisions see here and here). The Court of Appeal's decision in *Canada (Attorney General) v E.F.*, 2016 ABCA 155 (CanLII), highlights the lack of congruence between what *Carter* 2015 constitutionally required and what the government has, so far, delivered in Bill C-14, particularly when it comes to whether a person seeking medical assistance in dying must have an illness that is "terminal". *E.F.* also comments on the appropriate role of the Attorney General of Canada in applications seeking judicial authorization of the constitutional exemption allowing assisted dying in certain circumstances during the suspended declaration of invalidity.

Facts and Background

Canada v E.F. is the second landmark ruling to come out of Alberta on assisted death post-*Carter*. In *H.S. (Re)*, 2016 ABQB 121 (CanLII), Justice Sheilah Martin of the Alberta Court of Queen's Bench considered the first application for authorization of physician assisted death outside of Quebec (for my post on *H.S.* see here). One of the key points of Justice Martin's decision was that a constitutional exemption from what would otherwise be criminal activity had already been granted in *Carter* 2016, and the role of the authorizing courts was to determine whether individuals meet the criteria for the exemption laid out in *Carter* 2015 (*H.S.* at paras 46-47). This interpretation was confirmed by the Court of Appeal in *Canada v E.F.* According to Justices Peter Costigan, Marina Paperny and Patricia Rowbotham,

> It is important to note that the application for authorization from the superior court is not an application to be granted a constitutional exemption; the constitutional issues have already been considered and decided by the Supreme Court of Canada, and the exemption has been granted to qualified individuals. The task of the motions judge who hears the application is to ascertain whether the applicant is within the class of people who have

> been granted a constitutional exemption during the four month period that ends on June 6, 2016. (*E.F.* at para 5)

Judicial authorization applications should therefore focus on whether the applicant meets the criteria for exemption as stipulated in *Carter* (at para 14, citing *Carter* 2015 at para 127); they must be:

> (1) a competent adult who (2) clearly consents to the termination of life and (3) has a grievous and irremediable medical condition (including an illness, disease or disability) that (4) causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

The Court of Appeal noted the following facts with respect to the applicant, E.F. (*E.F.*at para 7):

> E.F. is a 58 year old woman who endures chronic and intolerable suffering as a result of a medical condition diagnosed as "severe conversion disorder", classified as a psychogenic movement disorder. She suffers from involuntary muscle spasms that radiate from her face through the sides and top of her head and into her shoulders, causing her severe and constant pain and migraines. Her eyelid muscles have spasmed shut, rendering her effectively blind. Her digestive system is ineffective and she goes without eating for up to two days. She has significant trouble sleeping and, because of her digestive problems, she has lost significant weight and muscle mass. She is non-ambulatory and needs to be carried or use a wheelchair. Her quality of life is non-existent. While her condition is diagnosed as a psychiatric one, her capacity and her cognitive ability to make informed decisions, including providing consent to terminating her life, are unimpaired. She deposes that she is not depressed or suicidal, but "simply exhausted after years of suffering indescribable pain". Medical opinion evidence confirms that the applicant is not suffering from depression and is able to and is voluntarily consenting. Her mental competence is not in dispute. We also note that the applicant's husband and adult children are supportive of her decision.

Issues

E.F.'s application for judicial authorization of physician assisted dying was made on April 22, 2016, with notice to the Attorneys General of Canada, Alberta and British Columbia. British Columbia, which was included because that is the jurisdiction where the physician who has offered to assist E.F. resides, opposed the application, as did Canada. Their opposition was based on concerns about the sufficiency of the psychiatric evidence provided, and, for Canada, on the position that E.F. did not meet the *Carter* criteria because her illness was not terminal and it was rooted in a psychiatric condition. The judge at first instance, Justice M.R. Bast, authorized physician assisted death in spite of these objections, and Canada and British Columbia appealed her ruling. The same arguments in opposition to judicial authorization were made on appeal; neither Canada nor British Columbia argued that E.F. lacked competence or the ability to consent. (at paras 8-13)

Court of Appeal Decision

The Court of Appeal indicated that this was the first of approximately 16 to 20 applications for judicial authorization in Canada that had been opposed, and the first to be appealed by an Attorney General (at paras 6, 15). According to the Court, "In these circumstances, the standard

of review takes on particular importance and requires us to consider the role of the motions judge in the application for authorization, and of this Court on review" (at para 16). On the issues related to whether E.F. met the *Carter* criteria, the Court found that as questions of law, they were subject to review on a standard of correctness (at para 17). On the issue related to the sufficiency of evidence, the Court found that it related essentially to fact finding and the application of those facts to the law as stated in *Carter* 2015, and was therefore entitled to review on the more deferential standard of palpable and overriding error (at para 19). It disagreed with Canada's submission that the standard of review should be higher because the case involved a constitutional exemption, noting again that "the task of the authorizing court is limited to determining whether a particular claimant satisfies the criteria established in *Carter 2015* so as to qualify for the exemption already granted by the Supreme Court", which is not in itself a constitutional inquiry. (at para 23)

On the issue of whether a terminal illness is required in order for an applicant to be eligible for authorization under the constitutional exemption, Canada acknowledged that *Carter* 2015 did not explicitly set out such a requirement, but argued that it was implied by the Supreme Court's statement that:

> 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. (*Carter* 2015 at para 127)

Because the relevant plaintiffs in *Carter* had terminal illnesses, and the Supreme Court repeatedly referred to "people like Ms Taylor" (Ms. Taylor being one of the plaintiffs in *Carter* 2015) and "end of life care", Canada argued that the Supreme Court intended to restrict the scope of its decision to cases of terminal illness (*E.F.* at paras 29-31).

