CITATION: O.P. v. Canada (Attorney General), 2016 ONSC 3956
COURT FILE NO.: AD-012/16
DATE: 20160615

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
O.P.	)	*Andrew Faith* and *Emma Carver* for the Applicant
Applicant	)	
	)	
– and –	)	
	)	
ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, DR. DOE, and DR. DOE	)	*S. Zachary Green* and *Stacey Young* for the Attorney General of Ontario
	)	
	)	*Erica Baron* for Dr. Doe and Dr. Doe
Respondents	)	
	)	
	)	
	)	**HEARD**: June 15, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] O.P., who is in his sixties, has end-stage (Stage 4) glioblastoma multiforme, an incurable brain cancer in his left temporal lobe. His prognosis is that he will die in three months.

[2] O.P. applies for a declaration that his planned physician-assisted death is permitted at law because his circumstances meet the criteria established in *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[3] It is to be noted that O.P. is applying for a declaration, and it is to be emphasized that he does not request, pursuant to *Carter v. Canada (Attorney General)*, 2016 SCC 4, a court-ordered authorization of a physician-assisted death.

[4] I repeat that O.P. seeks a declaration not an authorization. O.P.'s position is that if the criteria set out in *Carter v. Canada (Attorney General)*, 2015 SCC 5, are satisfied, then he has a constitutionally protected right to a physician-assisted death without court authorization.

[5] Although he submits that he does not require an authorization order, O.P. is, however, applying for a declaration, which is just another type of court order, for the practical reason that without a declaration that his planned physician-assisted death is permitted by law, the healthcare practitioners needed for a physician-assisted death perceive a risk of civil or criminal liability and they fear being disciplined by their profession's regulators. Therefore, the healthcare providers are not prepared to assist O.P. in ending his intolerable suffering from the ravages of brain cancer without a court order. Thus, the court's declaratory order becomes a practical, although not a legal, requirement for a physician-assisted death.

[6] O.P. also seeks a declaration that a physician-assisted death is permitted at law because of another practical problem. This problem is associated with the *Coroners Act*, R.S.O. 1990, c. C.37. Physicians have been directed by the Ministry of Health to notify the Office of the Chief Coroner of physician-assisted deaths, but the Chief Coroner will give no assurance that the notification will not prompt an investigation and an autopsy. This notification requirement is a serious impediment to the constitutional right to a physician-assisted death. O.P. believes that a declaratory order will remove this problem. Relying on this court's decision in *A.B. v. Canada (Attorney General),* 2016 ONSC 1912, which was for a court authorized physician-assisted death, O.P. submits that notification is also not necessary when a court declares that a physician-assisted death is permitted at law.

[7] For the reasons that follow, I shall authorize a physician-assisted death for O.P., but I shall do so directly and not by the mechanism of a declaratory order.

[8] In my opinion, the fundamental premise of O.P.'s argument for a declaration is fallacious. The premise of the argument is that after June 6, 2016, a physician-assisted death is permissible without court order. However, that is not correct. In my opinion, pending the enactment of legislation by the federal government to regulate physician-assisted death, this constitutional right is available only by court order.

[9] The required court order authorizing a physician-assisted death is not a matter of a superior court authorizing a constitutional exemption, which was the situation up to June 6, 2016; rather, a court authorization order is required after June 6, 2016, as a constitutional remedy under s. 24(1) of the *Constitution Act, 1982* pending the enactment of new legislation in order to ensure the rule of law and to provide an effective safeguard against potential risks to vulnerable people from an unregulated regime of physician-assisted death.

B. O.P.'s CIRCUMSTANCES

[10] O.P.'s application for a physician-assisted death was supported by: (1) his own affidavit; (2) an affidavit from his loving and beloved; (3) an affidavit from a law student at O.P.'s lawyer's law firm including supportive correspondence from two of O.P.'s relatives and from his lifelong best friend; (4) an affidavit from his attending family physician for the last three years; (5) an affidavit from a palliative care physician; and, (6) an affidavit from a psychiatrist, who very recently assessed O.P.'s mental capacity to consent to a physician-assisted death.

[11] Over two years ago, O.P. was diagnosed with brain cancer on his left temporal lobe. Before his diagnosis, he was in excellent health and extremely fit. He is a polymath.

[12] After the diagnosis, he made herculean efforts to fight the cancer, and it appeared that

with the surgery, chemotherapy, and radiation, he had succeeded. However, the tumor returned to the left temporal lobe. The tumor began to grow geometrically. Experimental treatments were tried, but the treatments were unsuccessful in arresting the cancer's growth.

