

Tuckwell, Re, 2016 ABQB 302, 2016 CarswellAlta 1012

2016 ABQB 302, 2016 CarswellAlta 1012, [2016] A.J. No. 562

2016 ABQB 302
Alberta Court of Queen's Bench

Tuckwell, Re

2016 CarswellAlta 1012, 2016 ABQB 302, [2016] A.J. No. 562

In the Matter of John Tuckwell

In the Matter Of Carter v Canada (Attorney General), 2015 SCC 5,
[2015] 1 SCR 331 and Carter v Canada (Attorney General), 2016 SSC 4

S.J. Greckol J.

Heard: May 6, 2016

Judgment: May 6, 2016

Docket: Edmonton

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Counsel: Vivian Stevenson, Q.C., for Applicant
Rose Carter, Q.C., for Physicians

Subject: Criminal; Public

Headnote

Criminal law

Health law

Table of Authorities

Cases considered by *S.J. Greckol J.*:

A. (A.), Re (2016), 2016 BCSC 511, 2016 CarswellBC 825 (B.C. S.C.) — referred to

A. (A.), Re (2016), 2016 BCSC 570, 2016 CarswellBC 855 (B.C. S.C.) — referred to

B. (A.) v. Canada (Attorney General) (2016), 2016 ONSC 1571, 2016 CarswellOnt 3457, 129 O.R. (3d) 700 (Ont. S.C.J.) — referred to

B. (A.) v. Canada (Attorney General) (2016), 2016 ONSC 1912, 2016 CarswellOnt 4088, 396 D.L.R. (4th) 127 (Ont. S.C.J.) — referred to

B. (A.), Re (2016), 2016 ONSC 2188, 2016 CarswellOnt 4879 (Ont. S.C.J.) — referred to

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CD v. Canada (Attorney General) (2016), 2016 ONSC 2431, 2016 CarswellOnt 5584 (Ont. S.C.J.) — referred to

Carter v. Canada (Attorney General) (2015), 2015 SCC 5, 2015 CSC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, 66 B.C.L.R. (5th) 215, [2015] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [2015] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (S.C.C.) — followed

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Carter v. Ontario (Attorney General) (2016), 2016 ONSC 2022, 2016 CarswellOnt 4584 (Ont. S.C.J.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168, 20 O.R. (3d) 816 (S.C.C.) — followed

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 2(b) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 14 — considered

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s. 241(b) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

Pt. 6, Div. 4 — referred to

S.J. Greckol J.:

I. Introduction

1 John Tuckwell is an adult man suffering from Amyotrophic Lateral Sclerosis ("ALS") who seeks to end his life by means of physician-assisted death. The *Criminal Code* provides that it is a crime in Canada to assist another person to end his own life. However, two recent Supreme Court of Canada decisions operate to permit physician-assisted death if certain criteria are met.

2 On January 6, 2016, the Supreme Court granted a personal constitutional exemption for competent adult persons who (1) clearly consent to the termination of life and (2) 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.

3 The Supreme Court ruled that individuals wishing to avail themselves of such exemption may apply to the superior court of their jurisdiction for relief until June 6, 2016. The applications for judicial authorization concerning physician-assisted death introduced by the Supreme Court have a defined scope and are intended to operate for a limited duration.

4 The singular question before this Court is whether Mr. Tuckwell qualifies for the exemption granted by the Supreme Court. For the reasons that follow, I find that Mr. Tuckwell has met the test and qualifies for a personal constitutional exemption allowing a physician-assisted death.

II. Notice and Process

A. Process

5 Mr. Tuckwell's application was commenced by an Originating Application and Application for an Order Restricting Court Access.

6 Notice was provided to the Attorneys General for Alberta and Canada, and they have indicated they will not participate. The physicians are represented today by counsel. The College of Pharmacists was given notice and have provided input with respect to the relief sought. Alberta Health Services was given notice and does not intend to take any position with respect to this application.

7 Notice of this application for a restriction on media reporting and public access to court proceedings has been provided to the media pursuant to Division 4 of the *Rules of Court*. No responses were received to that notice. The Applicant seeks a partial sealing order, the use of pseudonyms except for his own name, and a partial publication ban.

