Court of Queen's Bench of Alberta

Citation: HS (Re), 2016 ABQB 121

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Docket: 1601 01683
Registry: Calgary

In the Matter of H.S. and
In the Matter Of ***Carter v Canada (Attorney General)***, 2015 SCC 5, [2015] 3 SCR 331

Restriction on Publication

By Court Order, no one may publish information that may identify the assisted person.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

Memorandum of Decision
of the
Honourable Madam Justice S.L. Martin

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1. Introduction

[1] Ms. S. is an adult woman in the final stages of amyotrophic lateral sclerosis ("ALS") who seeks to end her life by means of physician-assisted death. Under existing law, it remains a crime in Canada to assist another person in ending her 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] Ms. S. makes such an application to this Court on an expedited basis. This is the first application of its kind in this Province and no applications from other Canadian jurisdictions have been brought to my attention.

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

2. The Applicant

[6] Ms. S. is a long-time resident of Calgary. She is a retired clinical psychologist who obtained a Masters degree in psychology. She worked in a psychiatric hospital for four years and then worked in the healthcare system in Calgary for a further 34 years. She says "I am happy looking back at my career" and describes those decades as "very healthy, productive years and most rewarding."

[7] Before her diagnosis, she was in good physical and mental health and was very physically active. She enjoyed jogging, swimming, yoga, hiking and traveling. She was a member of a hiking group for 23 years and loved the mountains and national parks. She was an award-winning dancer for many years, dancing three or four nights per week. She also loved reading, music, opera and studying languages.

[8] After she retired, she developed a speech impairment and was eventually diagnosed with ALS in April 2013. ALS is a degenerative neurological disease in which the motor neurons are destroyed. The nerve fibers lose their conductivity and the muscles do not receive impulses. This causes increasing weakness of the majority of muscles, including those of the tongue, lips, arms, legs, hands, feet, neck, chest and others. The cause of this disease is unknown but it is progressive, not treatable and terminal.

[9] Her disease progressed rapidly. She attended and received ongoing treatment from the Calgary ALS and Motor Neuron Disease Clinic until October 2015. She stopped attending when there was nothing more they could do to slow the progress of her illness.

[10] Ms. S. is presently in the final stages of ALS, with at most six months to live. She describes herself as "severely disabled, quite weak and in my wheelchair." She is mentally alert, can make certain sounds, but is unable to speak. She is almost completely paralyzed. Her bodily movements are limited to a few gestures and "still moving my left hand a little." This allows Ms. S. to communicate by typing or using a device that will speak from the text she can produce. Even this form of communication is rapidly declining.

[11] She is in significant pain and requires constant care and support. She cannot swallow any liquids and water is pumped into her stomach via a gastric tube. While grateful for the physiotherapy she receives, she also has frequent muscle cramps, aching joints, pains in her

shoulders and neck due to stiffness and lack of motion. She is in constant discomfort but takes little pain medication because she prefers to be alert. She must be moved every two hours to prevent bedsores. She has lost the ability to pursue the independent life she so valued.

[12] In the last two months she reports more frequent breathing problems. Several times during the night she has episodes of choking due to saliva and mucus in her throat or trachea that require suction.

[13] She has no children and the two remaining members of her family do not live in Canada. She lives with her spouse, who is her constant companion and has become her main caregiver. She states that despite their challenges, they have managed to keep a positive attitude and remain strong. She says their nine-year relationship has been the happiest of her life: "as I look back upon my life prior to this illness which began three years ago, I feel happy, as I have had a very healthy, productive and fulfilled life."

[14] She seeks a physician-assisted death in which two named physicians would provide her with medication to induce death. Those physicians are located in British Columbia. She plans to die on private property in Vancouver and no nurses will be involved.

[15] In her words:

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

3. The Legal Landscape: *Carter 2015, Carter 2016* and Subsequent Developments

[16] The distinctive nature of this application and the defined scope of this hearing are the product of the two recent decisions of the Supreme Court of Canada: ***Carter 2015*** and ***Carter 2016***.

A. *Carter 2015*

[17] First, in ***Carter v Canada (Attorney General)***, 2015 SCC 5, [2015] 1 SCR 331 ("***Carter 2015***"), a unanimous Supreme Court decided that provisions of the *Criminal Code*, RSC 1985, c C-46, which prohibit physician-assisted dying violate an individual's s. 7 *Charter* right to life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice.

[18] The Supreme Court understood it was being asked to balance competing values of great importance: the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition on the one hand and the sanctity of life and the need to protect the vulnerable on the other.

[19] The Supreme Court noted that the evidentiary record before it was voluminous. In ***Carter 2015,*** the Court heard from the three parties, as well as from nineteen intervenors, including many Attorneys General and organizations representing diverse points of view.

[20] The Court explained that the trial judge had canvassed evidence, from Canada and from the permissive jurisdictions, on medical ethics and current end-of-life practices, the risks associated with assisted death, and the feasibility of safeguards. The Court also reviewed its

previous reasons in ***Rodriguez v British Columbia (Attorney General)***, [1993] 3 SCR 519, a case in which a divided Court refused physician-assisted death to a person with ALS. The Court also outlined legislative initiatives and reports from various organizations, and highlighted a change in the legislative landscape in which eight Western democracies now permit assistance in dying.

[21] One of the claimants in ***Carter 2015*** was Ms. Gloria Taylor, who suffered from ALS. The Court record in ***Carter 2015*** contained much information about this degenerative and terminal disease. The Supreme Court recognized at para 11:

> ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and eventually breathe. Like Sue Rodriguez before her, Gloria Taylor did "not want to die slowly, piece by piece" or "wracked with pain"...