[13] All of the physicians agree that O.P.'s condition is grievous, terminal, irreversible, and irremediable. The growing tumor is causing O.P. significant emotional distress with panic and a feeling of helplessness as his remarkable, mental and communicative skills, and his physical prowess are rapidly diminishing.

[14] O.P. has problems with his vision and problems with auditory oversensitivity. He is experiencing, nausea, substantial loss of strength, resilience and endurance, extreme fatigue, extreme imbalance, difficulty walking, loss of short term memory, and serious and accelerating expressive aphasia (difficulty in word finding). Although each of his physical symptoms, standing alone could perhaps not be said to cause intolerable physical pain, taking all together the physical symptoms combined with their accelerating severity, the imminence of death, the accelerating deterioration of his physical, intellectual, and communicative skills, his increasing psychological distress and panic, and the recognition that he is losing his sense of identity from a deteriorating mind and body are causing O.P. intolerable suffering.

[15] All of the physicians agree that O.P.'s medical condition is causing him intolerable suffering. The cancer is rapidly and progressively destroying O.P. both physically and mentally. The attending family physician stated that O.P. is experiencing significant emotional distress in contemplating his own demise. The attending physician observed that O.P. is obsessed and terrified of having to suffer through an inexorable decline and of potentially losing his abilities and faculties that characterize whom he is. The palliative care physician observed that O.P. feels that the loss of his cognitive functioning coupled with his diminishing physical capabilities has damaged his personhood to a point where his life no longer has any quality. The palliative care physician observed that O.P.'s suffering is enduring and intolerable to O.P.

[16] The palliative care physician and the attending family physician both agree that O.P.'s suffering has not been, and cannot be, alleviated by any treatment acceptable to him.

C. THE POSITIONS OF THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, AND HEALTHCARE REGULATORS

[17] The Attorney General of Canada took no position on this application.

[18] The position of the Attorney General of Ontario was that if the criteria set out in *Carter v. Canada (Attorney General)*, 2015 SCC 5 are satisfied, then a physician-assisted death may proceed without court authorization.

[19] The Attorney General made a public announcement that physicians will not be prosecuted for assisting with the death of individuals who meet the *Carter* criteria, and that nurses and pharmacists will not be prosecuted for their involvement in a physician-assisted death provided their involvement is at the direction or request of a physician who represents that – in the opinion of two physicians – the patient meets the *Carter* criteria. The Ontario government has announced that it will pay for the drugs used for a physician-assisted death. However, the Attorney General will not provide any assurances as to how the government will determine after-the-fact whether a patient has met the *Carter* criteria.

[20] The regulatory bodies of nurses and pharmacists are advising their members that participating in a physician-assisted death may be illegal without a court order.

[21] The Ministry of Health has directed that unless ordered otherwise by a court, physician-assisted deaths, because they involve the administration of toxic drugs, will require a notification to the Office of the Chief Coroner. Once notified of a physician-assisted death, the Office of the Chief Coroner must initiate an investigation, which includes an examination of the body of the deceased. The Coroner will not decide in advance of any death whether an autopsy will be necessary or who may assist in the investigation.

D. DISCUSSION AND ANALYSIS

1. Introduction

[22] As noted at the outset of these Reasons for Decision, O.P. plans a physician-assisted death and he seeks declaratory relief to facilitate that plan. Although he believes that a court authorization order is not required to permit a physician-assisted death, he seeks a declaratory order that a physician-assisted death is permitted by law.

[23] Much of O.P.'s factum is directed at showing that in the circumstances of this case, the court has jurisdiction to grant the declaratory relief he seeks.

[24] I shall, however, not be reviewing O.P.'s argument and his case law about the court's jurisdiction to make declarations, because, as I shall explain below, while O.P. is correct in asserting that there is a constitutional right to physician-assisted death, it is my opinion that pending the enactment of legislation by the federal government to regulate physician-assisted death, this constitutional right is available only by court order, which I am prepared to grant in O.P.'s particular circumstances.

[25] To explain my opinion, it is necessary to describe the legal history of physician-assisted death, which is now in its third turbulent phase. For this current phase, I hope that these Reasons for Decision will bring some certainty about the role of the court pending the fourth phase, which will begin when Parliament enacts legislation to regulate physician-assisted death.