8 The Applicant further seeks declarations or Orders that the Applicant has met the criteria set out by the Supreme Court of Canada in *Carter v. Canada (Attorney General)* [2015 CarswellBC 227 (S.C.C.)]; that the Applicant comes within the scope of the constitutional exemption granted by the Court in *Carter 2016*; that the Applicant is authorized

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to proceed with physician-assisted death; that the Applicant and the physicians who assist in the provision of physician-assisted death or counselling for physician-assisted death to the Applicant are exempt for the prohibitory provisions of the *Criminal Code* during the extension of the suspension of the declaration of invalidity of these sections; and that any pharmacist or pharmacy technician who provides professional services or assistance in relation to the physician-assisted death of the Applicant, are exempt from the application of the prohibitory *Criminal Code* provisions during the extension of the suspension of the declaration of invalidity of those provisions.

B. Confidentiality Concerns

9 The Applicant seeks an Order that the following restrictions on publication be made:

1. that the Court file including all of the evidence, documents and pleadings filed in this matter and this Order shall be sealed, except for the Originating Application, the Affidavit of the Applicant in support, and any reasons for judgment;
2. that pseudonyms shall be used to identify any persons other than the Applicant referenced in this matter, both in the Originating Application and during the hearing, and the Applicant may use pseudonyms so as to prevent other persons from being identified, including the Applicant's family and physicians;
3. that any judgment shall be released with all persons, other than the Applicant, identified by pseudonyms only;
4. that there shall be a publication ban with respect to any identifying information related to the Applicant's family members and the Applicant's physicians including the physicians involved in the Applicant's request for physician-assisted death.

10 Mr. Tuckwell does not seek to prevent his own name from becoming public because he believes very strongly in physician-assisted death for any person who considers this option important to their dignity and personal integrity. He is prepared to accept some loss of personal privacy in order to provide support to others who chose to follow this path. He believes people should not have to hide the choice because of how they might be viewed or treated. I agree with Mr. Tuckwell's counsel that this is a courageous stance on his part.

11 Mr. Tuckwell wishes to protect his family from unwanted public or media attention and so does not mention them by name, and asks that any information that might emerge at the hearing that identifies them be subject to a publication ban.

12 His doctors have expressed to him their concern about their identities being revealed. He does not want them to suffer personally or professionally because some might be opposed to physician-assisted death; or to have adverse response to their involvement deter other doctors from agreeing to assist.

13 For these reasons, he is asking the Court to seal any information or documentation filed with the Court that might identify his family or his doctors, that there be a publication ban on any such identifying information that might be revealed during the course of the application and that any judgment not contain identifying information respecting these people, and that pseudonyms be used.

14 Further, though Mr. Tuckwell has shared his personal health information for the purposes of this application, he is not otherwise waiving his right to privacy in terms of his personal health information generally or his expectation of doctor-patient confidentiality.

15 I reviewed the authorities provided by counsel concerning the extent to which, if any, there ought to be restrictions on publication of proceedings concerning physician-assisted death. In the decision of *Dagenais v. Canadian Broadcasting*

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Corp., [1994] 3 S.C.R. 835 (S.C.C.), a case very familiar to those involved with the justice system, the Supreme Court of Canada reminds us that the open court principle is a "hallmark of a democratic society", that it ensures "that justice is administered in a non-arbitrary manner, according to law", and that it is "inextricably linked to the freedom of expression protected by s. 2 (b) of the *Charter*". This is a crucial, foundational value in our justice system, and one that must be sedulously protected.

16 Mr. Tuckwell's privacy, dignity, and autonomy are also important interests in this case as he seeks Court authorization for the most personal and intimate of decisions, concerning a subject of the highest order, that of life and death itself. The privacy interests of his family members are closely linked: their need for privacy, to be free from public intrusion at this difficult time, must also be respected.

17 The physicians who are providing assistance to Mr. Tuckwell to exercise his constitutional right in choosing this end of life path, are entitled to provide their professional services without negative consequences to their personal and professional life, so long as the process assures public scrutiny of evidence-based decisions by them as well as by this Court. It is important to ensure that there is no chill on their ability to offer professional medical services to others who need their care in this or other situations.

