NOVA SCOTIA COURT OF APPEAL

Citation: *Sorenson v. Swinemar*, 2020 NSCA 62

Date: 20201002
Docket: CA 499817
Registry: Halifax

Between:

Katherine Sorenson

Appellant

v.

Schelene Swinemar, Jack Sorenson, and Nova Scotia Health Authority

---

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: September 24, 2020, in Halifax, Nova Scotia

Subject: **Judicial review of Medical Assistance in Dying eligibility; Justiciability; Standing; Interlocutory injunction**

Summary: Mr. and Mrs. Sorenson have been married for 48 years. He is 83. She is 82. Mr. Sorenson is in poor health and has made application for Medical Assistance in Dying ("MAID"). He was approved for the procedure, which was initially scheduled for July 20, 2020 and then again on August 4, 2020. Mrs. Sorenson adamantly opposes her husband's application for MAID. She has turned to the courts to prevent him from ending his life.

Mrs. Sorenson filed an Amended Application in Court seeking a declaration that Mr. Sorenson did not meet the eligibility requirements for MAID according to Canadian law. She also sought permanent and interlocutory injunctions to prevent healthcare providers from providing him with MAID.
Mrs. Sorenson filed a Notice of Motion seeking an interlocutory injunction, which was heard on August 7, 2020. Mr. Sorenson opposed the request for an injunction, arguing that he had been found eligible and there was no justification to prevent him from seeking MAID. The motion judge dismissed Mrs. Sorenson's

request for an interlocutory injunction.

Mrs. Sorenson appealed. She argued the motion judge erred by failing to issue the injunction she sought. She argued the courts have a role in the review of MAID eligibility assessments, particularly where there are differing opinions as to whether the person has met the requirements set out in the *Criminal Code*. In response, Mr. Sorenson argued the courts have no role in reviewing the assessments undertaken by the healthcare providers who had found him eligible for MAID. He further argued Mrs. Sorenson had no standing to ask the court to interfere in his decision.

Issues:

(1) Do the courts have a role in reviewing MAID eligibility assessments?
(2) Does Mrs. Sorenson have standing to challenge the finding Mr. Sorenson is eligible for MAID?
(3) Did the motion judge err in declining to grant the interlocutory injunction?

Result:

The appeal is dismissed. Further, based on the findings of the Court, the Amended Application in Court is dismissed.

In her arguments on appeal, Mrs. Sorenson raised the issue of whether the courts have a role in reviewing MAID eligibility assessments. She did not argue the *Criminal Code* provisions permitting MAID were unconstitutional. She did not argue the MAID policy implemented by the Nova Scotia Health Authority failed to comply with the *Criminal Code* provisions. There was no allegation Mr. Sorenson's MAID eligibility was determined in a manner that contravened the *Criminal Code* or the NSHA policy. Rather, she sought to question the accuracy of the assessments undertaken by the approved MAID assessors who found Mr. Sorenson met the eligibility criteria. She argued the law permitted her to do so because there had been differing opinions expressed about whether Mr. Sorenson met the MAID criteria.

The Court concluded there is no role for courts in the review of MAID eligibility assessments. The legislative history giving rise

to the *Criminal Code* amendments permitting MAID establishes that Parliament considered, and rejected, a role for judges in the pre-approval or review of MAID eligibility assessments. Parliament made clear that role rests with approved healthcare assessors.

Further, the courts do not possess the institutional capacity to review MAID eligibility assessments in a manner that respects the s. 7 *Charter* rights of persons who have been approved. As a result of these conclusions, the Court found Mrs. Sorenson's Amended Application in Court did not raise a justiciable issue—that is, an issue that should be to be determined by the courts.

In the absence of Mrs. Sorenson raising a justiciable issue, the Court concluded she did not have standing to challenge Mr. Sorenson's MAID eligibility assessment.

Finally, the Court found the motion judge did not commit an error in declining to grant an interlocutory injunction preventing Mr. Sorenson from obtaining MAID.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 53 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: *Sorenson v. Swinemar*, 2020 NSCA 62

Date: 20201002
Docket: CA 499817
Registry: Halifax

Between:

Katherine Sorenson

Appellant

v.

Schelene Swinemar, Jack Sorenson, and Nova Scotia Health Authority

Respondents

Judges: Wood C.J.N.S., Bourgeois and Derrick JJ.A.

Appeal Heard: September 24, 2020, in Halifax, Nova Scotia

Held: Appeal dismissed with costs per reasons for judgment of Bourgeois J.A.; Wood C.J.N.S. and Derrick J.A. concurring

Counsel: Hugh Scher, John Campion, and Kate Naugler, for the appellant
Karen Bennett-Clayton, for the respondents Ms. Swinemar and Nova Scotia Health Authority
Philip Romney, for the respondent Jack Sorenson
Mary Ann Persaud, for the respondent Nova Scotia Health Authority (in-house counsel)

Reasons for judgment:

[1] Mr. and Mrs. Sorenson[1] have been married for 48 years. He is 83. She is 82. Mr. Sorenson is in poor health and has made application for Medical Assistance in Dying ("MAID"). He was approved for the procedure, which was initially scheduled for July 20, 2020 and then again on August 4, 2020. Mrs. Sorenson adamently opposes her husband's application for MAID[2]. She has turned to the courts to prevent him from ending his life.