[22] The Court also quoted from Ms. Taylor's testimony in which she described the progression of her illness and her desire for a peaceful rather than an "ugly death." The Supreme Court noted at para 14 a constant theme running through the extensive evidence of all the witnesses. Whether they suffered from a motor neuron disease, Huntington's disease or advanced-stage cancer, "they suffer from the knowledge that they lack the ability to bring a peaceful end to their lives at a time and in a manner of their own choosing."

[23] The Court framed the issue in this way at para 1:

> It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

[24] The Supreme Court agreed with the trial judge that the prohibition on assisted dying infringed Ms. Taylor's s. 7 rights by interfering with fundamentally important personal medical decision-making, imposing pain and psychological stress and depriving her of control over her bodily integrity. She was denied the opportunity to make a choice that may be very important to her sense of dignity and personal integrity and that is consistent with her lifelong values and life experiences. Ms. Taylor's security of her person was also impaired as she was forced to suffer physical and psychological pain.

[25] The Supreme Court recognized at para 67 that the law has long protected patient autonomy and medical decision-making. The Court said the right to decide one's own fate entitles adults to direct the course of their own medical care and underlies the concept of informed consent and s. 7's guarantee of liberty and security of the person.

[26] The s. 7 liberty interests are engaged when the state affects important and fundamental life choices. People seeking physician-assisted death do so out of deeply personal and fundamental beliefs about how they wish to live or cease to live. Such a decision is rooted in their control over their bodily integrity and represents their deeply personal response to serious pain and suffering. The Supreme Court held that by denying them the opportunity to make that choice, the prohibition infringes on their liberty and security of the person. While s. 7 recognizes the value of life, it also honours the role autonomy and dignity play at the end of that life.

[27] At para. 66 the Supreme Court said:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.

[28] The Court then canvassed the principles of fundamental justice and concluded that the prohibition on assisted dying was overbroad. While the impact of the prohibition was severe, they made no finding in regards to gross disproportionality.

[29] The Court found the impugned provisions could not be saved under s. 1. The Court accepted that the purpose or object of the impugned criminal prohibition against assisted death is to protect vulnerable persons from being induced to take their own lives in times of weakness. The Court explicitly rejected a submission that the purpose of the prohibition should be defined as simply "the preservation of life." While protecting the vulnerable was a legitimate purpose, the prohibition was not a reasonable limit on the applicant's s. 7 rights because an absolute prohibition is not minimally impairing. The Supreme Court stated at para 117 that the risks associated with physician-assisted death could be managed by a carefully designed and monitored system of safeguards.

[30] As a result of these findings, the Supreme Court of Canada struck down those provisions of the *Criminal Code* prohibiting physician-assisted death, stating at para 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.

[31] The Supreme Court suspended its declaration of invalidity for 12 months, ending February 6, 2016.

[32] Earlier in the action, the trial judge had struck down the impugned provisions and suspended the declaration of invalidity for one year: see ***Carter v Canada (Attorney General)***, 2012 BCSC 886, 261 CRR (2d) 1 ("***Carter 2012***"). The trial judge also granted a personal constitutional exemption to Ms. Taylor during that period of suspension and the final order outlined certain requirements before Ms. Taylor could avail herself of that exemption. On October 4, 2012, Ms. Taylor died from complications of her medical condition, without seeking to invoke her personal exemption.

[33] In ***Carter 2015***, the Supreme Court specifically declined to create a mechanism for personal exemptions during the 12-month period in which its declaration of invalidity was

suspended. Ms. Taylor had died by the time the Supreme Court heard the matter and none of the remaining litigants sought a personal exemption. The Court held at para 125 that legislators were best suited to enact the type of complex regulatory regime required and that stand-alone constitutional exemptions had the potential to create uncertainty, to undermine the rule of law and to usurp Parliament's role.

B. Developments after *Carter 2015*

[34] Many governments and organizations worked diligently to respond to ***Carter 2015***. Criminal law is a federal power, but health law may involve both federal and provincial governments. As the Supreme Court stated in ***Carter 2015*** at para 53, "Health law is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic... This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation."

[35] The Québec government enacted *An Act Respecting End-of-Life Care*, CQLR c S-32.0001 to govern physician-assisted dying in that province. The stated purpose of the legislation, which came into force in December 2015, is to ensure that end-of-life patients receive care that respects their dignity and their autonomy. Section 2 states:

> The provision of end-of-life care is to be guided by the following principles:
>
> (1) respect for end-of-life patients and recognition of their rights and freedoms must inspire every act performed in their regard;
>
> (2) end-of-life patients must be treated, at all times, with understanding, compassion, courtesy and fairness, and with respect for their dignity, autonomy, needs and safety; and
>
> (3) the healthcare team providing care to end-of-life patients must establish and maintain open and transparent communication with them.

[36] End-of-life care is defined to include palliative care and medical aid in dying. Section 5 gives statutory form to the right patients have under civil law to refuse or withdraw consent to life-sustaining care. See ***Nancy B v Hôtel-Dieu de Québec***, [1992] RJQ 361, 86 DLR (4th) 385 (Qc Sup Ct).

[37] Québec's *Act* permits medical aid in dying to patients who meet the criteria in section 26. In particular, eligible patients must:

1. be of full age;
2. be capable of giving consent to care;
3. be an insured person within the meaning of the *Health Insurance Act*, RSQ c A-29;
4. be at the end of life;
5. suffer from a serious and incurable illness;
6. be in an advanced state of irreversible decline in capability; and
7. experience constant and unbearable physical or psychological suffering which cannot be relieved in an manner the patient deems tolerable.

[38] In Québec, a patient must initiate the request for medical aid in dying, using a standard form. The form must bear the patient's signature and be witnessed by a health or social services professional. The *Act* establishes an exception to the general rule requiring the patient to sign the form if the patient is physically unable to do so: section 26. A patient may withdraw his or her request or delay aid at any time and by any means: section 27.