18 In my view, it is necessary to impose some restrictions on media reporting and public access to court proceedings pursuant to Division 4 of the *Rules of Court*, in order to protect these vital interests. The protection of these interests will be the salutary effect of such restrictions.

19 Further, the salutary effects of the requested publication restrictions are proportional to any deleterious effects on the open court principle for the following reasons.

20 If the requested restrictions are granted, the open Court principle is honoured by this application proceeding in open court and on the public record. It is honoured by public access to the Originating Application and the supporting affidavit of the Applicant, Mr. Tuckwell. It is further honoured by the delivery of an oral judgment with reasons delivered in open Court at the conclusion of the proceedings, including reference to the medical and other evidence upon which the decision is based. A decision rendered in open Court, based on articulated evidence and reasons provides accountability, transparency, and respect for the open court principle. Finally, the open court principle is honoured by the availability of a transcript of those oral reasons being available to the public, should those transcripts be requested, as well as by this published decision.

21 On the other hand, Mr. Tuckwell's privacy interests in the medical details of his case, ordinarily protected by privacy legislation, will be protected by the partial sealing order that is requested. The privacy interests of Mr. Tuckwell's family will be respected if publication of information that could identify them is prohibited. The physicians' entitlement to privacy in their personal lives, as well as their ability to continue to provide professional care to others similarly situated will be assured, if their identities are protected through the use of pseudonyms and the partial sealing order.

22 In my view, the restrictions on publication sought by the Applicant, including the partial sealing order of the file; the use pseudonyms to identify any persons other than the Applicant referenced in this matter; and the publication ban with respect to any identifying information related to the Applicant's family members and the Applicant's physicians, are necessary. The salutary and deleterious effects of the restrictions on publication are proportional, balancing the competing interests identified by counsel and called for by legal principle and fairness.

III. The Applicant

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23 Mr. Tuckwell is 53 years of age. In October of 2012, he was diagnosed with ALS. He resides in Edmonton as he has for most of his life. He is a graduate of the University of Alberta where he completed a Bachelor of Commerce Degree in 1984 and three years towards a Bachelor of Science degree.

24 Mr. Tuckwell has worked for the Government of Alberta for most of his career. In 2000, he was hired to work in the Department of Health and Wellness as a senior public affairs officer, focusing on Public Health. He left government service for a period of time to work as communications manager for the Canadian Patient Safety Institute (CPSI), a federally funded agency focussed on the reduction of serious injury to patients, while also coordinating a national committee of patients injured by the health system.

25 After working at CPSI, Mr. Tuckwell returned to government service in the Department of Health where he was promoted to Assistant Director in media relations. He also worked as a Director for Child and Youth Services and a Director at Treasury Board. He was a Director at the Department of Culture when he was diagnosed with ALS. He continued working with the Public Affairs Bureau on the new Government of Alberta website until late 2014.

26 Mr. Tuckwell describes a thoroughly engaged and interesting life. He has travelled broadly, to Europe, Africa, Asia, Australia and New Zealand, the South Pacific, Central America and China. He was recently elected to the Royal Canadian Geographical Society's College of Fellows for his hiking and travel experience. Mr. Tuckwell states in his affidavit:

10. Prior to 2012 I was healthy, fit and extremely active. I had taken five sick days in 17 years of work. My work was high-stress and very busy, but I thrived in that environment. Communication was not only my job, but a large part of my life. I took great pleasure in debating, talking and laughing with friends and family.

11. Away from work I spent much of my time cycling, running, hiking, backpacking, climbing, diving and paddling, most of which I did with my dog Bruno who died in 2013. Besides Bruno, my great love in life was food. I was a good cook and baker and I loved to entertain.

27 Mr. Tuckwell states that he has *bulbar limbis* ALS, a form of ALS that started in his mouth, throat and diaphragm. His ALS initially progressed slowly so that he could continue to hike, ski, dive, entertain and travel with family and friends. He planned a trip to Peru for the fall of 2015, but was forced to cancel due to his health. His condition is deteriorating and, as he states in his affidavit, regardless of the form of ALS, it is a terminal disease.