[2] On July 31, 2020, Mrs. Sorenson filed a Notice of Application in Court seeking a declaration that Mr. Sorenson does not meet the eligibility requirements for MAID "according to Canadian law". She requested permanent and interlocutory (temporary) injunctions to prevent healthcare providers from providing him with MAID. A motion brought by Mrs. Sorenson for an interlocutory injunction was heard on August 7, 2020 by Justice Peter Rosinski of the Nova Scotia Supreme Court. The first line of her written submissions in support of the motion asserted she "questions the assessments conducted in support of a request for assisted suicide" made by her husband.

[3] By order issued August 14, 2020, Justice Rosinski dismissed Mrs. Sorenson's motion. He declined to grant an interlocutory injunction preventing Mr. Sorenson from obtaining MAID.

[4] Mrs. Sorenson now appeals to this Court. In her arguments on appeal, she raises a broader issue than merely whether Justice Rosinski's decision is supportable in law. Mrs. Sorenson advances a strenuous argument for the courts to undertake a role in determining MAID eligibility. She submits the "Rule of Law" requires this Court "to ensure that the legal criteria for MAID have been met".

[5] Relating more specifically to the decision under appeal, Mrs. Sorenson argues Justice Rosinski's analysis discloses numerous errors. She asks this Court to issue an interlocutory injunction halting Mr. Sorenson's access to MAID until

---

[1] Earlier decisions have chosen to reference Mr. and Mrs. Sorenson by the initials X and Y, respectively. In reviewing the record, none of the parties when asked if they intended to seek a publication ban felt the need to restrict public access to the court materials, or to anonymize themselves. Absent an order being sought pursuant to *Nova Scotia Civil Procedure Rule* 85.04, I see no reason to restrict in any fashion the open court principle. Of course, those who read and report upon this decision may choose to continue to anonymize the parties given the personal nature of the subject matter.

[2] Some documents employ the acronym MAiD. However, I prefer to use MAID, the form employed by the federal government.

such time as the Application in Court can be heard. She further requests the court below be directed to address her outstanding motion for production, scheduling of discoveries, and setting of hearing dates, including cross-examination of numerous doctors and nurses, in a “speedy fashion”.

[6] Given the nature of the arguments advanced in the parties’ written submissions, they were asked to address the issue of Mrs. Sorenson’s standing. Both Mrs. Sorenson and Mr. Sorenson filed written submissions in advance of the appeal hearing, which were supplemented in oral argument. The Nova Scotia Health Authority and Ms. Swinemar did not file written submissions but addressed the issue of standing at the hearing.

[7] For the reasons that follow, I am satisfied neither this Court, nor the court below, should undertake a review of the assessments that found Mr. Sorenson to be eligible for MAID. I am further satisfied Mrs. Sorenson does not have standing to attempt to prevent or delay Mr. Sorenson’s receipt of MAID. Although I would dismiss the appeal on this basis alone, I also find Mrs. Sorenson’s complaints regarding Justice Rosinski’s decision to decline an interlocutory injunction are without merit.

Procedural History and Decision under Appeal

[8] On July 31, 2020, Mrs. Sorenson filed a Notice of Application in Court pursuant to *Nova Scotia Civil Procedure Rule* 5.07. She named Schelene Swinemar (a Nurse Practitioner) and the Nova Scotia Health Authority (“NSHA”) as respondents. Mr. Sorenson was not named as a party. The relief being sought in the Application was stated to be an order:

> (1) **For a permanent and interlocutory injunction enjoining the Respondents from carrying out an assisted suicide of Jack Sorenson;**
>
> (2) For directions relative to the hearing of this Application, cross-examinations on affidavits, production and examination of third party witnesses, and such other procedural matters as counsel may advise and the court may permit;
>
> (3) An order compelling production of the clinical notes and records and reports on Jack Sorenson from the following physicians who have assessed Mr. Sorenson:
>
> > (a) Nurse Practitioner Schelene Swinemar;
> >
> > (b) Nurse Practitioner Lori Griffin [*sic*];
> >
> > (c) Dr. David Martell;

(d) Dr. Ashley Miller;

(e) Dr. Terry Chisholm;

(f) Dr. Daniel Du [*sic*] Toit; and

(g) Diyana Docheva.

(4) A declaration that Jack Sorenson does not meet the legal requirements to permit an assisted suicide according to Canadian law and particularly that he does not suffer from a grievous and irremediable medical condition and that his death is not reasonably foreseeable;

(5) An order to abridge the time for service and filing of this Application which is brought on an emergency basis; and

(6) Costs of this Application.

(Emphasis added)[3]

[9] On the same day, Mrs. Sorenson filed a Notice of Motion seeking an order that the respondents (Ms. Swinemar and the NSHA) produce "all clinical notes, records and reports in their possession touching on the issues in dispute", as well as an order compelling various named non-parties to "produce all clinical notes, records and reports and other documents in their possession touching on the issues in dispute". Mrs. Sorenson viewed the matter to be urgent, the Notice stating:

> The Motion is to be heard at the earliest opportunity in the Courthouse located at 141 High Street, Bridgewater, Nova Scotia. The moving party has set the Motion for hearing concurrent with the Application for an Intern [*sic*] Injunction on an emergency basis set to proceed at the same time. The moving party states that the Motion will not require more time.

[10] Given representations that the matter was highly urgent, an appearance was scheduled on July 31, 2020, before Justice Jamie Campbell. Justice Campbell ordered on an *ex parte* basis:

(i) An interim injunction shall issue enjoining the Respondents or any party under their control from providing medical aid in dying to Jack Sorenson. This injunction shall remain in place until Friday August 7, 2020 at which time the matter shall be returned to court on notice to all interested parties in order for a motion for an interim injunction to be adjudicated;

(ii) The Applicant shall provide notice to the Respondents and to Mr. Sorenson of this interim injunction and of the return date for hearing on August 7, 2020;

---

[3] The nature of the relief sought by Mrs. Sorenson is particularly relevant to whether this Court or the court below has a role to play in the determination of the matter and will be discussed further below.

