CITATION: A.B. v. Canada (Attorney General), 2017 ONSC 3759
COURT FILE NO.: AD-001/17
DATE: 20170619

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
A.B.	)	*Andrew Faith* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF ONTARIO	)	*Joseph Cheng* for the Respondent the Attorney General of Canada
	)	
	)	*Josh Hunter* for the Respondent the Attorney General of Ontario
Respondents	)	
	)	
	)	
	)	**HEARD**: June 19, 2017

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Two physicians have concluded that AB meets the criteria of the *Criminal Code*, R.S.C. 1985, c. C-46 for a medically assisted death, and one of them was prepared to provide the assistance. However, when a predecessor physician did not agree that AB met the criteria of the *Criminal Code* - because he felt that AB's natural death was not reasonably foreseeable – no physician was prepared to offer her medical assistance in dying. The physician who had been prepared to provide assistance, although still of the view that AB qualified, declined to provide assistance because of a fear of being charged with murder.

[2] Although she has qualified, no physicians are prepared to assist AB with a medically assisted death, which is her constitutionally protected civil and human right, unless the court grants a declaration that would protect them from criminal charges. AB has applied for that declaration. The position of Ontario and Canada is that the declaration should be refused, but they take no position on whether AB meets the criteria for medical assistance in dying. They also submit that granting a declaration would improperly interfere with prosecutorial discretion by purporting to predetermine criminal liability.

[3] It appears that AB is already eligible for medical assistance in dying, but Ontario and Canada are technically correct that it is not the court's role to confirm what her existing

constitutional rights are should she wish to exercise them. Ontario and Canada may also be correct about the issue of court interference with prosecutorial discretion, but I need not decide that point because what I propose will not interfere with prosecutorial discretion.

[4] AB's heartbreaking application is misconceived. Ontario's and Canada's response is as unhelpful as it is technically correct.

[5] The court cannot grant AB the declaration that she seeks. However, the court can do something, which is to address the real problem, which is a matter of interpreting and explaining the meaning and operation of s. 241.2 (2)(d) of the *Criminal Code*. This will not interfere with prosecutorial discretion and thus, the court can grant AB's application - in part.

[6] For the reasons that follow, I declare that in accordance with the proper interpretation of s. 241.2 (2)(d) of the *Criminal Code*, AB's natural death is reasonably foreseeable.

[7] I also grant a publication ban and an order sealing the evidence. There shall be no order as to costs.

B. ORDER REQUESTED

[8] AB requests the following:

a. a determination that she has a grievous and irremediable medical condition within the meaning of s. 241.2 (2)(d) of the *Criminal Code*, and specifically that her natural death has become reasonably foreseeable within the meaning of s. 241.2 (2)(d) of the *Criminal Code*;

b. a declaration that she may receive medical assistance in dying, in that she meets all of the criteria in s. 241.2 (1) of the *Criminal Code*;

c. a declaration that she provided a signed and dated request for medical assistance in dying on or before May 8, 2017, within the meaning of s. 241.2 (3)(b) and (c) of the *Criminal Code*;

d. an order banning the publication of any identifying information related to her, her family members and the her healthcare providers; and

e. an order sealing the evidence, documents and pleadings filed in this application subject to her undertaking to provide the filed evidence, documents and pleadings upon request to members of the public and media in a form redacted to remove any information that would identify or tend to identify her, her family members, or the her healthcare providers.

C. POSITION OF ONTARIO AND CANADA

[9] Ontario submits that the requested declaration should not issue because judicial pre-authorization of medical assistance in dying is contrary to the regime established by the *Criminal Code* for medical assistance in dying and is neither necessary nor advisable. Ontario submits that judicial pre-authorization is not required because Parliament expressly decided not to require judicial pre-authorization; rather, Parliament decided that physicians and nurse practitioners, not judges, were to be given the responsibility of determining whether the *Criminal Code's* criteria for providing medical assistance in dying were met. Further, in the case at bar, since two

physicians are of the opinion that AB meets the *Criminal Code's* criteria, no judicial pre-authorization is required.

[10] Further still, Ontario submits that a civil court should not issue a declaration that any particular patient meets the criteria for obtaining medical assistance in dying because such a declaration would improperly interfere with prosecutorial discretion by purporting to predetermine criminal liability.

[11] Finally, Ontario submits that if the court finds that it should issue a declaration concerning whether AB meets the criteria for obtaining medical assistance in dying, then Ontario takes no position on whether those criteria have been met. Ontario also submits that a declaration is made it should be general and not refer to AB in particular.