28 Mr. Tuckwell describes, and I accept, that his independence has always been very important to him and he has always been in control of his own affairs. His quality of life has significantly and rapidly declined. He feels that once he loses his ability to communicate altogether, he will have no quality of life left. He does not want to be caught unprepared and unable to communicate his wish to have a physician-assisted death. For this reason he is seeking an order declaring him to fall within the constitutional exemption granted by the Supreme Court of Canada in [Carter 2016](#).

IV. The Law: Carter 2015, Carter 2016 and Subsequent Developments

29 A number of decisions have been issued in response to applications for physician-assisted death in Canada. Counsel have provided the decisions of *S. (H.), Re*, [2016 ABQB 121](#) (Alta. Q.B.); *B. (A.) v. Canada (Attorney General)*, [2016 ONSC 1571](#) (Ont. S.C.J.) and [2016 ONSC 1912](#) (Ont. S.C.J.); *Patient v. Canada (Attorney General)*, [2016 MBQB 63](#) (Man. Q.B.); *A. (A.), Re*, [2016 BCSC 511](#) (B.C. S.C.) and [2016 BCSC 570](#) (B.C. S.C.); *Carter v. Ontario (Attorney General)*, [2016 ONSC 2022](#) (Ont. S.C.J.) and [\[B. \(A.\), Re\] 2016 ONSC 2188](#) (Ont. S.C.J.); *V. (W.) v. Canada (Attorney General)*, [2016 ONSC 2087](#) (Ont. S.C.J.); *CD v. Canada (Attorney General)*, [2016 ONSC 2431](#) (Ont. S.C.J.); *Dagenais*

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v. *Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.); *Vancouver Sun, Re*, [2004] 2 S.C.R. 332 (S.C.C.).

30 A thorough consideration of the law as well as an analytic approach to these applications is found in the first decision of its kind in Canada, penned by Martin J of this court in *S. (H.), Re*, 2016 ABQB 121 (Alta. Q.B.). Though she heard the application *in camera* for reasons particular to that case, including the presence of the applicant in the court room, upon further application, she lifted the publication ban.

31 As stated by Martin J in *S. (H.), Re*, the majority of the Supreme Court of Canada has already granted the constitutional exemption as a remedy to the group who qualify under para 127 of *Carter 2015*. This Court is not called upon to conduct a full blown inquiry as to whether a claimant has established an individual case for personal constitutional exemption, a balancing exercise that would require the participation of Alberta, Canada, and other affected parties.

32 Rather, the job of the motions judge is simply to determine whether a particular claimant meets the criteria articulated in *Carter 2015*. The question that the Supreme Court has directed the superior courts to answer is whether the applicant falls within that group. Therefore the inquiry is individual and fact specific, though, as indicated in the *S. (H.), Re* decision, the motions judge must be mindful of the legal framework and overall constitutional context of the inquiry.

V. The Issue

33 I agree with the conclusion reached by Martin J, in *S. (H.), Re*, and since followed by other courts, that the role of the superior court motions judge as it now flows from the majority judgment in *Carter 2016*, is to determine whether or not the Applicant, Mr. Tuckwell, meets the criteria set out in *Carter 2015*, for a declaration by this court that he is eligible for a physician - assisted death. The focus of the judicial authorization process established in *Carter 2016* is on a particular person, his or her particular condition, and the actual record before the Court.

VI. Evidence and Application of the Carter 2015 Criteria

34 The following are the criteria taken from the *Carter 2015* decision that must be met for Mr. Tuckwell to qualify for a court order for physician-assisted death.

1. Whether Mr. Tuckwell is a competent adult

35 I find that Mr. Tuckwell is a competent adult. Competence is presumed, and there is nothing in the record before me that challenges that presumption. There is no suggestion in the medical reports that illness has affected Mr. Tuckwell's mental capacity. The affidavit containing Mr. Tuckwell's evidence shows that he is intelligent and thoughtful and charting his own course through his illness.