The Court of Appeal found that Justice Bast had correctly rejected this argument. It pointed to a background document to Bill C-14 prepared by Justice Canada, which acknowledges (at p 29) that the declaration in *Carter* 2015 "describes a broad right, [and] that the terms used to describe it, such as "grievous and irremediable medical condition" … could include conditions that are not life-threatening or terminal." (at para 28) It also found that Canada's argument was not supported by the language of the *Carter* 2015 decision highlighted by the federal Attorney General, nor its underlying principles (at paras 33-36). Referencing *Carter* 2015's opening paragraph, which noted that persons "who are grievously irremediably ill" face the "cruel choice" of taking their own lives prematurely, or suffering until they die of natural causes, the Court of Appeal stated that "The cruelty in the situation is there regardless of whether the illness causing the suffering may be classified as terminal." (at para 37)

The Court of Appeal decision also emphasized that *Carter* 2015 was based on the Supreme Court's conclusion that the blanket criminal prohibitions against assisted dying were found to be an overbroad violation of the rights to life, liberty and security of the person, contrary to section 7 of the *Charter,* and that the Court's declaration of invalidity was carefully tailored to this finding. Accordingly,

> Any attempt to read in or infer additional limitations to those expressly set out in paragraph 127 [of *Carter* 2015] must respect the balance of competing values struck by the court – balancing the sanctity of life, broadly speaking, and society's interest in protecting the vulnerable, against the *Charter* rights of an individual to personal

> autonomy without state intervention, including autonomy over personal decisions regarding one's life and bodily integrity. (at para 40)

Seen in this light, it was not appropriate to read in a requirement that the applicant's illness be a terminal one, as argued by Canada – if the Supreme Court had intended such a limitation, it would have said so in *Carter* 2015 "clearly and unequivocally". (at para 41)

Similarly, Canada could not point to any express language in *Carter* 2015 that limited the scope of the decision so as to exclude psychiatric conditions, and the Court of Appeal was not prepared to infer such a limitation (at paras 44-45). It also rejected Canada's argument that the Supreme Court had accepted the opinion of an expert in *Carter*, Professor Montero, that psychiatric conditions should be excluded, pointing again to the language of paragraph 127 of *Carter* 2015 and the explicit safeguards introduced by the Supreme Court around competence and clear consent (at paras 47-51). The Court of Appeal noted that the availability of assisted dying for psychiatric illnesses had been "very much part of the debate and on the record" in *Carter* 2015 (at para 54), and that "nevertheless the [Supreme Court] declined to make such an express exclusion as part of its carefully crafted criteria." (at para 59) Lastly, it declined to accept Canada's contention that because none of the applications for judicial authorization in Canada to date have dealt with psychiatric conditions, they should be excluded, noting that these applications were fact dependent and it was not determinative that this kind of condition had not been considered previously (at para 46).

The third issue, the sufficiency of the evidence before Justice Bast to establish that E.F. had a "grievous and irremediable medical condition", was raised by both Canada and British Columbia on appeal. British Columbia argued that E.F.'s condition was "relatively poorly understood", and that the court should therefore have been provided "with direct evidence from a psychiatrist with expertise in the condition who has seen the applicant, [and who can] establish that the condition is irremediable; [and] that no further treatment options, acceptable to the individual, are available." (at para 60) The Court of Appeal held that Justice Bast had not erred in rejecting this argument. She had been presented with evidence from E.F.'s attending physician of 28 years, a second physician competent to provide assistance in dying, and a psychiatrist with expertise in severe conversion disorder, all of whom had concluded that E.F.'s condition was grievous and irremediable. The fact that E.F. had not been examined by the psychiatrist was not fatal, as "there [was] no reason to think that this experienced specialist would have rendered that opinion if he were not satisfied with the medical information he was provided, or if there was a treatment option that could or should be tried by the applicant." (at para 64) Canada's argument that the evidence of E.F.'s condition was "vague and stale" was also rejected (at para 68).

Having dismissed all three grounds of appeal, the Court of Appeal went on to provide its view of the role of Attorneys General on judicial authorization applications. It noted that the Supreme Court did not intend these applications to be adversarial, and that it is the courts rather than Attorneys General "that are tasked with being the gatekeeper in an authorization application." (at para 71) As such, the Court of Appeal stated that it was not in the public interest for the Attorney General of Canada to "assume the role of adversary when she is not satisfied that the application meets the *Carter 2015* criteria." (at para 71) The Court also questioned why the Attorneys General of Canada and British Columbia "considered [it] necessary to put an applicant to the test on appeal, particularly where, as here, one of the primary issues is fact-finding." (at para 72) The fact that Bill C-14 is currently before Parliament did not offer an adequate explanation: "Issues that might arise regarding the interpretation and constitutionality of eventual legislation should obviously wait until the legislation has been enacted." (at para 72) In contrast, the Attorney

General of Alberta was said to have taken the proper approach by appearing in an advisory role and not participating in the appeal (at para 70).