[12] Canada adopts the position of Ontario.

D. PUBLICATION BAN AND ORDER SEALING THE EVIDENCE

[13] The request for a publication ban and an order sealing the evidence was not opposed by the parties or by the media, which was given notice of the request.

[14] The requested orders should be granted.

E. FACTUAL BACKGROUND

1. Introduction

[15] To understand the issues in this case and the arguments of the parties, it is necessary to interweave AB's personal history with the judicial history that led to the enactment of *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c. 3 ("Bill C-14").

[16] It is also necessary to describe the legislative history of Bill C-14 separately; i.e., without integrating it with AB's personal history. The pertinent provisions of Bill C-14 are set out in Schedule "A" to these Reasons for Decision.

2. AB's Personal History and the Judicial History of Medical Assistance in Dying

[17] AB is an almost 80-year old woman with an advanced and incurable disease that she has courageously battled for 25 years. She now suffers from uninterrupted, incredibly-excruciating pain.

[18] In 1982, AB, then in her forties, was diagnosed with osteoarthritis. At the time, she was working full time to support her family, and although in significant pain, she continued to work until she was in her mid-fifties, when she had to retire because she could no longer work because of the pain.

[19] After her retirement from work, AB moved to live with a family member. Her condition continued to deteriorate. She had multiple operations and had knee replacements, hip replacements, metal rod implants in her legs and back. The pain could not be managed, and the surgeries were not helpful. She lived with her family until she was in her early seventies, when it became clear that she needed full-time care, and she moved to a nursing home.

[20] In the nursing home, AB's condition continued to deteriorate, and by 2015, her pain became unbearable to her and she began to think about medical assistance in dying, which was a matter then being considered by the courts in British Columbia and by the Supreme Court of Canada.

[21] On February 6, 2015, in *Carter v. Canada (A.G.)*, 2015 SCC 5, the Supreme Court of Canada found that former sections 241(b) (aiding suicide) and 14 (consent to death) of the *Criminal Code* unjustifiably infringed s. 7 of the *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 and were of no force and effect to the extent that they prohibited 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.

[22] The Supreme Court suspended the declaration of invalidity for 12 months, to February 6, 2016, to give Parliament the opportunity to craft new legislation.

[23] Subsequently, because of the intervention of a federal election, the government asked the Supreme Court for a six-month extension of the suspension of its declaration of invalidity to allow more time to introduce legislation and have it considered by Parliament.

[24] On January 15, 2016, in *Carter v. Canada (A.G.)*, 2016 SCC 4, the Court unanimously extended the suspension but for only four months, until June 6, 2016. The majority of the Court also held that, in the interim, those who met the criteria set out in *Carter 2015* and who wished to seek a physician's assistance in dying during the extended period of suspension, could apply to the superior court of their jurisdiction for an individual constitutional exemption from the still in force provisions of the *Code*.

[25] Returning to AB's history, AB discussed her pain with her rheumatologist, who suggested more operations, but she refused because she felt that the previous surgeries had not helped and rather exacerbated her pain. The doctor prescribed increased medication (fentanyl, morphine, and prednisone), but her pain did not abate. Indeed, by early 2016, her pain became so intense that she was unable to sit in the dining room of the nursing home without crying in pain, and since she did not wish to make the other residents uncomfortable, she began spending almost all of her time in her room.

[26] Meanwhile, Ontario residents began to bring applications to the Superior Court of Justice seeking constitutional exemptions in accordance with the Supreme Court's direction in *Carter 2016*.

[27] On June 6, 2016, the suspension of invalidity expired with no new federal legislation yet in place.

[28] After the suspension expired, an Ontario resident brought an application for a declaration that his planned physician-assisted death was permitted at law because his circumstances met the criteria enunciated in *Carter 2015*.

[29] On June 15, 2016, in *O.P. v. Canada (Attorney General)*, 2016 ONSC 3956, I rejected the argument that, given the expiration of the suspension of invalidity, physician-assisted death was permissible without court order. I held that 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 and pending the enactment of legislation by the federal government to regulate physician-assisted death, the Superior Court of Justice had the jurisdiction to issue individual constitutional remedies under s. 24(1) of the *Constitution Act, 1982* to permit physician-assisted death. In my reasons for decision, I stated at para. 56:

> 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.