(iii)The matter shall return to court on August 7, 2020 at 9:30 a.m. at the Courthouse at 141 High Street, Bridgewater Nova Scotia.

[11] Following Justice Campbell's order, Mrs. Sorenson filed a further Notice of Motion in which she sought "an interim injunction enjoining the Respondents or anybody under their control from carrying out an assisted suicide of Jack Sorenson"[4]. The Notice advised the matter was to be heard on August 7, 2020 and that it could be heard in a half-day.[5]

[12] The matter returned to court on August 7, 2020. As per Justice Campbell's direction, Mr. Sorenson and the other respondents had been provided with notice of the proceedings. Also, in accordance with Justice Campbell's earlier direction, the only issue before the court was whether the injunction sought by Mrs. Sorenson was warranted.

[13] The evidence before the motion judge in support of injunctive relief consisted of:

(a) The affidavit of Mrs. Sorenson, sworn July 31, 2020; and

(b) The affidavit of Dr. Christian G. Bachman, sworn July 30, 2020.

[14] Mr. Sorenson did not file an affidavit, but counsel appeared on his behalf to oppose the motion. His counsel, Mr. Romney, submitted Mr. Sorenson had been approved for MAID in accordance with the requirements of the *Criminal Code* and NSHA policy, and there was nothing before the court that would justify him being prevented from proceeding. Further, Mr. Romney argued:

> In terms of the legislation, only qualifying practitioners can do the assessments, the court doesn't do the assessments nor unqualified doctors or unqualified nurse practitioners.

[15] Counsel for the NSHA and Ms. Swinemar[6] advised they were not taking a position on the motion but filed an affidavit to provide context relating to Mr. Sorenson's application for MAID. The affidavit sworn by Cheryl Tschupruk,

---

[4] In her Notice of Motion and in subsequent submissions, Mrs. Sorenson references the injunction being sought as "interim". Justice Rosinski used the terminology "interlocutory". Although there is a distinction in those terms, it is not relevant for the purpose of this appeal.

[5] On August 4, 2020, Mrs. Sorenson filed an Amended Notice of Application in Court in which she names Jack Sorenson as a Respondent. In all other respects it is identical to the Notice filed on July 31, 2020.

[6] The NSHA and Ms. Swinemar were represented by the same counsel and put forward a joint response in both the court below and before us.

Interim Director of MAID for the NSHA, provided background relating to the NSHA's Interdisciplinary Clinical Policy and Procedure for Medical Assistance in Dying (the "NSHA policy"). The affidavit further set out the contents of the NSHA's file relating to Mr. Sorenson's applications, including several assessments undertaken in relation thereto.

[16] It is helpful to review the nature of the evidence contained in each of the affidavits. In her affidavit, Mrs. Sorenson described her husband's education, work history, and medical concerns. She asserted he had hypochondriacal tendencies and often insisted over the years he was fatally ill without any supporting medical diagnosis. Mrs. Sorenson said her husband has experienced confusion, depression, and "bizarre thought processes". She indicated she does not believe he meets the criteria for "assisted suicide".

[17] In reviewing Mrs. Sorenson's affidavit, I note:

- Mr. Sorenson suffers from Stage III COPD and was assessed in the fall of 2019 as having 49% lung capacity.
- Mr. Sorenson has made three applications for "assisted suicide".
- Mr. Sorenson's first application was abandoned following receipt of a report from Dr. Daniel (Niel) du Toit in May 2020. His report was attached as an exhibit to the affidavit.
- Mrs. Sorenson asserted Dr. du Toit's report "makes clear that Jack is not suffering from a grievous and irremediable medical condition that is likely to result in his death in the foreseeable future".
- In response to his second application to receive MAID, Mr. Sorenson was scheduled to receive the procedure on the evening of July 20, 2020. Mrs. Sorenson told NP Swinemar, who was to administer the procedure, there was "something very fishy" and if the procedure took place, she "may be required to take legal action".
- Although she acknowledges being a devout Christian and does not believe in suicide, she has commenced legal action because "multiple medical doctors concur that Jack does not have a grievous and irremediable medical condition that renders his death reasonably foreseeable".

[18] As for Dr. Bachman's affidavit, it is clear Mrs. Sorenson sought to elicit opinion evidence through this witness, specifically in relation to Mr. Sorenson's eligibility for MAID.[7] I note the following from his affidavit:

- He has known Mr. Sorenson for many years and has had the opportunity to interact with him many times in the past four decades.
- He had a lengthy telephone conversation with Mr. Sorenson on July 29, 2020 in which Mr. Sorenson was able to speak in long sentences with no noted difficulties.
- He asserts Mr. Sorenson's "medical conditions do not remotely meet the criteria for significant suffering or for reasonably foreseeable death in the near future".
- He says Mr. Sorenson has a "lifelong history of hypochondriacal perseveration on health issues" and recounts an exchange between himself and Mr. Sorenson in support of this view that occurred more than 30 years ago.
- Based on his recent telephone conversation, in his opinion Mr. Sorenson is delusional with respect to his medical condition and imminent death, and "that if [Mr. Sorenson] did not have this delusional fixation that he would be able to carry on a reasonably happy and normal life".
- He concludes:

> In summary; Mr. Sorenson has suffered from a lifelong psychiatric disorder. He has endured many decades of substantially anxious hypochondriasis. He is now suffering from a powerful delusional thought process as it applies to an age appropriate disease burden. He also has several legitimate chronic health conditions. These include moderate COPD, cerebrovascular disease and "frailty". These conditions are of about average severity for a man of his age. None of these chronic diseases appear to be causing significant disability, discomfort or other suffering at this time. None of these processes are likely to cause death in the reasonably foreseeable future.