[39] The *Act* then sets out prerequisites that the physician must satisfy before he or she may provide medical aid in dying: section 29. This includes, among other things, taking steps to ensure a patient meets the criteria noted above in section 26, verifying the reliability of the patient's consent, informing patients of their prognosis and alternative therapies that may be available, verifying the persistence of a patient's suffering, confirming at regular intervals that the patient still wishes to die, discussing the request with members of the patient's care team, discussing the request with the patient's "close relations" if the patient so wishes, ensuring that patients have had an opportunity to discuss the request with anyone they wish to contact, and obtaining a second physician's opinion as to whether section 26's criteria have been met.

[40] Finally, section 30 compels the physician who ensured that all of these conditions were met to personally administer medical aid in dying to the patient. The physician must also stay with the patient until death.

C. *Carter 2016*

[41] In October 2015, Canadians elected a new federal government. The Attorney General of Canada sought a six month extension of ***Carter 2015***'s suspended declaration of invalidity on the basis that Canada needed more time to craft an appropriate legislative response. Those opposing the extension argued that it created hardship and severe harm to force individuals who qualified for physician-assisted death under ***Carter 2015*** to wait another six months. They also argued that it would be unfair to allow Québec residents to access medical aid in dying under Québec legislation, when others in similar circumstances but different jurisdictions lacked comparable access.

[42] In ***Carter v Canada (Attorney General)***, 2016 SCC 4 ("***Carter 2016***"), all members of the Supreme Court of Canada granted an extension but limited it to four months, being the amount of time the federal government's work on a legislative response to ***Carter 2015*** was interrupted by the intervening election and change of government. As a result, the Supreme Court's declaration of invalidity from ***Carter 2015*** will now expire on June 6, 2016.

[43] In ***Carter 2016***, the Supreme Court split on what should happen in this interim four-month period to persons seeking physician-assisted death in Québec and elsewhere. The four-judge minority, for reasons already articulated in ***Carter 2015*** at para 125, would not have exempted Québec from the extended suspension or allowed personal exemptions.

[44] The five-judge majority granted both exemptions and in terms that are very important.

[45] The majority noted that the Attorney General of Canada and the provincial Attorneys General who participated in the hearing did not oppose Québec's request for an exemption. Québec argued that such an exemption was necessary to clarify the legal position in that province, given that it had already enacted legislation dealing with end-of-life assistance. The majority expressed no view as to the validity of the Québec legislation but stated "we would

grant the exemption." Thus physician-assisted death in Québec will, during the four-month extension, be governed by its legislation and applicants must meet its requirements.

[46] The majority also granted a personal constitutional exemption to the group of individuals who meet the requirements of para 127 in ***Carter 2015***—that is, competent adults who consent to physician-assisted death and have a grievous and irremediable medical condition that causes intolerable enduring suffering. They did so in the following terms at para 6:

> 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 2015***]. 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 2015***], 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. [Underlining added, italics in original]

[47] The underlined words show that the Court was not merely saying that a person could apply to a court for a personal constitutional exemption, pending Parliament's response. Rather, they were granting that remedy immediately to those adults who have a grievous, intolerable and irremediable medical condition.

[48] The majority has thus already granted the remedy of a constitutional exemption to all those who meet its criteria. The role given to authorizing courts is to hear individual applications and determine whether a particular claimant is inside or outside the group which has already been granted the constitutional exemption. The judicial task of the authorizing court is therefore limited to determining whether a particular claimant satisfies the terms of para 127 of ***Carter 2015***.

[49] This important distinction is worth exploring as there appears to have been some confusion on this point. Under general legal principles, any individual may attack state action and challenge its constitutionality under the *Canadian Charter of Rights and Freedoms*. While most claimants seek a general declaration that the state action is invalid, a claimant may seek a remedy by way of a personal exemption. Usually this involves an allegation that even if the state action is generally valid, it becomes unconstitutional in its application to the applicant's particular circumstances. The applicant mounts a full-blown constitutional challenge. Notice is generally given to the relevant Attorneys General and the claimant bears the burden of proving an infringement of his or her *Charter* rights. If an infringement is established, the burden will shift to the government to demonstrate that the state action can be saved under s. 1. This is what

occurred in ***Carter 2015***. Ms. Taylor produced a voluminous record on multiple topics, attacked criminal prohibitions against assisted death and sought a personal exemption. After a full review of all constitutional rights and interests at play, the trial judge granted a personal exemption as a remedy to Ms. Taylor.

[50] Had ***Carter 2016*** not been decided in the manner it was, it would have been open to any individual to ask a court for a personal exemption to allow him or her to have a physician-assisted death during the period in which the declaration of invalidity had been suspended. A court application for the remedy of a personal exemption would also require a full constitutional analysis.

[51] By contrast, in the case at bar, this Court is not being asked to grant a constitutional exemption. That exemption was granted by the majority of the Supreme Court in ***Carter 2016***. The role of this Court is limited to applying or authorizing an existing constitutional exemption and determining whether a particular person qualifies for that exemption. Given the majority's decision in ***Carter 2016,*** the narrow question in this application is therefore whether Ms. S. is a person to whom the Supreme Court has already granted an exemption.

[52] That the majority in ***Carter 2016*** already has granted an exemption for a group of qualifying individuals is clear from the paragraph quoted above, as well as the express wording of other parts of their judgment. For example, they frame the issue at para 1 in the following way: "the appellants and certain interveners ask this Court to grant a constitutional exemption for individuals who wish to seek assistance in ending their life during the period of any extension."

[53] At para 5 they again articulate the issue as:

> The third question is whether, during the four-month extension, the Court should grant an exemption for those who wish to seek assistance in ending their life on the bases articulated in our reasons in [***Carter 2015***]. The appellants argue that fairness and equality require this, particularly if Québec is exempted from the extension.