[30] Two days later, on June 17, 2016, Parliament enacted Bill C-14, which amended the *Criminal Code* to set out a detailed regulatory regime for medical assistance in dying. Bill C-14 left the decision of whether a patient meets the *Criminal Code's* criteria to medical professionals, not the court.

[31] AB's current condition is that she is in an advanced state of incurable, irreversible, inflammatory and erosive osteoarthritis. Her medical condition is not imminently terminal. She is immobile due to constant arthritic pain and cannot perform daily tasks. Her pain is intense, despite every effort of her physicians to manage the pain, which she experiences in her knees, hips, back, stomach, fingers, and toes. She frequently wakes up screaming in pain. Her esophagus has constricted, and it is painful to eat and to swallow medication. She recently suffered from pneumonia. Her condition will worsen. There are no further treatment options. She feels that she has no future other than to live in pain until allowed to die.

[32] In January 2017, AB decided that she was ready for medical assistance in dying. She spoke to Physician-A, who referred her to Physician-1.

[33] On April 4, 2017, Physician-1, a general practitioner, told AB that her natural death had become reasonable foreseeable, and on April 6, 2017, AB made a written request for medical assistance in dying to him.

[34] Physician-1, who was prepared to provide assistance, concluded that AB met all the criteria set out in s. 241.2 (1) of the *Criminal Code*. Physician-1 deposed that AB's death was reasonably foreseeable given her age and irreversible, incurable, debilitating illness that is causing her incredible suffering.

[35] Having one assessment, AB hoped that Physician-A would agree to be the second assessor and confirm that she was eligible for medical assistance in dying, but he was not. He was of the view that AB's death was not reasonably foreseeable. AB sought out another assessor, the second assessor required by Bill C-14.

[36] On May 8, 2017, Physician-2 assessed AB and provided a written opinion confirming her eligibility for medical assistance in dying.

[37] Physician-1, however, was not prepared to proceed with the medically assisted death. He deposed:

> Despite the fact I have assessed AB and have concluded she meets the criteria for

> MAID [medical assistance in dying], I am also aware that at least one other physician who has assessed AB does not agree. Specifically, that physician is of the opinion that AB's natural death is not reasonably foreseeable.
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> Because of the conflicting opinions, and in spite of the fact another physician agrees with me, I do not feel I can proceed with MAID in all of the circumstances. While I am of the opinion that AB meets the criteria for MAID, I am uncomfortable performing the procedure because if I am wrong in my understanding of the meaning of "reasonably foreseeable" in section 241.2 (2)(d) of the *Criminal Code*, I put myself at risk of being charged with murder.
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> My uncertainty about proceeding is due to the vagueness of the term "reasonably foreseeable." From a medical point of view, I believe that AB's natural death is reasonably foreseeable in the sense that she is [almost 80 years old], in a declining state of health, is virtually immobile, and has an irreversible, incurable and debilitating illness that is causing her incredible suffering. In my view, her death is reasonably foreseeable in that she does not have long to live given her age and health.

3. The Legislative History of Medical Assistance in Dying

[38] On July 17, 2015, in response to *Carter 2015*, the federal Ministers of Health and Justice appointed an External Panel on Options for a Legislative Response to *Carter v. Canada*.

[39] The External Panel held discussions with the interveners in *Carter 2015* and with relevant medical authorities. It also conducted a consultation open to all Canadians. On December 15, 2015, the External Panel submitted its Final Report. The report identified four categories of how requests for medically assistance in dying might be authorized; namely: (1) prior judicial authorization; (2) prior authorization by administrative tribunal; (3) prior authorization by a panel of physicians; or (4) a decision between individuals and their physicians.

[40] On December 11, 2015, the Senate and House of Commons struck a Special Joint Committee on Physician-Assisted Dying to review the External Panel's Final Report and to consult with Canadians, experts, and stakeholders, and to make recommendations on the framework of a federal response on physician-assisted dying.

[41] The Special Joint Committee determined that requiring a review by either a panel or a judge would create an unnecessary barrier or impediment to individuals requesting medical assistance in dying and recommended that the Government of Canada work with the provinces and territories, and their medical regulatory bodies to ensure that the process to regulate medical assistance in dying does not include a prior review and approval process.

[42] The federal government introduced Bill C-14. The Bill did not include any requirement for prior judicial or other review before a physician or nurse practitioner could provide medical assistance in dying. Instead, the criteria for providing medical assistance in dying, including the criteria that death has become reasonably foreseeable, were to be applied by physicians and nurse practitioners using their professional judgment.