[26] The greater part of my Reasons for Decision will focus on explaining how and why it is the case that although a constitutional right, physician-assisted death still requires a court authorization order. After that discussion, I will return to the matter of explaining why O.P. qualifies for a physician-assisted death by court authorization order, and I shall grant that order.

2. Does the Court Still Have Jurisdiction to Authorize a Physician-Assisted Death?

[27] Parliament, the provincial legislatures, and the courts across this country have now entered the third phase of a legal history about the law that governs what is called physician-assisted suicide by its opponents or physician-assisted dying or physician-assisted death, by its proponents. As I deliver this decision, the House of Commons and the Senate are determining the nature of the fourth phase.

[28] In the first phase, physician-assisted death was criminalized. A doctor who assisted a patient in dying committed a serious crime.

[29] In the second phase, pursuant to what is known as a constitutional exemption, a physician-assisted death could be authorized by court order.

[30] In the third phase, which commenced on June 7, 2016, the legal status of a physician-assisted death is uncertain. The legal status of a physician-assisted death in this third phase is the issue I must determine. The third phase will last until Parliament enacts legislation to govern physician-assisted death.

[31] The fourth phase will begin with the enactment of new legislation. That legislation is presently being debated in the House of Commons and in the Senate. It is likely that the fourth phase will not be the end of the saga and that subsequent phases will be demarcated by litigation and more legislation.

(a) The Criminalization Phase

[32] In the first phase, the criminalization phase, physician-assisted suicide or physician-assisted death was a criminal act under sections 14 and 241(b) of the *Criminal Code*, R.S.C. 1985, c. C-46. This criminal law prohibition applied to circumstances where a patient requested a physician to provide or to administer medication that intentionally brings about death. Sections 14 and 241 of the *Criminal Code* state:

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

[33] In 1993, during the first phase, in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, five justices (Justices La Forest, Sopinka, Gonthier, Iacobucci, and Major) of the Supreme Court of Canada upheld the criminalization of physician-assisted suicide. Four justices (Chief Justice Lamer and Justices Cory, McLachlin and L'Heureux-Dubé) dissented. Three of the four dissenting justices (Justices Cory, McLachlin and L'Heureux-Dubé) held that the *Criminal Code's* prohibition of physician-assisted suicide violated s. 7 (the right to life, liberty and security of the person) of the *Canadian Charter of Rights and Freedoms,* and two of the dissenting justices (Chief Justice Lamer and Justice Cory) held that the prohibition violated s. 15 (equality under the law) of the *Charter*.

[34] The criminalization phase was supposed to end on February 6, 2016, which was exactly 12 months after the unanimous decision of nine justices (Chief Justice McLachlin and Justices LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, and Gascon) of the Supreme Court in *Carter v. Canada (Attorney General)* 2015 SCC 5. In that decision, the

Supreme Court reversed the judgment of the British Columbia Court of Appeal (Justices Newbury and Saunders concurring, Chief Justice Finch dissenting) in *Carter v. Canada (Attorney General),* 2013 BCCA 435 and restored the decision of Justice Smith in *Carter v. Canada (Attorney General),* 2012 BCSC 886.

[35] The result of *Carter v. Canada (Attorney General)*, 2015 SCC 5 was that the Supreme Court struck down sections 14 and 241(b) of the *Criminal Code* as contravening s. 7 of the *Charter,* and the Court declared the prohibition against physician-assisted death invalid. However, the Court suspended its declaration for 12 months; i.e., to February 6, 2016 to allow Parliament to enact a new *Criminal Code* provision that would not contravene the *Charter*. In the meantime, physician-assisted death remained criminalized.

[36] It may definitively be said that in *Carter v. Canada (Attorney General),* 2015 SCC 5, the Supreme Court held that a prohibition on physician-assisted death infringed a Canadian citizen's right to life, liberty, and security of the person contrary to s. 7 of the *Charter.* In this case, the Court concluded the prohibition found in sections 14 and 241 of the *Criminal Code* infringed the right to life because it was a state action that imposed an increased risk of death on those persons who would end their own lives prematurely out of fear that they would be incapable of doing so when they reached the point where their suffering was intolerable. The Court concluded that the prohibition infringed a citizen's right to liberty and security of the person because the prohibition interfered with fundamentally important and personal medical decision-making, imposed pain and psychological stress, and deprived the citizen of a choice important to their sense of dignity, personal integrity, values and life experience.