[19] Dr. Bachman attached his *curriculum vitae* to his affidavit. It provides:

- He received his medical degree from Dalhousie Medical School in June 1993.

---

[7] At paragraph [3] of his affidavit, Dr. Bachman references providing "opinion evidence".

- He undertook a Family Practice Residency at Memorial University, which concluded in June 1995.
- He practiced family medicine in Newfoundland, his last noted position ending in October 1995.
- All further listed positions, commencing in January 1997 have been in the State of Florida.
- He lists a License to Practice Medicine in the State of Florida. He does not list a current license to practice medicine in Canada.

[20] The affidavit of Ms. Tschupruk sets out the contents of the NSHA file in relation to Mr. Sorenson's attempts to obtain MAID. Several exhibits are attached, including:

- First Physician/Nurse Practitioner Assessment completed by NP Swinemar on April 22, 2020, which stated Mr. Sorenson met the criteria for MAID.
- Report and Physician/Nurse Practitioner Assessment completed by NP Giffin on April 30, 2020 indicating she did not believe Mr. Sorenson could make decisions regarding MAID due to dementia. She noted although Mr. Sorenson suffers from a grievous, progressive, and incurable illness (dementia/COPD), she did not view his death as being foreseeable. She indicated she had reviewed with Mr. Sorenson "that a formal capacity assessment and further evaluations may uncover information that support[s] his ability to access MAID in the future".[8]
- Report of Geriatric Psychiatrist Dr. Terry Chisholm dated May 8, 2020 setting out the results of Mr. Sorenson's capacity assessment. The report described Mr. Sorenson as "visibly short of breath while speaking, and had very effortful expiration at times". With respect to his mental status the report stated Mr. Sorenson "has good insight into the symptoms, functional limitations, and options for treatment for his illness (COPD) and intact judgment". The report concluded Mr. Sorenson's "cognitive status is not impairing his ability to consent for MAID", and there was "no evidence of any psychosis or delusional thought content".

[8] As will be discussed later, the NSHA policy places an obligation on assessors to advise patients of their right to seek further assessments.

- Report of Dr. Daniel (Niel) du Toit, Internist, dated May 14, 2020. The report noted a psychiatrist "found [Mr. Sorenson] capable to make decisions". With respect to the foreseeability of Mr. Sorenson's death, he wrote:

> Unfortunately the law regarding MAID is rather vague stating that the person should be dying in the foreseeable future. I unfortunately have no idea what that means; although I do not see that Jack will die from his lungs in the next year. That however is never sure with the Covid 19 and other respiratory tract infections.

- Report and Physician/Nurse Practitioner Assessment of Dr. Robert Martell dated July 11, 2020 in which he determines Mr. Sorenson meets the criteria for MAID, including having the required capacity.

- Report of Dr. Ashley Miller, Internist, dated July 27, 2020 in which she documents the outcome of her assessment of Mr. Sorenson. She finds Mr. Sorenson meets all the eligibility criteria to receive MAID. With respect to capacity, the report states:

> In terms of my capacity assessment, I am confident that Jack has the capacity to make decisions related to his own health and specifically medical assistance in dying based on multiple observations including the following:
>
> 1. An understanding of the process and legal requirements of MAID.
>
> 2. An ability to clearly describe the circumstances of his recent health challenges including his journey to be assessed for MAID and the associated complexity of his case.
>
> 3. An ability to clearly explain his history of stroke including an anatomic description of his areas of infarction based on his brain imaging.
>
> 4. An ability to describe the medical indication and a basic overview of the mechanism of action of his medications (ie. "my puffers open up my airways").
>
> 5. An ability to describe the condition of COPD and express a view related to the way in which he does not fit the prototypical disease model ("Just because the number on my test hasn't changed the doctor didn't think I am dying but I now can't breathe." and "Just because my oxygen level is 98% doesn't mean I can breathe.") Although he has an odd belief related to his COPD, he can rationally explain relative risks and benefits of differing options relative to his own understanding of that disease.
>
> 6. An ability to describe his own trajectory of decline and symptom burden as the rationale for his desire to pursue MAID.

With respect to Mr. Sorenson's eligibility, Dr. Miller wrote:

I explained to Jack following this comprehensive assessment that it is my impression that he meets the legal criteria for Medical Assistance in Dying. He is over 18 and bears an NS health card. I have previously outlined my rationale for concluding that he has capacity for this decision making. His request is clearly voluntary, considering that he reported activity consistent with coercion in an effort to discourage him from pursuing MAID and yet has remained steadfast in his desire to obtain MAID. In terms of the legal requirements related to the determination of a "grevious [*sic*] and irremedial [*sic*] medical condition", I concluded that his progressive frailty and severe COPD meet all of the required criteria. Firstly, COPD is a "serious and incurable illness." Secondly, Jack is in "an advanced state of irreversible decline in capability" as evidenced by his loss of function over the past months. Thirdly, Jack's COPD-related dyspnea is the cause of "enduring physical AND psychological suffering that is interolable [*sic*] to HIM and cannot be relieved by under conditions that he finds acceptable." Finally, I am confident that Jack's "natural death has become reasonably foreseeable" related to his progressive frailty that appears to be driven by his end stage COPD and associated dyspnea. I asked myself the "surprise question" of whether or not I would be surprised to learn that Jack had died naturally in the coming year if he did not have access to MAID. My answer is yes.[9]