[43] In introducing Bill C-14, in the House of Commons Debates, Hon. Jody Wilson-Raybould (Minister of Justice and Attorney General of Canada, Lib.) stated:

> To be clear, the bill does not require that people be dying from a fatal illness or disease or be terminally ill. Rather, it uses more flexible wording; namely, that "their natural death has become reasonably foreseeable, taking into account all of their medical circumstances". This language was deliberately chosen to ensure that people who are on a trajectory toward death in a wide range of circumstances can choose a peaceful death instead of having to endure a long or painful one.
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> ....
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> It makes sense to limit medical assistance in dying to situations where death is reasonably foreseeable, where our physicians, nurse practitioners, and others, can draw on existing ethical and practical knowledge, training and expertise in addressing those challenging circumstances.
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> ....
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> The question was specifically around reasonable foreseeability. In terms of the legislation, reasonable foreseeability and the elements of eligibility in terms of being able to seek medical assistance in dying, all must be read together. We purposefully provided flexibility to medical practitioners to use their expertise, to take into account all of the circumstances of a person's medical condition and what they deem most appropriate or define as reasonably foreseeable.

[44] In her answers to opposition members' questions, the Attorney General stated:

> On reasonable foreseeability and diagnosis, as I said, we leave the determination, taking into account all of the elements, up to medical practitioners. The requirement of reasonable foreseeability must be in conjunction with an irreversible state of decline or a trajectory toward death. That would be determined on a case-by-case basis, recognizing the many views that we were provided on individual circumstances of patients being quite different.

[45] The Attorney General also tabled a Legislative Backgrounder which explained that the Bill proposed to give physicians and nurse practitioners a great deal of flexibility in determining whether death had become reasonably foreseeable. The Backgrounder stated:

> The criterion of reasonable foreseeability of death is intended to require a temporal but flexible connection between the person's overall medical circumstances and their anticipated death. As some medical conditions may cause individuals to irreversibly decline and suffer for a long period of time before dying, the proposed eligibility criteria would not impose any specific requirements in terms of prognosis or proximity to death ... The medical condition that is causing the intolerable suffering would not need to be the cause of the reasonably foreseeable death. In other words, eligibility would not be limited to those who are dying from a fatal disease. Eligibility would be assessed on a case-by-case basis, with flexibility to reflect the uniqueness of each person's circumstances, but with limits that require a natural death to be foreseeable in a period of time that is not too remote. It should be noted that people with a mental or physical disability would not be excluded from the regime, but would only be able to access medical assistance in dying if they met all of the eligibility criteria.

[46] In Parliamentary Committee, Mr. Ted Falk, a Conservative MP, made motions to amend the Bill to allow medical assistance in dying provided: (1) only if a judge of the superior court

makes an order stating that the court is satisfied that the person meets all of the *Criminal Code's* criteria; or (2) only with the written consent of the Minister of Health; or (3) only with a prior review of a competent legal authority appointed by the province or the federal Minister of Health and Justice if a province failed to do so. Department of Justice officials, government members, and NDP members of the Committee objected to these proposals, and the amendments were defeated.

[47] Notwithstanding that these proposed amendments were defeated in Committee, when the Bill went the whole House, the Speaker of the House of Commons allowed a vote on the proposal that there by a prior review by a competent legal authority before there could be medical assistance in dying. The proposed preapproval requirement was again rejected.

[48] In the Senate, the Leader of the Opposition moved an amendment to require a person who is not at end of life to receive medical assistance in dying only with the authorization of a judge of a superior court. That amendment was also defeated.

[49] In responding to a Senate amendment that would have removed Bill C-14's definition of grievous and irremediable harm (including the requirement that death has become reasonably foreseeable), both the Attorney General and the Minister of Health reiterated the government's intention was to have physicians and nurse practitioners determine when patients' deaths had become reasonably foreseeable. The Attorney General stated:

> Reasonable foreseeability is something that has been used quite regularly in the *Criminal Code*. We placed it in the legislation to inject what we feel is a necessary flexibility to provide medical practitioners with the ability, based on their direct relationship with their patient, to determine when that patient would be eligible for medical assistance in dying. In other words, they would determine when their patient's death has become reasonably foreseeable.

[50] The House rejected a Senate amendment and restored the requirement that physicians or nurse practitioners providing medical assistance in dying determine whether a patient's death had become reasonably foreseeable.