Two final points were addressed by the Court of Appeal. First, because it was first raised on appeal, the Court declined to deal with British Columbia's argument that courts in one jurisdiction should not authorize physician assisted deaths that will take place in another, unless special circumstances exist to show why this is necessary. Second, it did not address the argument that Justice Bast had improperly granted a partial publication ban, as this ground of appeal was not pursued by the Attorneys General at the appeal hearing.

Commentary

It takes no great leap to speculate that the reason the Attorney General of Canada took the position she did in this case was to support the stance the Liberals have taken in Bill C-14 on assisted death. Bill C-14 defines medical assistance in dying in the proposed section 241.1 of the *Criminal Code* as follows:

> **(a)** the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or
> **(b)** the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death. (*aide médicale à mourir*)

Bill C-14 restricts medical assistance in dying to those who meet the criteria in the proposed section 241.2 of the *Criminal Code:*

> **(a)** they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;
> **(b)** they are at least 18 years of age and capable of making decisions with respect to their health;
> **(c)** they have a *grievous and irremediable medical condition*;
> **(d)** they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
> **(e)** they give informed consent to receive medical assistance in dying. (emphasis added)

In turn, a person is defined to have "a grievous and irremediable medical condition" only if they meet all of the following criteria, according to proposed section 242.2:

> **(a)** they have a *serious and incurable illness, disease or disability*;
> **(b)** they are in an *advanced state of irreversible decline in capability*;
> **(c)** that illness, disease or disability or that state of decline causes them *enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable*; and
> **(d)** *their natural death has become reasonably foreseeable*, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining. (emphasis added)

The requirement in section 241.2(d) that death be "reasonably foreseeable" is addressed in the preamble, which states that this restriction "strikes the most appropriate balance between the autonomy of persons who seek medical assistance in dying, on one hand, and the interests of

vulnerable persons in need of protection and those of society, on the other." This requirement of a terminal illness has been one of the most controversial aspects of Bill C-14, with counsel for the *Carter* plaintiffs, Joe Arvay, arguing that it is a significant and unconstitutional departure from the Supreme Court's decision in that case (see also the positions on Bill C-14 by Dying with Dignity Canada and the BC Civil Liberties Association). The Court of Appeal's ruling in *E.F.* confirms that *Carter* 2015 did not require candidates for medical assistance in dying to have terminal illnesses, and thus calls into question the constitutionality of Bill C-14.
As for Canada's position on psychiatric conditions in *E.F.*, this may also line up with Bill C-14, section 9.1 of which provides that:

> 9.1 The Minister of Justice and the Minister of Health must, no later than 180 days after the day on which this Act receives royal assent, initiate one or more independent reviews of issues relating to requests by mature minors for medical assistance in dying, to advance requests and to requests where mental illness is the sole underlying medical condition.

Mental illness is not defined in Bill C-14, so it is unclear whether the type of psychiatric condition that E.F. has would be captured here. It could be argued that regardless of section 9.1, E.F. meets the criteria for medically assisted dying in section 241.1 and 241.2, with the exception of the reasonable foreseeability of death.

There are many other cases where governments have gone further than the courts mandated in enacting curative legislation after a constitutional challenge. The regime for production of personal records in sexual assault cases is one example, where Bill C-46 was more restrictive of production than required by the majority of the Supreme Court in *R. v. O'Connor*, [1995] 4 SCR 411 (CanLII), yet was upheld in *R. v. Mills*, [1999] 3 SCR 668 (CanLII). The notion of "dialogue" between the courts and legislatures is often invoked in these scenarios (see Peter W. Hogg & Allison A. Bushell. "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)" (1997), 35 Osgoode Hall LJ 75). In this case, however, the Attorney General of Canada arguably went beyond the appropriate parameters of dialogue theory by taking an adversarial position in an individual case that had the potential to produce the sort of cruelty decried by the Supreme Court in *Carter*. One is reminded of the language used by Justice McLachlin, as she then was, in her dissenting opinion in *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 (CanLII) at 621 where she stated that Sue Rodriguez was being "asked to serve as a scapegoat" because she was denied access to assisted death even though she did not present any of the risks that can be associated with such cases.

Parliament is expected to vote on Bill C-14 during the last week of May, but the Bill must then wind its way through the Senate, and all bets are off on whether the Bill will pass before the Supreme Court's deadline of June 6, 2016 (see *Carter* 2016). In the meantime – and perhaps thereafter, if no new law is in force by the deadline – the Court of Appeal decision in *Canada (Attorney General) v E.F.* provides welcome guidance to applicants for assisted dying, their counsel, the courts, and perhaps most importantly, Attorneys General in terms of how to conduct themselves in judicial authorization proceedings.