36 Physician A, Mr. Tuckwell's treating neurologist, observes that Mr. Tuckwell has had cognitive testing and scored very high, well above normal range. Though he has understandably experienced periods of sadness, the evidence does not indicate that he is depressed.

37 I agree with the views expressed by Martin J in the decision *S. (H.), Re*, that in the absence of any suggestion that the applicant lacks competence, there is no need to have evidence from a psychiatrist. I am confident in these circumstances that this Court can make findings in respect of the *Carter 2015* criteria without the assistance of a psychiatrist.

2. Whether Mr. Tuckwell clearly consents to a physician-assisted death

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38 Mr. Tuckwell asserts, and I accept, that he is fully informed about his medical condition and his prognosis. His doctors have advised him, and he accepts, that there are currently no treatments available that can alter the course of his ALS.

39 Since his diagnosis of ALS, Mr. Tuckwell has asked questions of his ALS team about options available to him when his disease progresses to the stage that his suffering becomes too much to bear. After the release of the *Carter* decision, when the Alberta Government began to consider its options for dealing with the question, Mr. Tuckwell became a member of the Alberta Health Services Provincial Physician-Assisted Dying Steering Committee. He has served as the Patient and Family representative on that Committee since November 2015. He expresses his view that because of this involvement, he is a uniquely knowledgeable layperson on the question of physician-assisted death, its risks and alternatives.

40 He has also questioned doctors about, and researched the subject of, physician-assisted death as well as the other options available to him. He is aware of the hospice and palliative care facilities available in Edmonton, options that he finds no more tolerable for enduring the progression of the disease. He is aware of the option of withdrawing from care and feeding under palliative sedation. This path is starvation and could take days or weeks. He states that physician-assisted death is the best option for him given his circumstances. He confirms that his request for a Court Order allowing him to access a physician-assisted death is made freely and voluntarily. Based on the material before me, I accept that to be so.

41 I accept Mr. Tuckwell's view that he is not clinically depressed, but that he makes this decision as a logical one, based on the options he has and the progression of his ALS.

42 Mr. Tuckwell is close with his parents and his sister and has discussed with them his decision to seek an order to allow him to access physician-assisted death; they respect and support his decision.

43 Mr. Tuckwell has met with the doctor who has agreed to assist him if the Order is granted. He is aware of the process that will be followed and the potential risks involved. He understands them and accepts them.

44 Mr. Tuckwell is also aware that if the Court grants this Order authorizing a physician-assisted death for him, the decision whether or not to use that authorization remains entirely his decision to make.

45 Physician B and Physician C swore Affidavits in support of this application. Both confirm that they had complete and full discussions with Mr. Tuckwell about physician-assisted death wherein he communicated with them via his computer. Both confirm he indicated to them in a very clear fashion that it is his wish to end the suffering he is enduring by bringing his life to an end.

46 Both Physician B and Physician C confirm that after full discussions with the Applicant, they are satisfied that he understands the ramifications of his request and as a result, has given his consent to end his life with physician assistance. They confirm that Mr. Tuckwell is fully informed, understands the information given to him by them, appreciates the foreseeable consequences of his decision and ably communicated to them his decision to end his life through physician assistance.

47 Both physicians B and C have confirmed in their affidavits that they will provide medical assistance to Mr. Tuckwell to help him end his life.

48 I am satisfied on the evidence before the Court that Mr. Tuckwell clearly consents to a physician-assisted death.

3. Whether Mr. Tuckwell suffers from ALS, a grievous and irremediable medical condition

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49 I conclude from the evidence before me that ALS is a grievous and irremediable medical condition. It is widely understood to be a progressive, terminal disease. Both the decision in *S. (H.), Re* and in *Carter 2012* refer to the evidence from the experts to that effect.