[51] Bill C-14 was enacted and came into force on June 17, 2016. The Department of Justice published a Glossary to Bill C-14, which explained that:

> Natural death has become "reasonably foreseeable" means that there is a real possibility of the patient's death within a period of time that is not too remote. In other words, the patient would need to experience a change in the state of their medical condition so that it has become fairly clear that they are on an irreversible path toward death, even if there is no clear or specific prognosis. Each person's circumstances are unique, and life expectancy depends on a number of factors, such as the nature of the illness, and the impacts of other medical conditions or health related factors such as age or frailty. Physicians and nurse practitioners have the necessary expertise to evaluate each person's unique circumstances and can effectively judge when a person is on a trajectory toward death. While medical professionals do not need to be able to clearly predict exactly how or when a person will die, the person's death would need to be foreseeable in the not too distant future.

F. DISCUSSION AND ANALYSIS

[52] I begin the discussion by explaining why this application is misconceived, and then I shall go on to explain why Ontario's and Canada's response to it is unhelpful.

[53] AB's application appears to be a constitutional challenge to Bill C-14. However, AB's plight is not caused by Bill C-14. Her plight is caused by Physician-1's abundance of caution and misunderstanding of the meaning of the statute.

[54] AB's application is not like the cases now pending in British Columbia and Québec that genuinely raise constitutional issues about whether Bill C-14 contravenes the *Canadian Charter of Rights and Freedoms*. As I understand it, those cases involve applicants who are suffering grievous and irremediable harm but for whom it cannot be said that death has become reasonably foreseeable. In contrast, in the case at bar, two physicians have said and continue to say that AB's death is reasonably foreseeable. Thus AB's circumstances come within the ambit of the statute.

[55] With no disrespect intended, AB's submission that her constitutional rights have been contravened is ill conceived. But for actually receiving the assistance, it appears that AB qualifies for medical assistance in dying. The court does have jurisdiction to enforce a person's *Charter* rights, but in the case at bar, AB's constitutionally protected right to medical assistance in dying is not being contravened by any government actor or by some constitutional deficiency in Bill C-14, as may be the case in the pending cases in British Columbia and Québec. In the case at bar, AB's problem is not some constitutional deficiency in Bill C-14; the problem is in the mind of the physicians - not in the mind of the legislator who intended that persons like AB have the right, in certain circumstances, to request and obtain medical assistance in dying from the medical profession without pre-authorization of the judiciary.

[56] Turning to why Ontario's and Canada's response to AB's application and her plight is unhelpful, with no disrespect intended, the Attorney Generals cannot ignore AB's plight and in one breadth submit that her application is unnecessary but then refuse to take a position as to whether AB meets the criteria for obtaining medical assistance in dying, which is the reason why AB's application would be and is unnecessary.

[57] It is equally unhelpful for Ontario and Canada to say that no declaration should issue because there is no live controversy between them and AB. They say there is no dispute because medical assistance in dying is available in Ontario without pre-approval from the court. They oppose court approvals as unnecessary and as adding expense and delay for vulnerable patients who wish to access medical assistance in dying in accordance with the regime crafted by Parliament.

[58] However, there is in fact a live controversy before the court. AB, whose plight is pitiful, asserts that her constitutionally protected civil rights have been contravened, and she seeks a remedy. Ontario and Canada dispute that her rights have been violated on their account, and they ask that her application be dismissed leaving her in her distressing and awful plight.

[59] Ontario and Canada, however, are quite correct in submitting that it is not a superior court's job to appropriate Physician-1's job and make an order stating that AB meets all of the *Criminal Code's* criteria for medical assistance in dying. With the enactment of Bill C-14 that job is for the medical profession, and it is not for the court to give confirming comforting orders.

[60] These observations about why this application is misconceived and about why the response to it is unhelpful bring the matter back to the real problem, which is Physician-1's abundance of caution and apprehensive misunderstanding about the meaning of Bill C-14.

[61] With no disrespect intended to Physician-1, I say he misunderstands the regime of Bill C-14, because he cannot in one breadth say that from a medical point of view, AB's natural death is reasonably foreseeable but he is uncertain about proceeding because of the vagueness of the term "reasonably foreseeable."

[62] I agree with Ontario and Canada that Bill C-14's legislative history (and its language) demonstrates Parliament's intention that the physicians and nurse practitioners who have been asked to provide medical assistance in dying are exclusively responsible for deciding whether the *Code's* criteria are satisfied without any pre-authorization from the courts.