[54] Their express wording in para. 7 is a further demonstration of their clear intention to grant the exemption:

> Finally, during the four-month extension period, we grant an exemption to those who wish to exercise their rights so that they may apply to the superior court of their jurisdiction for relief in accordance with the criteria set out in para 127 of our reasons in [***Carter 2015***]. [Emphasis added.]

[55] Moreover, there would have been no need for the Supreme Court to address exemptions if all they were doing was allowing people a right to mount individual constitutional challenges and to seek personal constitutional exemptions. That option exists without comment from the Court and an ability to apply for an exemption would not have generated the controversy that resulted in four judges dissenting.

[56] Further, given that Québec was granted an exemption, only the actual granting of a similar exemption to others would support the majority's desire for fairness and equality. Thus, the majority has established parallel grants. In Québec, claimants must meet that province's legislative requirements. For people in jurisdictions without legislation, the majority have granted an exemption that is accessed through a process of judicial authorization, in which the motions court applies the criteria established in ***Carter 2015***.

[57] That the majority have already granted the constitutional exemption as a remedy to the group who qualify under para 127 of ***Carter 2105*** has important implications for the nature and scope of the hearing to be conducted on such applications before the motions judge. The judge is not called upon to conduct a full-blown inquiry as to whether a claimant has established an individual case for a personal constitutional exemption, a balancing exercise that would require the participation of Attorneys General and perhaps other affected parties.

[58] Instead, the job of the motions judge is simply to determine whether a particular claimant meets those articulated criteria. The singular question the Supreme Court has directed the superior courts to answer in this type of application is whether the applicant falls within that group. This limited inquiry is individual- and fact-specific. The motions judge must be mindful of the legal framework and overall constitutional context of the inquiry; it is a rights-rich context. However, there is no opportunity or need to re-litigate the various rights and interests fully considered by the Supreme Court's unanimous decision in ***Carter 2015***.

[59] The question, properly understood after ***Carter 2016,*** is: does this person fall within the group of persons to whom a constitutional exemption has already been granted?

4. The Issue

[60] Given this analysis, Ms. S. has stated the issue correctly when she asserts:

> The issue before the court is whether or not the applicant meets the criteria set out in ***Carter 2015*** for a declaration by this court that she is eligible for a physician-assisted death.

[61] In the following sections I first canvass issues of process and evidence. I then review each requirement in para 127 of ***Carter 2015*** and conclude that Ms. S. has satisfied the Court that she meets all the criteria from ***Carter 2015*** and therefore qualifies for the constitutional exemption granted by the Supreme Court in ***Carter 2016***.

5. Process and Evidence

[62] The Supreme Court of Canada in ***Carter 2016*** charged the motions court with the task of screening individual applications for physician-assisted death based on the criteria it had established in ***Carter 2015***. The Court did not prescribe particular procedures or evidence for the superior courts to consider in conducting the requisite factual inquiry. In this section I address issues relating to notice, confidentiality and evidence. Before doing so, I would like to make two comments.

[63] First, shortly after the release of ***Carter 2016***, the Chief Justice of the Ontario Superior Court of Justice published a *Practice Advisory – Application for Judicial Authorization of Physician Assisted Death*. In addition, on the day of the hearing of this application, the Chief Justice of the British Columbia Supreme Court published a *Notice Regarding Applications for Exemption from the Criminal Code Prohibition Against Physician Assisted Death*. These protocols lack legislative force and are intended as practice advisories or practice notes within their provinces on such issues as notice, confidentiality, and the type, amount and form of evidence, as well as matters of timing and scheduling.

[64] While both protocols are based on the two ***Carter*** decisions and have certain similarities, each province has adopted slightly different rules and approaches. In my view, some of the suggestions or requirements are broader and more onerous than how I read the ***Carter 2015*** requirements.

[65] Alberta does not have such a protocol. In this province, the proceedings should be based on what ***Carter*** says (and does not say), supplemented, as necessary, by general principles and any guidance thought appropriate from the Québec legislation and these two provincial protocols.

[66] Second, Ms. S. provided this Court with the *Final Report on Consultations on Physician-Assisted Dying* from the federal government dated December 15, 2015 and the *Final Report of the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying*. On the day of the hearing, a special Parliamentary committee published its recommendations in a report entitled *Medical Assistance in Dying: A Patient-Centred Approach*.

[67] I have reviewed these documents which contain a full consideration of relevant issues, from the viewpoint of possible legislative and regulatory responses. While they provide background and context, they address different and larger questions, compared with the more narrow focus of individual judicial authorizations. For example, the federal *Final Report* recognized that there were many legislative options available, saying at page 52 that ***Carter 2015*** established "a floor, and not a ceiling" in respect of the constitutional rights at play. Parliament is free to consider issues beyond those addressed in ***Carter 2015***. However, this Court is bound to stay within the four corners of the ***Carter 2015*** analysis.

[68] Further, legislators are called upon to contemplate and address general rules, for all foreseeable types of cases and in relation to every "illness, disease or disability" considered in ***Carter 2015***. The various reports show a great diversity of opinion on what would constitute appropriate legislative requirements and safeguards. Again, by contrast, 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.

A. Notice

[69] Notice of this application was given to the Attorneys General of Canada, Alberta and British Columbia. Attorneys General are to be given notice of constitutional challenges to state action within their jurisdiction. Both the Ontario and British Columbia protocols require notice to the Attorney General of Canada and the relevant provincial Attorneys General.

[70] The Attorney General of Canada provided no response to counsel and did not attend or participate in the hearing. The Attorney General of Alberta took no position on the application but had a lawyer attend the hearing. The Attorney General of British Columbia wrote to counsel for Ms. S. and asked counsel to bring its comments and suggestions to the attention of this Court. That was done and this letter forms part of the Court record.