50 According to the evidence of Physician A, Mr. Tuckwell's treating neurologist, ALS is described as follows:

ALS is a progressive neurologic disorder that compromises voluntary movement by both involving the brain pathways to nerve, and the motor nerve pathways to muscle. ALS can manifest in a number of ways; (1) bulbar onset ALS starts with speech and swallowing difficulties, (ii) respiratory onset starts with breathing difficulties related to weakness of respiratory muscles, (iii) limb onset starts with weakness in the arms or legs. Progression is usually steady within the region where symptoms initially appeared, and regions tend to become involved at different rates in different patients. The median survival is reported in many studies to be between 2 and 3 years from diagnosis, although 10 percent of patients can live longer than 10 years. Patients with onset in the bulbar region, older age of onset, and those with cognitive impairment have a relatively poorer prognosis.

51 In her evidence, Physician A confirms that Mr. Tuckwell suffers from ALS and that there is no cure for ALS. She traces the trajectory of his illness from its diagnosis in October 2012, through the onset and advancement of debilitating symptoms, to his present condition.

52 Physician B has reviewed the evidence provided by Physician A and by Mr. Tuckwell. He affirms that Mr. Tuckwell suffers from an irreversible medical condition called ALS and that it is a grievous and irremediable medical condition. He confirms that Mr. Tuckwell's condition is dire.

53 I am satisfied on the evidence before the Court, that Mr. Tuckwell suffers from ALS, a grievous and irremediable medical condition.

4. Whether Mr. Tuckwell's ALS is causing him enduring, intolerable suffering

54 After his diagnosis, Mr. Tuckwell came under the care of a team of health care professionals at the ALS Clinic at the University of Alberta. In 2013, he had a gastric feeding tube surgically implanted so he could supplement his nutrition while travelling in Tibet. In the late summer of 2014, he completely lost his ability to speak and eat. He has not tasted food in a year and one half. He began communicating in writing and using a text-to-speech application on his IPAD.

55 A symptom of Mr. Tuckwell's condition is choking, at first on food and drink, and then on his own saliva. It is increasingly likely that he will choke on his own secretions or have a respiratory arrest. He expresses that he is frightened of choking to death alone and, understandably, does not wish to die as a result of choking.

56 Mr. Tuckwell's condition has now progressed to the point that use of his arms and legs are compromised. He experiences painful cramps in his legs and abdomen. The cold exacerbates his condition. He would have trouble walking to the end of the block and can no longer drive. He can still use his text-to-speech application on his iPad but slowly and with difficulty.

57 Mr. Tuckwell must use a bi-pap machine, which assists breathing with positive airway pressure along with forced inhalation, 3 to 4 hours a day now, but the amount of time will increase as the disease progresses. He uses cough assist and suction machines to manage his secretions. Both machines are becoming increasingly difficult to use independently because of the limited use he has of his hands and arms. Outings with family and friends are increasingly difficult because it is difficult to predict when the suction machine will be necessary. He relates an experience in recent weeks where he had a full airway obstruction while out with friends; it was a terrifying experience for him.

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58 Mr. Tuckwell requires a Home Care Assistant overnight, for his activities of daily living and for having his meals. He asserts that his life would have ended in 2014 had he not had the feeding tube implanted. He says that his quality of life has significantly and rapidly declined; that at the rate his limbs are deteriorating, he is concerned that he will lose the ability to communicate his wish to have a physician-assisted death.

59 Physician A affirms that at this time, Mr. Tuckwell has advanced ALS, and while not imminently dying, is at risk of a sudden decline in his health and sudden death. In order to manage the burden of symptoms, his suffering which is both physical and psychological, and to relieve his concerns about an intolerable death, he is applying for physician-assisted death. She further states that ALS is a grievous and irremediable medical condition that causes enduring suffering that is intolerable to Mr. Tuckwell in the circumstances of his condition.

60 Physician B confirms that he has reviewed the evidence of Mr. Tuckwell; and that his ALS condition causes Mr. Tuckwell enduring, intolerable suffering.

61 I am satisfied on the evidence before the Court, that Mr. Tuckwell's ALS is causing him enduring, intolerable suffering

5. Whether Mr. Tuckwell's suffering cannot be alleviated by a treatment acceptable to him

62 Mr. Tuckwell asserts that he has been advised by his doctors that there are currently no treatments available to him that can alter the course of his ALS.