[37] Having decided that the *Criminal Code's* prohibition against physician-assisted death contravened s. 7 of the *Charter*, the Supreme Court in *Carter v. Canada (Attorney General)*, 2015 SCC 5 turned to the matter of what remedy should be granted in the circumstances. Here, in order to understand what the Supreme Court did and to understand the current status of physician-assisted death, it is necessary to note that sections 24(1) and 52(1) of the *Constitution Act, 1982* provide remedies for breaches of the *Canadian Charter of Rights and Freedoms.* These sections state:

> 24 (1) Anyone whose rights or freedoms, as guaranteed by this *Charter* have been infringed may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> ....
>
> 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[38] With this background about constitutional remedies for *Charter* breaches, it may definitively be said that in *Carter v. Canada (Attorney General),* 2015 SCC 5, the Supreme Court exercised its authority under s. 52(1) of the *Constitution Act, 1982* to declare the *Criminal Code's* prohibition of no force and effect but only insofar as it interfered with a person's right to a physician-assisted death where certain preconditions were satisfied. The Court stated at para. 127:

> 127. The appropriate remedy is therefore a declaration that s. 241(b) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. "Irremediable," it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

[39] It may definitively be said that in *Carter v. Canada (Attorney General),* 2015 SCC 5, the Supreme Court suspended its declaration of invalidity insofar as the *Criminal Code* interfered with a person's right to a physician-assisted death until February 6, 2016. The Court suspended its declaration of invalidity to allow Parliament time to enact new legislation in accordance with the Court's declaration of rights.

[40] The suspension of a declaration of invalidity is a judicial tool that shows respect for the different governance roles of the judiciary and legislative bodies and provides legislators with an opportunity to do their part in governing and in law making. The suspension of invalidity preserves the rule of law and shows deference to the different law making functions of judges and legislators. Justice Sharpe, writing extra-judicially, and Law Professor Roach, in *The Charter of Rights and Freedoms* (4th ed.), state at p. 397:

> In certain situations, the Supreme Court of Canada has used the technique of temporary suspension of invalidity. In these cases, the Court has found that although a challenged law is unconstitutional, the immediate nullification of the law could lead to chaos or a serious threat to public safety. To avoid chaos or serious public harm, the Court has delayed the implementation of its order of invalidity to afford Parliament or the legislature the opportunity to repair the constitutional deficiency.

See: *Reference Re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1876*, [1985] 1 S.C.R. 721; *Mahé v. Alberta*, [1990] 1 S.C.R. 342 at p. 393.

[41] In *Carter v. Canada (Attorney General),* 2015 SCC 5, the Supreme Court was providing Parliament with an opportunity to repair the constitutional deficiency that criminalized physician-assisted death. Parliament's inability to seize upon that opportunity in a timely way ushered in the second phase of the legal history of physician-assisted death.

(b) The Court Authorization Phase

[42] The second phase of the legal history of physician-assisted suicide or physician-assisted death, the court authorization phase, began on February 6, 2016 and ended on June 6, 2016. As noted above, February 6, 2016 was the deadline set by the Supreme Court in *Carter v. Canada (Attorney General)*, 2015 SCC 5, for new legislation to be enacted, but because of the intervention of a very lengthy general election that saw the election of a new government, the federal government was unable to meet the February 6, 2016 deadline. Thus, the new

government applied to the Supreme Court for an extension of the suspension of the declaration of invalidity that was sustaining the continued operation of the unconstitutional *Criminal Code* provisions. In other words, the government sought the continued criminalization and prohibition on physician-assisted death and more time to enact new legislation.

[43] By the time of the second phase, although the federal government was unable to enact new legislation, the Québec government had enacted *An Act Respecting End-of-Life Care*, CQLR c S-32.0001 to govern physician-assisted dying in that province. The statute came into force in December 2015.

[44] What demarcates the second phase of the legal history of physician-assisted death is the Supreme Court's decision in *Carter v. Canada (Attorney General)*, 2016 SCC 4. In this decision, a unanimous Court granted the federal government's request for an extension of the deadline to enact new legislation. A minority (Chief Justice McLachlin, and Justices Cromwell, Moldaver, and Brown) of the Court concluded that no further relief should be granted. However, the majority (Justices Abella, Karakatsanis, Wagner, Gascon, and Côté) of the Court, as a constitutional remedy granted constitutional exemptions pending the enactment of new legislation. A constitutional exemption is a remedy under s. 24(1) of the *Constitution Act, 1982*, where the unconstitutional law remains valid for all purposes save that a particular individual is exempted from its application. In this case, the constitutional exemptions were granted: (1) to permit a physician-assisted death for individuals in Québec who could satisfy the criteria of the Québec legislation; and (2) to permit citizens in the rest of Canada to have a physician-assisted death with the approval of a superior court judge.