[71] Counsel for Ms. S. argued that notice was given only as a courtesy as the Supreme Court has already dealt fully with the constitutional dimensions of the application by granting an exemption in ***Carter 2016.*** There is some merit in this position, especially given the limited factual inquiry to be undertaken in the process of judicial authorization. However, there is practical merit to providing notice to allow the Attorneys General the opportunity to make

submissions in the public interest. The comments of the Attorney General of British Columbia in the case at bar supported a more complete consideration of the issues.

[72] No notice was required to Ms. S.'s family members who live outside Canada. Her evidence is that she has informed those close to her of her plans for a physician-assisted death. In addition, her spouse and best friend were in Court with her as this application was made.

[73] Several organizations have sent letters to the Chief Justice, providing information and asking to be notified of applications for physician-assisted death. Such organizations include Alberta Health Services, the Alberta College of Pharmacists, and regulatory organizations representing nursing professions in Alberta. Alberta Health Services says "it takes no position regarding whether physician-assisted death is appropriate in any specific patient's circumstances."

[74] In my view, this is the correct approach as such organizations have no apparent role to play on the merits of an application when the focus is on whether a particular individual meets the criteria established in ***Carter 2015***. Questions such as whether an applicant is enduring intolerable suffering and consents to the termination of life are not issues amenable to evidence from these organizations. As previously stated, the constitutional dimensions of physician-assisted death have been fully canvassed in ***Carter 2015.***

[75] Depending on the circumstances, it may, however, be appropriate to seek the assistance of some or all of such organizations in the crafting of an order if the court finds that the criteria are met. These organizations have said they are available to assist lawyers who take such applications. The plan for physician-assisted death placed before the court in the application will likely guide which non-parties, if any, may provide useful information or wording. In the case at bar, for example, only physicians and no nurses will be involved in the death of Ms. S. There is therefore no need to seek input from nurses. Similarly, since Ms. S. intends her physician-assisted death to occur at a private place in British Columbia, there is no need to involve Alberta Health Services.

[76] Therefore, I find there has been sufficient notice.

B. Confidentiality Concerns

[77] At the outset of the hearing, counsel for Ms. S. asked that the proceedings be held *in camera*. I heard from a representative of the media who argued the public's right to know should be protected. A lawyer who represents physicians was also in attendance and explained why he requested to watch a new type of application of interest to his clients.

[78] At the hearing, counsel for Ms. S. also requested various forms of confidentiality orders: sealing the Court file, sealing the affidavits, a publication ban on Ms. S.'s name, and the use of initials to protect the identities of Ms. S. and of the physicians and others involved in this matter.

[79] It is preferable for matters of confidentiality to be addressed when the Originating Application is filed to allow the motions judge to consider whether there is any need for preliminary orders. However, as this is the first application of its kind in this province and the matter is time-sensitive, I am prepared to deal with these requests in the context of the overall hearing.

[80] The Court is very mindful of the important reasons underlying the open court principle. The Supreme Court of Canada has held that this principle is "a hallmark of a democratic

society", that it ensures "that justice is administered in a non-arbitrary manner, according to the rule of law" and that it is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter*": see ***Dagenais v Canadian Broadcasting Corp.***, [1994] 3 SCR 835, ***R v Mentuck***, [2001] 3 SCR 442, 2001 SCC 76 and ***Re Vancouver Sun***, 2004 SCC 43, 2 SCR 332.

[81] However, in the circumstances, I determined that Ms. S.'s privacy, dignity and autonomy were the more important interests and the hearing was held *in camera*. This application pertains to Ms. S.'s medical state and to the fundamental life choice she wishes to make. Nothing could be more personal and, in my view, the need to protect Ms. S.'s privacy outweighs the benefit of an open courtroom in the circumstances of this case. I also note that the subject of the hearing, being her medical diagnosis and current physical condition, falls within the category of information that ordinarily would be protected under privacy legislation.

[82] Further, this written judgment provides an alternative mechanism for achieving accountability and transparency and respects the fundamental principles behind the open court principle. It provides what the Supreme Court of Canada in ***Re Vancouver Sun*** called the openness "necessary to maintain the independence and impartiality of courts."

[83] In ***Dagenais*** and in ***CBC v New Brunswick (Attorney General)***, [1996] 3 SCR 480, cases referred to in ***Re Vancouver Sun***, the Supreme Court of Canada set out the test for a publication ban. More recently, the Supreme Court refined the test in the companion cases of ***Mentuck*** and ***R v ONE***, 2001 SCC 77, 3 SCR 478. The following comments from para 32 of ***Mentuck*** are instructive:

> The ***Dagenais*** test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while ***Dagenais*** framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> > A publication ban should only be ordered when:
> >
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[84] I find that the circumstances of this case demonstrate the necessity of confidentiality orders as required by ***Dagenais***. Further, it is to be hoped the presence of a written judgment strikes the appropriate balance between the salutary and deleterious effects of such an order and achieves the openness and public access discussed in ***Re Vancouver Sun***.

[85] In addition, this Court has the ability to issue restrictions pursuant to the Alberta Rules of Court, Alta Reg 124/2010, *Rule* 6.28, which is contained within **Division 4—Restriction on Media Reporting and Public Access to Court Proceedings**, and provides as follows:

> 6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order
>
> (a) to ban publication of court proceedings,
>
> (b) to seal or partially seal a court file,
>
> (c) permitting a person to give evidence in a way that prevents that person or another person from being identified,
>
> (d) for a hearing from which the public is excluded, or
>
> (e) for use of a pseudonym.