63 As noted, Mr. Tuckwell is aware of the hospice and palliative care facilities available in Edmonton, options that he finds no more tolerable for enduring the progression of the disease. The options of withdrawing from care and feeding under palliative sedation, that is, starvation that could take days or week, is not a treatment acceptable to him.

64 Mr. Tuckwell has by now transitioned to palliative home care. He is of the view that a physician-assisted death is his best option in his circumstances and that there are no acceptable alternatives.

65 Physician A provides evidence that in the three and half years since diagnosis, Mr. Tuckwell has been very involved with the ALS clinic, seeking and accepting supports made available. Despite his consistent and at times intense involvement with the clinic, he is currently suffering from a symptom burden that has rapidly become unacceptable to him. Central to the burden are his ongoing problems with secretions, and choking episodes. He has developed increasing cramps and discomforts that are unpredictable. He has also suffered progressive loss of independence, and given his reliance on technology for communication, he fears a loss of the ability to communicate his immediate needs in the event of painful spasms or choking episodes.

66 This fear of inability to communicate his needs is one of his motivations for seeking physician-assisted death. This concern, together with the evident progression in his disease, means that in the near future he is likely to further lose independence to the point where he would not be able to stay in his own home even if supported by professional care givers. This recent decline in his independence and mobility has prompted the urgency in his application for physician-assisted death. While he continues to be supported by healthcare professionals in the ALS program and by his family doctor, the nuances and day-to-day variations in his symptoms make it difficult for even the most intense involvement to completely relieve his symptoms or reassure him that he will not be placed in an insupportable or intolerable situation.

67 Physician B confirms that he has reviewed the evidence of Mr. Tuckwell; and that his condition causes Mr. Tuckwell enduring, intolerable suffering that cannot be alleviated by any treatment acceptable to him.

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68 I am satisfied on the evidence before the Court, that Mr. Tuckwell's suffering cannot be alleviated by a treatment acceptable to him.

VII. Conclusion and Terms of Order

69 I am satisfied based on the affidavit evidence filed, and on the submissions of counsel, that Mr. Tuckwell meets the criteria set out by the Supreme Court of Canada in *Carter 2015* so as to be entitled to proceed with a physician-assisted death; and that he comes within the scope of the constitutional exemption granted by the Supreme Court of Canada in *Carter 2016*.

70 In addition to the terms of the Order already granted concerning the restrictions on media reporting and public access to court proceedings, the Order will contain the following terms:

1. The Applicant comes within the scope of the constitutional exemption from the extension of the suspension of the declaration of invalidity of sections 14 and 241 (b) of the *Criminal Code* RSC 1985 c. C-46 granted by the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2016 SCC 4 (S.C.C.);
2. The Applicant is authorized to proceed with a physician-assisted death, but nothing contained in the order shall obligate the Applicant to proceed with a physician-assisted death;
3. The Applicant is exempt from the application of sections 14 and 241(b) of the *Criminal Code* RSC 1985 c. C-46 during the extension of the suspension of the declaration of invalidity of those sections;
4. Any physician licensed to practice medicine in Canada, who provides, aids or otherwise assists in the provision of a physician-assisted death or counseling for physician-assisted death in respect to the Applicant is exempt from the application of sections 14 and 241(b) of the *Criminal Code* RSC 1985 c. C-46 during the extension of the suspension of the declaration of invalidity of those sections;
5. Any
 - a. pharmacist authorized to engage in the practice of pharmacy in the Province of Alberta who
 - i. dispenses, compounds or sells drugs,
 - ii. provides any other professional service within the practice of pharmacists in Alberta, or
 - iii. both (a) and (b); and
 - b. pharmacy technician authorized to engage in the practice of pharmacist technicians in the Province of Alberta, who assists the pharmacist in relation to the actions referred to in the preceding section in relation to the physician-assisted death of the Applicant

is exempt from the application of sections 14 and 241(b) of the *Criminal Code* RSC 1985 c. C-46 during the extension of the suspension of the declaration of invalidity of those sections;

71 Thank you for the high degree of professionalism exhibited by all those involved in this application; for your excellent conduct of the proceedings, and for your thoughtful representations. Our system of justice is as its best when its participants rise to the challenges of helping those who face hardship or disadvantage.

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