February 04, 2016

ARTICLE

Update on Physician-Assisted Death: Superior Court Issues Practice Direction with Requirements for Bringing an Application

On January 15, 2016, the Supreme Court of Canada granted the Attorney General a further four month extension of the suspension of invalidity of the *Criminal Code* provisions relating to physician-assisted death, i.e., to June 6, 2016. In addition, the Court allowed individuals to bring an application to the Superior Court of Justice for an order that would authorize a physician-assisted death during the four month extension. On January 29, 2016, the Ontario Superior Court released a practice direction on what will be required for that Court to hear such an application and grant the relief sought.

The Evidence:

In order to bring an application, the individual must file evidence in the form of affidavits from:

- the applicant seeking the relief, with background biographical information, medical conditions, the reasons for the applicant's request (addressing the criteria set out in the *Carter* case), the manner, means and timing of the assisted physician death, and whether the applicant is aware that this request may be withdrawn at any time.
- the applicant's attending physician, with evidence about the grievous irremediable medication condition, the applicant's suffering as a result of the medical condition, the applicant's mental capacity, whether or not the applicant is or will be physically incapable of ending her life, and whether the applicant is aware that she may withdraw the request at any time.
- a consulting psychiatrist who attests to, among other things, whether the patient has the mental capacity to make a clear, free and informed decision about physician-assisted death.
- the physician who will be authorized to assist the applicant's death, who may be the attending physician or another physician. This affidavit would address, among other things, the manner and means and timing of the physician assisted death, whether the physician is willing to assist the applicant in dying, whether the physician believes that his or her providing assistance would be clearly consistent with the applicant's wishes and whether the physician understands that the decision is entirely the applicant's to make.

We note that the Interim Guidance Document from the College of Physicians and Surgeons and the Canadian Medical Association's Recommendations do not require that the second opinion be from a psychiatrist but rather just from another physician. The requirement for a psychiatric opinion is, however, in line with the process outlined by Justice Lynn Smith of the British Columbia Supreme Court when she carved out a specific exemption for Gloria Taylor, one of the plaintiffs in the *Carter* case, so that she would not have to wait out the appeal process should she desire a physician-assisted death.

Who must be provided with notice of the application?

Importantly, the Ontario Superior Court has further directed that the application must be served on the Attorney General for Canada and the Attorney General for Ontario. In addition, depending on the circumstances, the Court *may* require that a notice of the application be served on the applicant's spouse or partner, children, parents, grandparents, siblings or any other person who will be affected by the order sought. Such notice is beyond that contemplated by Justice Smith in the *Carter* case, as she did not require that any notice be given of the application other than to the Court. It remains to be seen whether the federal or Ontario Attorneys General will participate in any hearing upon being provided with notice, and under what circumstances the Court will require that notice be provided to family members.

How, if at all, will the applicant's privacy be protected if so desired?

Another unique feature of the Ontario Superior Court's practice direction is a requirement that the notice of application should set out if the applicant intends to seek a publication ban, an order to have the application heard in the absence of the public, or an order to seal the file, as well as the grounds for seeking such an order. It is notable that the practice direction does not require that the media be put on notice of the request. This suggests that the Court is at least open to taking steps to preserve the very private nature of the situation if asked, although it is not yet clear that they would in fact take these steps. This might also underlie the Court's decision to require that the Attorneys General be notified of the application, so that the governments' position on this public interest issue may be brought to bear.

By: Daphne G. Jarvis, Barbara Walker-Renshaw, Ewa Krajewska

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