[86] I note that these general provisions are subject to a significant proviso: unless the Court otherwise orders. In my view, the Court may exercise its discretion to depart from these general rules in this distinctive type of application. Accordingly, I am satisfied that it is appropriate in this case to have proceeded *in camera*. Further, I order that the Court file and affidavits in this matter will be sealed, and that this judgment will be released with the parties and people involved identified by initials only.

C. Evidence

[87] The task set by the Supreme Court in ***Carter 2016*** is to determine whether an individual applicant meets the ***Carter 2015*** criteria. The Court did not prescribe or dictate what type or amount of evidence would satisfy its stated criteria. As such, it becomes a matter for the motions judge to make the determination based on evidence he or she considers sufficient.

[88] Under accepted general principles, the claimant carries the burden to establish that she falls within the constitutional exemption granted in ***Carter 2016.*** She is entitled to meet her burden based on any form of admissible, authentic and reliable evidence. The motions judge retains the discretion to accept all, some or none of the admissible evidence.

[89] Ms. S. provided evidence in the form of two affidavits: an Initial Affidavit dated February 19, 2016 and a Supplementary Affidavit dated February 23, 2016. Attached as exhibits to her Initial Affidavit were statements from her treating physician, the physician who plans to assist her death, medical records and statements from various other physicians from the Calgary ALS and Motor Neuron Disease Clinic, a letter from her best friend of 38 years and a letter written by Ms. S. to her counsel describing her life. Ms. S. attests that all the information contained in those statements is accurate and correct.

[90] In my view, it is preferable to have affidavits sworn by the physicians themselves, but attaching evidence as an exhibit to a sworn affidavit is a common practice and an accepted mode of presentation. Such practice may affect the weight a judge is prepared to place upon the evidence but such evidence is clearly admissible. There is no challenge to the authenticity of any of the exhibits to Ms. S.'s Initial Affidavit and I find them to be authentic and reliable.

[91] This record is not deficient simply because it is not as extensive or in the form proposed by Ontario's *Practice Advisory* or British Columbia's *Notice*. For example, no affidavits have been provided from Ms. S.'s attending physician, from a consulting psychiatrist or from the

physician proposed to assist death. The Ontario protocol provides what "should" be done and contemplates affidavit evidence from four persons: the applicant, the attending physician, a consulting psychiatrist and the physician proposed to assist death. The British Columbia protocol requires affidavits from the applicant and two physicians. The two physicians can be the treating physician and the physician assisting in the death. There is no requirement for an affidavit from a psychiatrist or psychologist. By way of further contrast, the Québec legislation does not require sworn testimony at all. The applicant need only fill out a prescribed form and the required statements of two physicians need not be sworn. Québec also does not require evidence from a psychiatrist or psychologist.

[92] Based on ***Carter 2016***, I conclude that I am entitled to take a flexible approach to the evidence on this kind of application. I note that I am bound only by the Supreme Court's directive and not by the Ontario, British Columbia or Québec approaches. It will be up to the individual judge in an individual case to assess the admissibility, authenticity and reliability of the evidence before him or her.

6. The *Carter 2015* Criteria

[93] Has Ms. S. demonstrated, based on admissible, authentic and reliable evidence that she satisfies all the criteria in para 127 of ***Carter 2015*** and therefore qualifies for the constitutional exemption granted by the Supreme Court in ***Carter 2016?***

[94] Ms. S., like Ms. Taylor in the ***Carter*** cases, is in the final stages of ALS. The Supreme Court had this very condition before it when it established the criteria in para 127 of ***Carter 2015***. I conclude Ms. S. has met her burden because:

A. she is a competent adult person;
B. she clearly consents to the termination of life;
C. she has a grievous and irremediable medical condition;
D. her condition causes enduring, intolerable suffering; and
E. her suffering cannot be alleviated by any treatment acceptable to her.

A. Ms. S. is a competent adult

[95] I find that Ms. S. is a competent adult. While competence is presumed, the record also is clear that she is mentally alert. There is no suggestion in any of the medical reports attached to her Initial Affidavit that her illness has in any way affected her mental capacity. Statements from her treating physician, assisting physician and her long-time friend support her competence. Indeed, her treating physician was "very impressed by [Ms. S.'s] clarity of thought." I note that Ms. S. attended the hearing of this application and it was clear to me from seeing her in the courtroom that she was fully engaged in and attentively following the proceedings.

[96] In the absence of any suggestion that Ms. S. lacks competence, there is no need to have evidence from a psychiatrist. Nowhere in the Supreme Court's decision is there a requirement for psychiatric evaluation. Such is not required in the Québec legislation or the British Columbia *Notice*. Only the Ontario *Practice Advisory* suggests that the applicant should include evidence from a psychiatrist. I am confident in these circumstances that the Court may make findings in respect of the ***Carter 2015*** criteria without the assistance of a psychiatrist.

[97] In ***Carter 2012***, the trial judge placed great emphasis on the issue of depression, referring to it at para 640 as a "crucial issue." The Supreme Court adopted a differently worded test, but what is paramount is that the evidence establishes that Ms. S. is not depressed. Indeed, she attests to that in her Initial Affidavit and I am mindful of her background as a clinical psychologist. In addition, her best friend M.V., a retired social worker, confirms that Ms. S. is fully competent mentally and is not depressed.

[98] There was some reference in part of the evidence to a one-time score on an ALS depression test which indicated a "possible mild depression." However, going back to the original source of this statement, dated July 22, 2015, her palliative care physician at the Calgary ALS and Motor Neuron Disease Clinic noted that on that day Ms. S. reported that "her mood is actually quite good and stated unequivocally at today's visit, 'I am not depressed.'"

[99] That physician concluded:

> I actually do not think that [Ms. S.] is depressed, although she does meet the criteria for mild depression on the ALS depression index.