- Report of Dr. Timothy Holland dated August 5, 2020 in which he concluded, following his assessment of Mr. Sorenson, that he meets the eligibility criteria to receive MAID. Dr. Holland stated Mr. Sorenson "clearly has the necessary understanding, appreciation, expression of choice and reasoning to make [*sic*] be deemed capable to make a decision regarding MAID. The report further concluded:

Jake [*sic*] also meets all other requirements for MAID:

- Eligible for health services in Nova Scotia
- At least 18 years old
- Has been provided a copy of the College standard
- Is acting voluntarily: I have no sense whatsoever that there, is any undue influence or coercion on the part of the family or any other parties that would be influencing the patient's decision towards MAID. In fact, it is my understanding that there is considerable influence from people in Jack's life to not pursue MAID. I am confident that the patient is making this decision based on their own values, priorities and goals of care.
- Has verbally reiterated their intention for MAID and is fully aware they may withdraw this request at any time

---

[9] In an addendum to her report, Dr. Miller wrote that she intended to write she would **not** be surprised to learn Mr. Sorenson had died in the coming year.

> • He is aware of palliative care options
>
> • The consent and request form has been signed by two independent witnesses.

[21] Ms. Tschupruk's affidavit further indicates NP Swinemar has decided to no longer be involved in the administration of MAID to Mr. Sorenson.

[22] Through their respective counsel, both Mrs. Sorenson and Mr. Sorenson raised concerns regarding the admissibility of the evidence before the court. Mrs. Sorenson argued the NSHA affidavit contained inadmissible hearsay evidence, namely the various medical assessments attached as exhibits. For his part, Mr. Sorenson submitted that the affidavit of Mrs. Sorenson was full of inadmissible hearsay and the affidavit of Dr. Bachman contained inadmissible expert opinion.

[23] With respect to the substantive issue, Mrs. Sorenson argued the evidence before the motion judge established an injunction was warranted on the basis that Mr. Sorenson did not meet the eligibility requirements for MAID as set out in the *Criminal Code*. In her view, Mr. Sorenson did not possess the requisite mental capacity to be approved for MAID and he did not suffer from a grievous and irremediable medical condition that made his death reasonably foreseeable. In response, Mr. Sorenson asserted he had been determined to be eligible and that his wife had not met the burden of establishing an interlocutory injunction was warranted.

[24] By way of a footnote in his written reasons (reported as 2020 NSSC 225), the motion judge expressed the view that Mrs. Sorenson "likely" had standing to request "the sought after relief". The issue of standing will be addressed later in these reasons.

[25] The motion judge addressed the concerns raised regarding Mrs. Sorenson's affidavit as follows:

> [18] Counsel for X suggests that the affidavit of Y contains a great deal of objectionable hearsay.
>
> [19] In large measure the facts recorded in Y's affidavit are matters of which she has direct or reliable indirect knowledge. Importantly, X permitted Y to be involved in the process he pursued to obtain MAID thus she has some direct knowledge of the circumstances. I bear in mind that I also have the benefit of the affidavit filed by the NSHA which confirms portions of the factual information contained in Y's affidavit.

> [20] On the other hand, Y's affidavit clearly has elements that suggest she may be motivated to present only evidence that supports her position as a person who is morally opposed to "assisted suicide".
>
> [21] Nevertheless, her affidavit is clearly oriented toward facts that are arguably relevant to the lawfulness of the decision to permit X to proceed with MAID-most significantly whether he has the capacity to make rational and informed decisions about his health and the question of physician-assisted death and whether his circumstances fulfil the criteria: that he has a "grievous and irremediable medical condition", and in particular whether his natural death has become "reasonably foreseeable", taking into account all of his medical circumstances, without a prognosis necessarily having been made as to the specific length of time that he has remaining.
>
> [22] I will not strike any portions of her affidavit but will give no weight or diminished weight appropriately to those objectionable statements made by her.

(Footnote omitted)

[26] The motion judge then addressed the affidavit of Dr. Bachman as follows:

> [24] Insofar as he purports to give expert opinion, his curriculum vitae notes that he graduated from Dalhousie Medical School in Halifax, Nova Scotia and received his MD in June 1993 and that he was certified in Family Medicine as of June 8, 1995 in Canada, but it does not show him having any license to practice medicine in Canada since that time. He also questioned how much opportunity Dr. CB has had to interact with X in person, particularly recently, other than a July 29, 2020 telephone conversation.
>
> [25] Moreover, he is not qualified to assert that "[X] has suffered from a lifelong psychiatric disorder… He is now suffering from a powerful delusional thought process as it applies to an age-appropriate disease burden… None of these processes are likely to cause death in the reasonably foreseeable future. [X] is suffering. His desire for urgent euthanasia stems not from the above medical conditions but from a treatable psychiatric condition – hypochondriasis with severe anxiety."
>
> [26] I accept these arguments – Dr. B is not a licensed psychiatrist, even in the United States. He is not a licensed doctor in Canada. He has very limited recent contact with X. It is entirely unclear when he last saw X in person. I give no weight to the purported expert opinion evidence contained in his affidavit. I will consider his factual evidence therein, but find it of minimal weight, particularly when contrasted with the very recent medical opinions and observations of X made by doctors licensed to practice medicine in Nova Scotia. Moreover, he has not had access to all the records regarding X that they have.