[45] Thus, in *Carter v. Canada (Attorney General)*, 2016 SCC 4, the decision ushering in the second phase of the legal history of physician-assisted death, the court authorization phase, the Supreme Court extended the deadline for new legislation until June 6, 2016 and thus continued the criminalization of physician-assisted death until that date, but a majority of the Court decided to decriminalize physician-assisted death for individual cases by authorizing a constitutional exemption for a physician-assisted death if a person could prove to a court that he or she satisfied the criteria the Court had used to define (in a non-exhaustive way) when a physician-assisted death was a person's guaranteed constitutional right to life, liberty, and security of the person. The Court delegated the responsible of authorizing physician-assisted deaths to the superior courts across the country. As explained by Justice Martin in *Re H.S.*, 2016 ABQB 197, the superior courts where granting authorizations and not granting constitutional exemptions.

[46] At para. 6 of *Carter v. Canada (Attorney General)*, 2016 SCC 4, the majority, which granted the constitutional remedy, stated, with my emphasis added:

> This is the first time the Court has been asked to consider whether to grant individual exemptions during an *extension* of a suspension of a declaration of invalidity. Parliament was given one year to determine what, if any, legislative response was appropriate. In agreeing that more time is needed, we do not at the same time see any need to unfairly prolong the suffering of those who meet the clear criteria we set out in *Carter v. Canada (Attorney General)*, 2015 SCC 5. An exemption can mitigate the severe harm that may be occasioned to those adults who have a grievous, intolerable and irremediable medical condition **by making a remedy available now pending Parliament's response**. The prejudice to the rights flowing from the four-month extension outweighs countervailing

> considerations. Moreover, the grant of an exemption from the extension to Québec raises concerns of fairness and equality across the country. We would, as a result, grant the request for an exemption so that those who wish to seek assistance from a physician in accordance with the criteria set out in para. 127 of our reasons in *Carter v. Canada (Attorney General)*, 2015 SCC 5 may apply to the superior court of their jurisdiction for relief during the extended period of suspension. **Requiring judicial authorization during that interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people**.

[47] During the second phase, courts across the country authorized physician-assisted deaths. See: *Re H.S.*, 2016 ABQB 197; *A.B. v. Canada (Attorney General)*, 2016 ONSC 1912; *A.B. v. Ontario (Attorney General)*, 2016 ONSC 2188; *W.V. v. Attorney General of Canada*, 2016 ONSC 2302; *Patient v. Canada (Attorney General)*, 2016 MBQB 63; *A.A. (Re)*, 2016 BCSC 570; *X.Y. v. Canada (Attorney General)*, 2016 ONSC 2317; *C.D. v. Canada (Attorney General)*, 2016 ONSC 2431; *X.Y. v. Canada (Attorney General)*, 2016 ONSC 2585; *E.F. v. Canada (Attorney General)*, 2016 ONSC 2790; *F.G. v. Canada (Attorney General)*, 2016 ONSC 3099; *B.C. v. Canada (Attorney General)*, 2016 ONSC 3231; *M.N. v. Canada (Attorney General)*, 2016 ONSC 3346; *I.J. v. Canada (Attorney General)*, 2016 ONSC 3380; *Canada (Attorney General) v. E.F.*, 2016 ABCA 155.

(c) The Uncertainty Phase

[48] The second phase ended and the third phase, the uncertainty phase, began on June 7, 2016. What demarcates the third phase is that the Supreme Court's order striking down sections 14 and 241 of the *Criminal Code* was no longer suspended but Parliament has not enacted new legislation to govern physician-assisted death.

[49] As noted above, for the second phase, the Supreme Court delegated to the superior courts across the country the responsibility of scrutinizing whether applications for a physician-assisted death satisfied the criterion for when a physician-assisted death was lawful, but it has not been clear whether that delegation of authority persisted into the third phase of the development of the law about physician-assisted death.

[50] The end of the suspension of invalidity that demarcates the commencement of the third phase has created uncertainty about the state of the law about physician-assisted death across the country. Physician-assisted death is a constitutional right, but in the absence of new legislation, there is nothing to ensure compliance with the rule of law and no safeguards against potential risks to vulnerable people. As a further source of uncertainty, while there is no prohibition against physician-assisted death and thus, in theory, no need for constitutional exemptions, nevertheless, as noted above, practically speaking, physicians and healthcare practitioners willing to assist in a physician-assisted death feel that it is too risky to assist without assurance that there is no exposure to civil, criminal, or disciplinary liability. Thus, court orders appear to be a practical necessity.