[100] In a subsequent letter dated October 14, 2015, the same physician said:

> [Ms. S.] has no current plans to end her life, however, and feels that her mood is quite good. Looking at her ALS depression index, I would say that she is doing better than at our last visit as she is able to say that she is still finding meaning in life, looking forward to each day and no longer feels "empty inside" most of the time. Her score is no longer reflective of mild depression.

[101] Accordingly, I need take no position on whether depression should be considered as part of determining an applicant's competence as Ms. S. is not depressed.

[102] The Attorney General of British Columbia argued that any order should require that competence be established both at the time of application to the superior court and at the time of death. I do not believe this is necessary for two reasons. First, I am of the view that an ongoing determination of competence is part of and flows from the physician-patient relationship. I do not believe it is necessary for a court order to require this. Second, as a practical matter, the evidence before me is that, if her application is granted, Ms. S. will seek a physician-assisted death in the very near future. Therefore, I see no need to order a reassessment of her competence beyond the obligation placed on physicians to obtain genuine, ongoing, and informed consent to treatment.

B. Ms. S. clearly consents to physician-assisted death

[103] I am satisfied that Ms. S. fully and freely consents to the termination of her life. She clearly states this in her Affidavit.

[104] Her application is not made in a moment of weakness and her desire for physician-assisted death is long-standing. The evidence is that, since her diagnosis, she has explored various options around physician-assisted death. At various points in time she explored going to Switzerland, Basel and Québec. Her friend M.V. confirms this, stating that Ms. S. has been thinking about physician-assisted death for two years. The letters attached to Ms. S.'s Affidavit from the Calgary ALS and Motor Neuron Disease Clinic indicate that she had discussions with professionals there by at least July 2015. Those letters indicate that Ms. S. also discussed this

subject with her spouse and her friends. She sought out the physician who will assist her. Ms. S. also expressly states that she waited until the release of ***Carter 2016*** before making this application. She states that she "would like to pass away peacefully and [is] hoping to have physician-assisted death soon."

[105] There is no suggestion in any of the documentation before the Court that Ms. S. was not rational or was being subjected to external pressure. Indeed, it appears that her spouse, who is her primary caregiver, was tearful, said he did not want her to die, and was resistant at first. After months of discussion, he respects her right to make this choice. Ms. S.'s friend M.V. confirms that Ms. S. is under no pressure from her husband or friends. Her treating physician notes that Ms. S. "has not swayed from her resolve of ending her life in a peaceful manner."

[106] Ms. S. understands her medical diagnosis and prognosis. She attended the Calgary ALS and Motor Neuron Disease Clinic and has been informed of the feasible treatments, including options in relation to palliative care. She has received counselling in relation to palliative care.

[107] Ms. S. has been informed of the risks associated with physician-assisted death and the probable result of the medication proposed for use in her physician-assisted death.

[108] She understands fully that it is her choice and that she has a continuing right to change her mind about terminating her life.

C. Ms. S. Suffers from ALS, a grievous and irremediable medical condition

[109] I have no difficulty in concluding that ALS is a grievous and irremediable medical condition. It is widely understood to be a progressive and ultimately terminal disease that has no cure. Indeed, it is the disease suffered by Ms. Taylor, one of the applicants in ***Carter 2012***. After discussing the meaning of "grievously and irremediably ill persons," Justice Smith of the British Columbia Supreme Court granted a constitutional exemption to Ms. Taylor, holding at para 1411 that "The circumstances of this case fit within the narrow range of cases in which a constitutional exemption is appropriate under ***Ferguson*** [2008 SCC 6, [2008] 1 SCR 96]." Justice Smith also noted the evidence before her respecting ALS at para 47:

> ALS is a neurodegenerative disorder that causes muscle weakness and eventually progresses to near total paralysis. As neurologists Dr. Sharon Cohen and Dr. Scott Meckling explain, while cognition and sensation remain generally intact, ALS patients become increasingly incapacitated. They lose the ability to use their hands and feet; the ability to walk, to chew and to swallow; the ability to make their speech intelligible to others; and, ultimately, the ability to breathe. The average time from diagnosis to death is three years.

[110] Ms. S.'s assisting physician states that Ms. S.'s illness is terminal and that her prognosis is less than six months.

D. Ms. S.'s ALS is causing her enduring, intolerable suffering

[111] The fourth criterion from ***Carter 2015*** is that the applicant's medical condition must cause enduring suffering that is intolerable to the individual. Ms. S. attests expressly to this criterion in her Supplementary Affidavit. In both her Affidavits, she refers to her desire to avoid dying by choking on her own bodily fluids. It is clear that she suffers from frequent choking incidents. She is unable to get restful sleep because of the need for her to be moved frequently throughout the night. The letters from the Calgary ALS and Motor Neuron Disease Clinic

indicate that she has ongoing issues with pain. She states in her Initial Affidavit that she is in constant discomfort but chooses not to take much pain medication because she prefers to remain alert.

[112] Ms. S. states that she needs constant care, with her spouse acting as her primary caregiver. Her friend M.V. notes that Ms. S. finds her near total dependence on others very difficult. Her assisting physician states that, in addition to her constant discomfort, Ms. S. suffers because she has permanently lost control over her bodily functions and is losing her ability to communicate.

[113] In my view, Ms. S. has provided sufficient evidence to ground a finding by this Court that her condition causes enduring and intolerable suffering.

E. Ms. S.'s suffering cannot be alleviated by any treatment acceptable to her

[114] Letters from two physicians at the Calgary ALS and Motor Neuron Disease Clinic speak to Ms. S.'s "ever declining state of health" and to her "deteriorating steadily at each visit." In her Initial Affidavit, Ms. S. states that she has stopped attending the Clinic because there is nothing they can do to slow the progress of her illness. It is clear that there is no treatment that will reverse or halt Ms. S.'s ALS. Her assisting physician confirms in her letter exhibited to Ms. S.'s Initial Affidavit that Ms. S.'s condition is terminal.