[27] Finally, with respect to Mrs. Sorenson's objection to the NSHA affidavit, the motion judge concluded:

> [28] Y's counsel objects to this affidavit on the basis that it contains only hearsay factual documentation in relation to X's circumstances as he progressed through the MAID process. On the other hand, Y's counsel was quite prepared to rely on evidence therein that buttressed his client's case – he pointed to the evidence of NP Giffin and that of Dr. du Toit.
>
> [29] I conclude that the NSHA affidavit in its entirety is admissible either as "business records" pursuant to section 23 of the *Evidence Act*, c. 154 RSNS 1989, as amended, and pursuant to the common law "business records" exception, articulated by the Supreme Court of Canada in *Ares v Venner*, or as an exception to the hearsay rule (as being necessary and reliable), captured in the recent canvas[s] of the law articulated by Justice Beveridge in *R v Keats*, 2016 NSCA 94 at paras. 108-131.

[28] Regarding the test for an interlocutory injunction, the motion judge considered whether Mrs. Sorenson had satisfied the court there was a serious question/issue to be tried; that she would suffer irreparable harm if the injunction were not granted; and whether the balance of convenience favoured her over her husband.

[29] The motion judge was satisfied Mrs. Sorenson had established the existence of a serious issue and irreparable harm[10]. He was not satisfied the balance of convenience weighed in her favour. He wrote:

> 11. … [I am NOT so satisfied – I conclude that there is significant compelling evidence that X has reasonably been determined to have "a grievous and irremediable medical condition" as defined in section 241.2 (2) of the *Criminal Code of Canada*, and that the other eligibility conditions have been met. X is constitutionally entitled to take this course of action, and given that he has some level of ongoing dementia, which could, by itself or in addition to other phenomena such as cerebrovascular disease, render him incapable, and therefore no longer qualified to consent to his presently chosen MAID process, there is a real risk here that he will be deprived of his present choice. He has also been found by MAID assessors to be presently enduring "a grievous and irremediable medical condition and his natural death has become reasonably foreseeable, taking into account all of his medical circumstances". Further delay entails further suffering for X. I conclude he would suffer irreparable harm if the injunction is

[10] These findings were not challenged by the respondents on appeal. I do not intend to address the motion judge's conclusions directly, but given the discussion to follow regarding standing and the appropriate role of the courts in assessing MAID eligibility, these findings should not be viewed as being endorsed by this Court.

granted. On balance, the harm he would suffer is significantly greater than what his wife would suffer.]

[30] The motion judge released his decision denying the interlocutory injunction on August 14, 2020. The same day, Mrs. Sorenson filed a Notice of Appeal (General) with this Court and a request for a stay pending appeal. An Amended Notice was later filed on August 18, 2020.

[31] The motion for a stay was heard on August 26, 2020 and subsequently dismissed by Justice Elizabeth Van den Eynden in chambers.[11] Mrs. Sorenson immediately filed a Notice of Motion seeking leave to review the chambers judge's decision pursuant to *Nova Scotia Civil Procedure Rule* 90.38. On September 9, 2020, Chief Justice Michael J. Wood declined to grant leave.[12]

[32] The appeal was heard virtually on September 24, 2020. The parties were given an opportunity in advance to raise concerns regarding the format of the appeal. No concerns were raised.

Medical Assistance in Dying

[33] Before considering the issues arising in this appeal, it is helpful to consider the background leading to MAID being recognized as an exemption to the *Criminal Code* prohibitions against assisted suicide.

[34] The ability of an individual to obtain assistance to end their life is an issue attracting strong societal support as well as forceful opposition. The law has historically not supported the existence of such a right. The *Criminal Code* provides that everyone who aids a person in committing suicide is guilty of an indictable offence (s. 241(1)) and further, an individual cannot consent to having death inflicted upon them (s. 14). An earlier challenge to the prohibition against assisted death was rejected by a narrow majority of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519.

[35] The Supreme Court revisited the criminal prohibitions in *Carter v. Canada (Attorney General)*, 2015 SCC 5.[13] In a unanimous judgment, the Court found the

---

[11] Written reasons were released on September 4, 2020 and reported at 2020 NSCA 56.
[12] The Chief Justice's reasons for declining to grant leave to review the decision to decline a stay are reported at 2020 NSCA 57.

[13] A second "*Carter*" decision was rendered the following year. For the purposes of this decision, references to *Carter* are in relation to the 2015 decision.

Criminal Code provisions infringed the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* (the right to life, liberty and security of the person) in a manner not in accordance with the principles of fundamental justice, and that it could not be saved by virtue of s. 1 of the *Charter*.

[36] The Court's explanation of the source of the s. 7 infringement was two-fold. With respect to the right to life, the Court noted:

> [57] The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.
>
> [58] We see no basis for interfering with the trial judge's conclusion on this point. The evidence of premature death was not challenged before this Court. It is therefore established that the prohibition deprives some individuals of life.

[37] Further, the *Criminal Code* provisions were found to infringe the liberty and security of the person interests of certain individuals in a deeply personal manner:

> [65] The trial judge concluded that **the prohibition on assisted dying limited Ms. Taylor's s. 7 right to liberty and security of the person, by interfering with "fundamentally important and personal medical decision-making" (para. 1302), imposing pain and psychological stress and depriving her of control over her bodily integrity** (paras. 1293-94). She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326).
>
> [66] We agree with the trial judge. **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.