[63] I also agree with Ontario and Canada that AB cannot ask the court to preempt the medical practitioners and make the decision for them. The legislation requires the physician or nurse practitioner providing medical assistance in dying to "personally" form an opinion and to ensure that another independent physician or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria before providing a person with medical assistance in dying. The court cannot assume the responsibility of forming somebody else's opinion, and the court obviously does not provide medical assistance in dying or at all. The court is a legal practitioner not a medical practitioner.

[64] I disagree, however, that the court cannot do anything but dismiss AB's application. Ontario and Canada say that a declaration by this court cannot have any practical effect, and, therefore, should not be made, because the court cannot assume the tasks assigned to the person who will provide medical assistance in dying.

[65] Although I agree that this court should not make a declaration that cannot have any practical effect; however, where I part company with Ontario and Canada is in the idea that there is no declaration that this court can make in the circumstances of this case that would have utility. In my opinion, it would be useful to declare as a matter of statutory interpretation (if I can, based on the evidence presented to the court) that AB's natural death has become reasonably foreseeable within the meaning of s. 241.2 (2)(d) of the *Criminal Code*.

[66] In my opinion, making this declaration of statutory interpretation would be useful and fall with this court's jurisdiction to interpret and declare the civil law, and it would not interfere with prosecutorial discretion by issuing declarations purporting to predetermine criminal liability. It should be kept in mind that the genuine issue is AB's civil and human rights not Physician-1's exposure to criminal proceedings. In making an interpretative declaration, I will not be declaring that courts could or should grant pre-approvals for persons seeking medical assistance in dying nor will I declare a jurisdiction or responsibility on the courts that Parliament has assigned to the medical profession. In making an interpretative declaration, I will be addressing AB's civil rights under a hybrid provision in a statute that has a role to play in both civil and criminal law.

[67] I accept that prosecutors, not courts, determine whether criminal prosecutions should proceed and that civil courts should not interfere with prosecutorial discretion by issuing declarations that purport to predetermine compliance with the *Criminal Code*. See *R. v. Beare*, [1988] 2 SCR 387 at pp. 410-11; *R. v. Power*, [1994] 1 SCR 601 at pp. 615-16; *Krieger v. Law Society of Alberta*, 2002 SCC 65 at paras. 46-47; *Miazga v. Kvello Estate*, 2009 SCC 51 at paras.

45-48; *R. v. Anderson*, 2014 SCC 41 at paras. 30-32, 44, and 46-48; *Henry v. British Columbia (A.G.)*, 2015 SCC 24 at para. 49; *R. v. Cawthorne*, 2016 SCC 32 at paras. 23-25 and 28.

[68] I also accept that in *London Health Sciences Centre v. R.K. (Guardian ad litem of)* (1997), 152 DLR (4th) 724 (Ont. Gen. Div.) at paras. 1-10 and in *Bentley (Litigation guardian of) v. Maplewood Seniors Care Society*, 2014 BCSC 165, aff'd on other grounds 2015 BCCA 91, the courts in Ontario and British Columbia considered whether they should issue declarations to predetermine whether healthcare providers considering ceasing treatment in an end-of-life situation would be immune from potential future criminal liability, and in both cases, the courts refused to issue the requested declaration because it could have no practical effect or would impermissibly interfere with prosecutorial discretion.

[69] In the immediate case, however, in making a declaration, if I can properly make it based on the evidence, I am not conferring immunity upon Physician-1, nor am I providing him with any defences he does not already have under the *Criminal Code,* nor am I relieving him of any obligations he has under the *Criminal Code.*

[70] In the case at bar, unlike the situations in *London Health Sciences Centre v. R.K. (Guardian ad litem of)* (1997) and in *Bentley (Litigation guardian of) v. Maplewood Seniors Care Society*, I am interpreting how a statute affects the civil rights of the patient and not the civil rights or criminality of the acts or omissions of the medical practitioner providing or not providing medical assistance. I do not see how interpreting s. 241.2 (2)(d) of the *Criminal Code* improperly interferes with prosecutorial discretion. In *London Health Sciences Centre,* the physician actually sought a declaration of immunity, which I shall not grant in the immediate case. In *Bentley (Litigation guardian of),* the hospital sought a declaration that it lawfully could follow the direction of the substitute decision maker not to feed the patient and be free of any exposure to criminal liability, and it was quite understandable why a court would decline to grant such a declaration. The case at bar is distinguishable from those cases. In the case at bar, I shall interpreting the words of a statute and not making findings about criminal liability.