[115] There is reference in the letters from the Calgary ALS and Motor Neuron Disease Clinic attached to Ms. S.'s Initial Affidavit to a medication prescribed to her for the purpose of thinning her secretions. However, her email to her counsel dated February 8, 2016 and exhibited to her Initial Affidavit states that repeated choking continues to cause her distress. Thus, I conclude that this treatment does not alleviate this aspect of Ms. S.'s suffering. Further, there is reference both in Ms. S.'s Initial Affidavit itself and in the letters exhibited thereto to continuous pain and to Ms. S.'s reluctance to take prescription medication for her pain.

[116] Ms. S. expressly states in her Supplementary Affidavit that her suffering cannot be alleviated by any treatment acceptable to her. She states that there are no palliative care options that are acceptable to her and that "it is not acceptable to me to live sedated to the point of unconsciousness until I choke on my own bodily fluids."

[117] Based on all of this, I find that Ms. S. meets this criterion from ***Carter 2015*** as well.

F. Conclusion and Terms of Order

[118] Based on the foregoing analysis, I find that Ms. S. meets the criteria set forth at para 127 of ***Carter 2015*** and is therefore entitled to the constitutional exemption granted by the Supreme Court of Canada in ***Carter 2016***. Like Ms. Taylor, she is not a vulnerable person who requires the protection of those sections of the *Criminal Code* impugned in ***Carter 2015***.

[119] If, however, I am wrong in my reading of ***Carter 2016*** and the application to which the Supreme Court of Canada referred is an application to this Court for a constitutional exemption, then I would grant the exemption. Like the majority of the Court in ***Carter 2016*** at para 6, I do not "see any need to unfairly prolong the suffering of those who meet the clear criteria ... set out in [***Carter 2015***]." It is clear that Ms. S. is such a person.

[120] Counsel for Ms. S. suggested that the order need only declare that Ms. S. qualifies for a physician-assisted death. In my view, a greater role and responsibility on the court was intended

when judicial authorization was established as the safeguard to protect the rule of law and the vulnerable.

[121] Other considerations also arise as Ms. S. has averred that she intends to have the assistance of two physicians in British Columbia and to die on private property in Vancouver. These physicians are named in the documents filed in Court but will not be specifically mentioned in the order. The Québec legislation requires that the physician personally perform what is called "medical aid in dying" and stay until death ensues. The evidence before me is that this is also what is contemplated in relation to Ms. S. The order should reflect this.

[122] The Attorney General of British Columbia questions whether an Alberta order would grant the necessary authority for medical practitioners in British Columbia, but made no submissions on this point. Notwithstanding this cross-jurisdictional aspect of this matter, I am satisfied that I have jurisdiction to hear this application and to grant a permissive and protective order. Persons who seek a physician-assisted death are told by the Supreme Court in ***Carter 2016*** to apply "to the superior court of their jurisdiction." I take this to mean the applicant's jurisdiction of residence which, in Ms. S.'s case, is Alberta. The constitutional exemption for which Ms. S. qualifies is personal to her and should accompany her throughout Canada, a country where she enjoys mobility rights. The constitutional exemption for which she qualifies flows from her *Charter* rights and such rights are part of the supreme law of the land. Her constitutional exemption is also granted in relation to a countrywide, federal prohibition.

[123] Further, while the constitutional exemption is personal to her, it clearly contemplates the assistance of others. That those individuals may be in a different jurisdiction than the jurisdiction in which she is obliged to apply, is secondary to the fact of the exemption. Had Ms. S. attempted to obtain a declaration in British Columbia, she might have been met with an argument that she has habitually resided in Alberta.

[124] The Supreme Court of Canada at para 40 of ***Carter 2015*** defined "physician-assisted death" or "physician-assisted dying" as "...the situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient." Exactly who is protected under the Supreme Court's use of that term has generated much debate, especially in health care settings where physicians work as part of treatment teams that involve nurses, nurse practitioners, pharmacists, technicians and others. Given the evidence that only physicians will be involved with Ms. S., it is not necessary for this Court to address this question in respect of nurses and others.

[125] However, Ms. S.'s Supplementary Affidavit outlines the medications recommended by the physicians to bring about her death. In written submissions provided to counsel for Ms. S. and the Court, the Attorney General of British Columbia argued that pharmacists, as well as physicians, should be included in any order granted.

[126] It is clear to me that licensed pharmacists who prepare and provide medications are necessarily and definitionally protected under the term "physician-assisted death." The Supreme Court expressly incorporates medication into its definition of physician-assisted death. What is contemplated is not death by a doctor, but a physician-assisted process designed to allow for a relatively painless and peaceful death through the use of pharmaceuticals. For the goals of ***Carter 2015*** to be achieved, the medications to be used must be capable of being accessed in a safe and professional manner. In my view, pharmacists are part of the term "physician-assisted death"

because, without them, physicians would be incapable of providing medication and assisting in the manner contemplated in ***Carter 2015***. Nevertheless, I accept that an express protection provides greater certainty and a licensed pharmacist who prepares and provides the medication prescribed by the physician will also be exempt from the operation of the impugned provisions of the *Criminal Code*.

[127] I am satisfied, based on the evidence before me, that Ms. S. meets all the criteria under para 127 in ***Carter 2015***. Ms. S. is permitted a physician-assisted death if she so chooses.

Heard on the 25th day of February, 2016.
Dated at the City of Calgary, Alberta this 29th day of February, 2016.

S.L. Martin
J.C.Q.B.A.

Appearances:
Olivier Fuldauer
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Nancy McCurdy
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Leah Greathead
for the Attorney General of British Columbia (by written submission)