(Emphasis added)

[38] The Supreme Court viewed the right to medical self-determination as lying at the heart of the right to liberty and security of the person:

> [67] The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), **endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care** (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.), **the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision**. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).
>
> [68] In *Blencoe*, a majority of the Court held that the s. 7 liberty interest is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (para. 49). In *A.C.*, where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, Binnie J. noted that we may "instinctively recoil" from the decision to seek death because of our belief in the sanctity of human life (para. 219). But his response is equally relevant here**: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition "does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live" (*ibid.*). The trial judge, too, described this as a decision that, for some people, is "very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience" (para. 1326). This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person.** As noted above, s. 7 recognizes the value of life, but it also honours the role that autonomy and dignity play at the end of that life. We therefore conclude that ss. 241 (*b*) and 14 of the *Criminal Code* , insofar as they prohibit physician-assisted dying for

> competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, infringe the rights to liberty and security of the person.
>
> (Emphasis added)

[39] Integral to the principle of self-autonomy in medical decision-making is the concept of capacity. As Mrs. Sorenson argues Mr. Sorenson is not capable to make decisions relating to his own self-determination, an important observation is in order.

[40] Adults are presumed to be capable to make decisions impacting on their health and medical care. This was described by Justice Abella in *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 as follows:

> [39] The legal environment for adults making medical treatment decisions is important because it demonstrates the tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity.
>
> [40] At common law, **adults are presumptively entitled to direct the course of their own medical treatment and generally must give their "informed consent" before treatment occurs, although this presumption of capacity can be rebutted by evidence to the contrary**. (See Lucinda Ferguson, "The End of an Age: Beyond Age Restrictions for Minors' Medical Treatment Decisions", paper prepared for the Law Commission of Canada (October 29, 2004), at p. 5.) When competency is not in question, this right "to decide one's own fate" (*Re T (adult: refusal of medical treatment)*, [1992] 4 All E.R. 649 (C.A.), at p. 661) includes the unqualified right to refuse life-saving medical treatment.
>
> (Emphasis added)

[41] The presumption of capacity and respect for personal dignity and autonomy has been legislatively recognized in this Province. The recitals of the *Adult Capacity and Decision-making Act*, S.N.S. 2017 c. 4, as amended[14] state:

> WHEREAS an adult is entitled to respect for the adult's dignity and autonomy;

[14] Mrs. Sorenson relies on this legislation in support of her argument that courts have a role in the assessment of capacity under the MAID regime. Although the *Act* does not apply directly in this instance, its underlying principles relating to the presumption of capacity as part of personal dignity and autonomy is indicative of the fundamental importance of these considerations.

> AND WHEREAS an adult is presumed to have capacity, unless the contrary is clearly demonstrated;

[42] Further, s. 4 of that *Act* directs it must be interpreted in accordance with fundamental principles including:

> (a) an adult is entitled to make his or her own decisions, unless the adult's incapacity to do so is clearly demonstrated;
>
> (b) an adult is not incapable of making a decision merely because the adult makes or would make a decision that another adult would consider risky or unwise.

[43] Returning to *Carter*, the Court concluded:

> [126] We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241 (*b*) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter* . To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982* . It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.
>
> [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.
>
> [128] We would suspend the declaration of invalidity for 12 months.

[44] On December 3, 2015, the Attorney General of Canada asked the Supreme Court to extend the suspension of the declaration of invalidity for a further six months. The Attorney General's request was based upon Parliament's legislative response to the Court's decision being delayed by an intervening federal election. A four-month extension of the suspension of the declaration of invalidity was granted (*Carter v. Canada (Attorney General)*, 2016 SCC 4).

[45] Following *Carter*, extensive consultations were undertaken to inform Parliament's response. This specifically included broad input relating to proposed

eligibility criteria, safeguards for the protection of the vulnerable, and what oversight mechanisms were warranted. Further consultations were undertaken to address how provinces should respond to the implementation of MAID in their existing health care systems.

[46] On June 17, 2016, Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* came into force. The amendments to the *Criminal Code* served to permit MAID in prescribed circumstances. The criteria are set out in s. 241.2. The provisions most relevant to this appeal are as follows:

> **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.

[47] Parliament included safeguards in s. 241.2 for the purpose of ensuring only those qualified would be found eligible for MAID. Subsection (3) provides:

> **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 and in accordance with any applicable provincial laws, rules or standards.

[48] As set out above, s. 241.2(3)(h) requires a person expressly consent to MAID immediately before it is provided. If a person earlier assessed to be eligible subsequently loses capacity to consent, MAID cannot be provided.

[49] Further, the amendments tasked the Minister of Health to make regulations relating to the monitoring of MAID nationally. *Regulations for the Monitoring of Medical Assistance in Dying,* SOR/2018-166 came into force on November 1, 2018 setting out national reporting requirements and standardized data collection for the provision of MAID.

[50] Following the *Criminal Code* amendments, the implementation of MAID across Canada became the responsibility of the provinces and territories. In Nova Scotia the administration of MAID lies with the NSHA, which has created policy governing eligibility and the process for obtaining assistance. Further, the College of Physicians and Surgeons of Nova Scotia, the Nova Scotia College of Nursing, and the Nova Scotia College of Pharmacists have implemented their own professional standards relating to MAID.[15]

Judicial Review and Oversight of MAID

[51] In her arguments, Mrs. Sorenson has raised an issue that impacts on this interlocutory appeal, as well as the Application in Court in the court below. That issue is whether the courts have a role in ensuring MAID assessments that determine applicants to be eligible for MAID are accurate and compliant with the law. Specifically, in this case, is there a role for judicial oversight because there have been differing professional views as to whether Mr. Sorenson meets the eligibility criteria for MAID?