[71] Rule 14.05(3)(d) of the *Rules of Civil Procedure* provides, among other things, that a proceeding may be brought by application where the relief claimed, depends on the interpretation of a statute. In the case at bar, AB seeks the remedy of a declaration about the interpretation of s.241.2 (2)(d) of the *Criminal Code*. At the heart of her application is her constitutionally protected right to a physician assisted death should she meet the criteria established by Parliament.

[72] AB's application is of the type brought in *Schaeffer v. Woods*, 2011 ONCA 716. In that case, the applicants successfully sought an interpretation of a legislative framework governing investigations by the Special Investigations Unit, which was established by the *Police Services Act*, R.S.O. 1990, c. P.15. That legislation had left unspecified whether police officers involved in SIU investigations were permitted to consult with legal counsel prior to drafting notes that they were required to make.

[73] The regime for medical assistance in dying is in early days, and given the extreme gravity of the issues involved and the enormous public interest in how the Canadian regime operates, there is utility in removing doubts about the interpretation and operation of the statute creating the regime. This exercise, however, is not to do anything more than that, and it certainly is not an exercise that can in advance remove or alter the role of the medical practitioners in the regime, and it is not an exercise that will create barriers by requiring or offering the alternative of

judicial approvals of requests for medical assistance in dying.

[74] An interpretation of s. 241.2 (2)(d) of the *Criminal Code* is not granting a constitutional exemption, which the circumstances of the immediate case do not call for, nor is it a judicial determination of whether AB is eligible to receive medical assistance in accordance with the regime established by Parliament. An interpretation of s. 241.2 (2)(d) does not grant Physician-1 immunity nor an exemption from complying with all the requirements of the legislation.

[75] All the court can do in the circumstances of the immediate case is to clarify what Parliament meant in s. 241.2 (2)(d) so that Physician-1 and other physicians have no misunderstanding about how to comply with the legislation. There is no floodgates concern because the court need do this only once for whatever benefit it may provide to AB and others.

[76] Although AB conflated her argument, an interpretation of s. 241.2 (2)(d) is also not an interpretation of s. 241.2 (3)(a), which stipulates that before a medical practitioner provides a person with medical assistance, he or she must be of the opinion that the person meets all of the criteria set out in subsections 241.2 (1) and (2), which includes the criterion of s. 241.2 (2)(d) that their natural death has become reasonably foreseeable.

[77] The application before the court is not about interpreting what it means for a medical practitioner "to be of the opinion that the person meets all of the criteria." Rather, the application arises because Physician-1 is uncertain about the meaning of "natural death has become reasonably foreseeable" in s. 241.2 (2)(d).

[78] There is and there ought not to be any uncertainty or misunderstanding about the meaning of those words.

[79] In this regard, those words are modified by the phrase "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." This language reveals that natural death need not be imminent and that what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making, but not necessarily precluding, a prognosis of the remaining lifespan.

[80] Although it is impossible to imagine that the exercise of professional knowledge and judgment will ever be easy, in those cases where a prognosis can be made that death is imminent, then it may be easier to say that the natural death is reasonably foreseeable. Physicians, of course, have considerable experience in making a prognosis, but the legislation makes it clear that in formulating an opinion, the physician need not opine about the specific length of time that the person requesting medical assistance in dying has remaining in his or her lifetime.

[81] In referring to a "natural death" the language denotes that the death is one arising from causes associated with natural causes; i.e., the language reveals that the foreseeabilty of the death must be connected to natural causes, which is to say about causes associated with the functioning or malfunctioning of the human body. These are matters at the core if not the whole corpus of medical knowledge and better known to doctors than to judges. The language reveals that the natural death need not be connected to a particular terminal disease or condition and rather is connected to all of a particular person's medical circumstances.

[82] The Attorney General, in introducing Bill C-14, described the meaning of the words in s. 241.2 (2)(d), and in my opinion, she correctly said that the language does not require that people be dying from a terminal illness, disease or disability.

[83] As the Attorney General said, the language of s. 241.2 (2)(d) encompasses, on a case-by-case basis, a person who is on a trajectory toward death because he or she: (a) has a serious and incurable illness, disease or disability; (b) is in an advanced state of irreversible decline in capability; and (c) is enduring physical or psychological suffering that is intolerable and that cannot be relieved under conditions that they consider acceptable.

[84] These criteria or factors are all matters with which Physician-1 and all physicians are, on an everyday basis, capable of forming opinions on. Physician-1 and all other physicians are equally capable of determining whether the criteria or factors are not satisfied because a natural death is not reasonably foreseeable.

