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The Law Courts
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MEMORANDUM

TO: Members of the Bar
Other Members of the Public
Prothonotaries

FROM: Chief Justice Joseph P. Kennedy, Chief Justice of the Supreme Court
of Nova Scotia
Justice James L. Chipman, Chairperson of the Rules Committee

DATE: March 1, 2016

RE: Draft Temporary Practice Memorandum on Physician Assisted Death

The judges of the Supreme Court authorized release of the attached draft for both comment and guidance. It will be considered by the Rules Committee on March 17, 2016 and by the court as a whole on May 12 and 13, 2016.

A black ink signature of Joseph P. Kennedy, C.J., written over a horizontal line.

Joseph P. Kennedy, C.J.
Chief Justice of the Supreme Court of
Nova Scotia

A blue ink signature of James L. Chipman, J., written over a horizontal line.

James L. Chipman, J.
Chairperson of the Rules Committee

JPK, JLC/m

Temporary Practice Memorandum

Physician Assisted Death

The Supreme Court of Canada issued an order, reported at 2016 SCC 4, extending the suspension of the declaration about the un-constitutionality of s. 14 and s. 241(b) of the *Criminal Code* until June 6, 2016. However, a majority of the court imposed a condition allowing the superior courts of Canada to grant “relief during the extended period of suspension” to “those who wish to seek assistance from a physician in accordance with the criteria set out in para. 127 of our reasons in *Carter*”. This temporary practice memorandum is to assist applicants with the procedures that may be followed in Nova Scotia for that relief.

Notice

The application may be made *ex parte* under Rule 5.02 or on notice to close family members and any other interested persons under Rule 5.03.

An *ex parte* application needs to be supported by evidence as to why it would be appropriate for the judge to grant the order without notice. This is in the discretion of the chambers judge, but any of the following might be helpful:

- Proof that persons who have *de facto* custody of the applicant are in agreement or are neutral.
- Proof that close family members are in agreement or are neutral.
- Proof that custodians and close family members have been given soft notice.
- Evidence from which the judge can infer that close family members should not be notified.

Whether the application is *ex parte* or on notice, the judge will need to be satisfied as to who the close family members are and whether there are other interested persons. So, evidence needs to be produced about the applicant’s family, friends, and circumstances.

An applicant who comes to court *ex parte* needs to understand that an *ex parte* order can be reviewed at the insistence of an interested person.

Confidentiality of Proceeding

The court and its records are open to the public, directly and as represented by news media, unless the applicant meets the burden of establishing a case for a confidentiality order under Rule 85.04 (see also, Rule 85.05 on notice) or closing the courtroom under s. 37 of the *Judicature Act*. A party who seeks a confidentiality order may request the prothonotary keep the application notice, affidavits, and other documents sealed while the motion is being made.

Criteria

The criteria in *Carter v. Canada*, 2015 SCC 5 require proof of the following about the applicant:

- She or he is a competent adult.
- The applicant desires the termination of his or her life, to the extent of giving a clear consent without undue influence.
- She or he has a grievous and irremediable medical condition that may be an illness, disease, or disability.
- The medical condition causes enduring suffering that is intolerable to the applicant in the circumstances of his or her condition.

Proof of Criteria Generally

The applicant will swear to age.

To support the chamber judge's finding of competency, it will be necessary to include the applicant's evidence about his or her level of function, supported by as much detail as is reasonable. Corroborative evidence may be advisable.

Free consent needs proof through the applicant. Corroborative evidence is advisable. The affidavit or affidavits should identify any persons who are close enough to exert influence on the decision to end the applicant's life and explain how it is that the applicant is free of undue influence.

The applicant and the physicians need to provide evidence supporting findings that the applicant suffers from a grievous and irremediable medical condition. Evidence from a psychiatrist may be corroborative and is necessary in cases in which the medical condition is a psychiatric illness.

The applicant is the primary witness to establish that the condition causes enduring suffering that is intolerable for him or her. Corroborative evidence may be advisable.

Affidavits

The foregoing describes the facts that need proving and generally how they may be proved. Details depend on the circumstances, and presentation depends on the judgment of counsel or applicants who act on their own. The following suggestions are subject to those circumstances and that judgment.

The affidavit of the applicant may include:

- 1) a statement of the applicant's age or proof of a birth certificate;
- 2) evidence of the applicant's personal circumstances, including close family members and friends;
- 3) proof the applicant starts the application after having been fully informed about the medical condition (illness, disease, or disability), diagnosis, prognosis, treatment options,

palliative care options, risks associated with the treatment and palliative care options, and risks associated with a physician-assisted death;

- 4) evidence that the medical condition is causing enduring suffering that is intolerable to the applicant and cannot be alleviated by any treatment that is acceptable to the applicant;
- 5) evidence that the request for the authorization of a physician assisted death is being made freely and without coercion or undue influence including evidence showing who is influential and the influence is not undue;
- 6) details of the reasons for the applicant's request for the authorization;
- 7) the manner, means, and timing of the physician assisted death for which the applicant seeks an authorization;
- 8) proof the applicant is aware that his or her request for a physician assisted death may be withdrawn at any time such that the decision to use or not use the authorization is entirely the applicant's decision to make.

The College of Physicians and Surgeons of Nova Scotia is considering adoption of a standard of practice in physician assisted death that would require the services of two independent physicians. The physicians' affidavits may include:

- 1) evidence of the physician's knowledge of, and intention to follow, practice standards applicable in Nova Scotia on physician assisted death;
- 2) evidence the physician is not in a conflict of interest with the applicant;
- 3) proof of the dates on which and manner in which the physician assessed the applicant's eligibility for physician assisted death;
- 4) evidence about whether the assessment was made by the physician on his or her own or was made in conjunction with opinions of other regulated health professionals and, if the latter, proof of the other opinions;
- 5) the physician's opinion on, and basis for concluding, whether:
 - a. the applicant has a grievous and irremediable medical condition (illness, disease, or disability);
 - b. the applicant was fully informed about his or her diagnosis, prognosis, treatment options, available alternatives to physician assisted death including comfort care, palliative and hospice care, pain and symptom control, counselling resources available, the risks associated with the treatment and palliative care options, and the risks associated with a physician assisted death;
 - c. the applicant has the mental capacity to understand the information, to appreciate the nature of the decision to request physician assisted death, and to see the reasonably foreseeable consequences of the decision;

- d. the applicant makes the request for authorization of physician assisted death freely and without coercion or undue influence;
- e. the applicant is aware that consent and the request for an authorization may be withdrawn at any time;
- f. the applicant is aware that if the authorization is granted, the decision to use or not use the authorization is entirely the applicant's decision to make;
- g. if the applicant's grievous and irremediable condition is primarily a mental illness, evidence that at least one of the affiants is a psychiatrist or evidence that the assessment of the eligibility of the applicant has been informed by a psychiatric opinion and proof of that opinion.

The affidavit of the physician who is proposed to be authorized to assist death may include:

- 1) evidence about the proposed manner, means, and timing of the physician assisted death;
- 2) proof the physician is willing to assist the applicant in dying if that is authorized;
- 3) proof the physician believes that the proposed assistance would be clearly consistent with the applicant's wishes; and
- 4) the physician's acknowledgement that the decision to use or not use the authorization is entirely the applicant's decision to make.

Adopted by the court on _____, 2016.

DRAFT

Joseph P. Kennedy
Chief Justice of the Supreme Court of Nova Scotia