[51] In my opinion, the solution to this uncertain state of affairs is to be found in *Carter v. Canada (Attorney General)*, 2016 SCC 4, when read, as it must be read, in the context of what the Supreme Court decided in *Carter v. Canada (Attorney General)*, 2015 SCC 5.

[52] Section 24(1) of the *Constitution Act 1982* empowers a court of competent jurisdiction to grant such remedy as the court considers as appropriate and just in the circumstances. In my opinion, *Carter v. Canada (Attorney General)*, 2016 SCC 4 did more than just grant a constitutional exemption; rather, to guarantee the constitutional right to a physician-assisted death pending the enactment of new legislation, the Supreme Court granted a charter remedy that empowered the superior courts across the country to authorize physician-assisted deaths pending the enactment of that new legislation.

[53] When the Supreme Court said that requiring judicial authorization during the interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people, the interim period that it was referring to was not the period between February 6, 2016 and June 6, 2016, it was the interim period that would exist until new legislation was enacted. There was a constitutional right to a physician-assisted death, but Parliament was not only being given the opportunity to enact legislation, it had the responsibility to do so. The parameters of physician-assisted death are not a matter to be left unregulated by the rule of law.

[54] The Supreme Court probably envisioned that Parliament would pass legislation by June 6, 2016 but, in my opinion, the Supreme Court's decision in *Carter v. Canada (Attorney General)*, 2016 SCC 4 also governs the circumstance that now pertains. Pending new legislation, in order to protect a constitutionally guaranteed right while at the same time preserving the rule of law and providing effective safeguards for vulnerable people who might be manipulated to seek a physician-assisted death, the superior court has been empowered to grant authorizations.

[55] The superior court's jurisdiction to grant authorizations was never the granting of constitutional exemptions; it was a jurisdiction fashioned by the Supreme Court to protect a constitutional right and the rule of law pending Parliament enacting new legislation.

[56] The situation of the need for court authorizations persists in the third phase of the legal history of physician-assisted death and may persist until Parliament enacts legislation without any constitutional deficiencies. I wish to be clear, however, that there is nothing in this decision about O.P's case that mandates that future phases of the legal history of physician-assisted death will require judicial authorizations. Arguably, the medical establishment is far better situated to supervise this constitutionally protected right, but pending a constitutionally-sound enactment, it falls on the court to protect a constitutional right and the rule of law.

3. Should the Court Authorize a Physician-Assisted Death for O.P.?

[57] I am, therefore, satisfied that the superior court still has and necessarily must have the jurisdiction to grant authorization orders pending the enactment of new legislation by Parliament to govern physician-assisted death. Thus, the question becomes whether this court should authorize a physician-assisted death for O.P. and the associated ancillary relief.

[58] I am satisfied on the evidence that: (1) O.P. is a resident of Ontario; (2) he commenced his application after having been fully informed about his medical condition, diagnosis, prognosis, treatment options, and palliative care options; (3) he is aware that his request for an authorization of 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; (5) he has the mental capacity to give an informed consent to a physician-assisted death; and (6) he consents without coercion, undue influence, or ambivalence to a physician-assisted death.

[59] I am satisfied that there are physicians willing to assist O.P. 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 O.P.'s wishes and that they understand that the decision to use or not use the authorization is entirely O.P.'s to make.

[60] I find as a fact that O.P. 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.

[61] 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. On the evidence, I find that all of these criteria are satisfied in the immediate case.

[62] Turning to the matter of a declaration that if O.P. 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.*

E. CONCLUSION

[63] For the above reasons, I grant:

a. An order declaring that O.P. meets the requisite criteria for the court to authorize a physician-assisted death;

b. An order declaring that the circumstances of O.P.'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 conditions as the cause of death;

c. An order declaring that O.P. and any healthcare provider, including physicians, nurses, and pharmacists, who provides O.P. with treatment or other services in connection with the physician-assisted death authorized by this order, is permitted by law to do so; and

d. An order that for the purposes of s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, O.P.'s death will not be due to the fault or neglect of any healthcare provider who provides O.P. with treatment or other services in accordance with this order.

Perell, J.

Released: June 15, 2016

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ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

O.P.

Applicant

– and –

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, DR. DOE, and DR. DOE

Respondents

REASONS FOR DECISION

PERELL J.

Released: June 15, 2016