[85] During 2015-2016 in the run up to the enactment of Bill 14, some of these factors or criteria were considered in the case law about what was formerly described as physician-assisted death and what is now described as medical assistance in dying. In *A.B. v. Canada (Attorney General)*, 2016 ONSC 1912 and in *I.J. v. Canada (Attorney General)*, 2016 ONSC 3380, I held that a grievous medical condition connotes that the person's medical condition greatly or enormously interferes with the quality of that person's life. In *I.J. v. Canada (Attorney General)*, *supra*, I held that in determining whether a person satisfies the criteria for a physician-assisted death, the proximity or remoteness of death and the duration of suffering are relevant factors that must be considered in the unique and special circumstances of any applicant. In *Canada (Attorney General) v. E.F.*, 2016 ABCA 155, the Alberta Court of Appeal held that the constitutional exemption granted in *Carter v. Canada (Attorney General)*, 2016 SCC 4, does not require the applicant's medical condition to be terminal.

[86] Thus, as a matter of statutory interpretation, I can say that a person in circumstances like those in which AB finds herself, is a person in circumstances that fall within the meaning of s. 241.2 (2)(d) of the *Criminal Code*.

[87] There may be cases of doubt about the ambit of s. 241.2 (2)(d), but AB's case of an almost 80 year old woman in an advanced state of incurable, irreversible, worsening illness with excruciating pain and no quality of life is not one of them. Nor is hers a case where she can say that the federal government has enacted legislation that does not go far enough in respecting her constitutional right to choose a medically assisted death.

[88] In the case at bar, Physician-1's deeds belie his words of uncertainty. He was perfectly capable and indeed did form an opinion about AB's natural death being reasonably foreseeable. That was his task, not the court's task. All the court can do is to declare that as a matter of statutory interpretation based on the evidence before it, AB's natural death has become reasonably foreseeable within the meaning of s. 241.2 (2)(d) of the *Criminal Code*.

G. CONCLUSION

[89] For the above reasons, I declare that in accordance with the proper interpretation of s. 241.2 (2)(d) of the *Criminal Code*, AB's natural death is reasonably foreseeable. There shall be no order as to costs.

Perell, J.

Released: June 19, 2017

Schedule "A"

Excerpts from *Criminal Code*

Exemption for medical assistance in dying

227 (1) No medical practitioner or nurse practitioner commits culpable homicide if they provide a person with medical assistance in dying in accordance with section 241.2.

Exemption for person aiding practitioner

(2) No person is a party to culpable homicide if they do anything for the purpose of aiding a medical practitioner or nurse practitioner to provide a person with medical assistance in dying in accordance with section 241.2.

Reasonable but mistaken belief

(3) For greater certainty, the exemption set out in sub-section (1) or (2) applies even if the person invoking it has a reasonable but mistaken belief about any fact that is an element of the exemption.

Non-application of section 14

(4) Section 14 does not apply with respect to a person who consents to have death inflicted on them by means of medical assistance in dying provided in accordance with section 241.2.

....

Medical Assistance in Dying

Definitions

241.1 The following definitions apply in this section and in sections 241.2 to 241.4.

medical assistance in dying means

> (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.

medical practitioner means a person who is entitled to practise medicine under the laws of a province.

....

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

(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 after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(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.

Safeguards

(3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

(a) be of the opinion that the person meets all of the criteria set out in subsection (1);

(b) ensure that the person's request for medical assistance in dying was

(i) made in writing and signed and dated by the person or by another person under subsection (4), and

(ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;

(c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) - before two independent witnesses who then also signed and dated the request;

(d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

(e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);

(f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or - if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent - any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and

(i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

....

Reasonable knowledge, care and skill

(7) Medical assistance in dying must be provided with reasonable knowledge, care and skill in accordance with any applicable provincial laws, rules or standards.

....

Clarification

(9) For greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying.

Failure to comply with safeguards

241.3 A medical practitioner or nurse practitioner who, in providing medical assistance in dying, knowingly fails to comply with all of the requirements set out in paragraphs 241.2(3)(b) to (i) and subsection 241.2(8) is guilty of an offence and is liable

(a) on conviction on indictment, to a term of imprisonment of not more than five years; or

(b) on summary conviction, to a term of imprisonment of not more than 18 months.

CITATION: A.B. v. Canada (Attorney General), 2017 ONSC 3759
COURT FILE NO.: AD-001/17
DATE: 20170619

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

A.B.

Applicant

– and –

THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR DECISION

PERELL J.

Released: June 19, 2017