[52] I am mindful this is an interlocutory appeal relating to the refusal of an interlocutory injunction. As such, the appeal hearing and resulting decision would

---

[15] The above policies/guidelines were before the motion judge as exhibits to the affidavit of Cheryl Tschupruk. The existence or content of the above policies are not challenged on appeal. There has been no suggestion that the policies are not in accordance with the *Criminal Code* provisions relating to MAID.

not normally address an issue that may be determinative of the litigation commenced in the court below and that may have broader implications. I am of the view, however, that it is not only warranted, but essential that this issue be addressed now. There are three primary reasons for doing so.

[53] First, the parties have had a full opportunity to argue the matter before this Court by way of both written and oral submissions. As will be demonstrated by her arguments set out below, Mrs. Sorenson squarely put the issue before us. The other parties have taken the opportunity to respond. There is no unfairness to any party in addressing the matter.

[54] Second, if there is a question as to whether this Court or the court below has a role to play in determining the issue advanced by Mrs. Sorenson, that should be decided as early in the proceedings as possible. Having the parties spend time, resources, and energy on advancing arguments that do not lend themselves to judicial resolution must be avoided.

[55] Third, and most importantly in my view, this issue must be resolved early given the particular facts before us. Mr. Sorenson has been found to be eligible to receive MAID. He has been found to be suffering from a grievous and irremediable medical condition. The commencement of legal proceedings or the threat thereof has postponed two previously scheduled MAID procedures. If the courts do not have a role in reviewing his eligibility, then it would be an affront to the right of medical self-determination and the important principles recognized in *Carter* to delay Mr. Sorenson in exercising his personal healthcare wishes any further.

[56] It is helpful at this juncture to review Mrs. Sorenson's sought-after relief and her arguments as to the role of the courts. In her Application in Court, she requests the court make an independent determination as to whether Mr. Sorenson meets "the legal requirements to permit an assisted suicide according to Canadian law and particularly that he does not suffer from a grievous and irremediable medical condition and that his death is not reasonably foreseeable".

[57] In her written submissions to this Court she asserts:

> 4. In this case, the clear conflict between multiple medical assessors cries out for a pause and adjudication of the dispute to determine whether or not X has capacity, whether he meets the legal requirements and whether his assisted death is properly authorized by law.

> 5. The failure to allow limited judicial review of the exercise of the statutory powers regarding MAID under the *Criminal Code* would mean that a terminal treatment decision that is clearly intended to result in the death of a person is subject to less protection than any other treatment decision where capacity is in issue and may properly be subject to review by a court or tribunal.
>
> 6. The Nova Scotia *Hospitals Act*, *Personal Directives Act*, and *Adult Capacity and Decision-making Act* expressly provide for judicial review of capacity assessments with respect to treatment decisions and management of property, particularly where the question of capacity is in dispute.
>
> 7. Nothing in the language of the *Criminal Code* regarding MAID precludes the application of provincial laws and regulations that govern the delivery of health care in the province.

And later:

> 76. There is nothing in the *Criminal Code* that precludes judicial review of the exercise of the delegated statutory power by medical assessors in their application of the legal criteria for MAID. This is particularly so if MAID is deemed as healthcare or treatment governed by provincial healthcare and consent to treatment statutes.
>
> …
>
> 80. Section 241.2 of the *Criminal Code* expressly provides that MAID must be made with "reasonable knowledge, care and skill and in accordance with any applicable provincial laws or standards."
>
> 81. While the court in *A(B)* acknowledges that it is not for the Court to substitute its own medical opinion for that of the assessing doctors, multiple courts have ruled that a third party adjudicator is in a much better position than either the assessing doctors, the individual or family members to resolve disputes about capacity and disputes over consent to treatment including for end of life treatment decisions.
>
> …
>
> 86. In the context of MAID, review of questions of capacity and consent are equally deserving of court adjudication in limited circumstances where multiple conflicting expert reports arrive at different conclusions to these fundamental questions. Failing such review, it is possible that a person lacking capacity to consent may be assisted to death in a manner contrary to law.
>
> 87. Sections 7 and 21 of the *Judicature Act* provides Justices of the Supreme Court and the Court of Appeal with inherent authority which empowers their oversight responsibility relative to their obligation to protect vulnerable people. This is particularly so where, as here, a person has been determined by multiple assessors to be lacking capacity to decide to die.
>
> …

> 90. The Rule of Law **requires a Court to ensure that the legal criteria for MAID have been met** before the Court effectively authorizes MAID to proceed in circumstances where there are multiple conflicting reports that call into serious question a person's capacity, consent to treatment, and whether or not they meet the legal criteria required to authorize a lawful assisted death.[16]

(Emphasis added; footnotes in factum omitted)

[58] Mr. Sorenson asserts this Court has no role to play in the present instance. In his written submissions, he says:

> 15. There is a clear administrative process set out in legislation, the policies and procedures for MAID. There is no requirement for court intervention before a person may invoke the right to die. …

[59] Similarly, the NSHA and Ms. Swinemar submit "that judicial oversight is not appropriate and is not a requirement under the [NSHA] Policy nor in the *Criminal Code*". They argue the consultative process that led to the MAID amendments demonstrates Parliament was aware of the potential for conflicting assessments, did not view this as fatal to a patient ultimately being found eligible to receive MAID, and declined suggestions that there be a mechanism for judicial oversight or review.

[60] Although the parties have framed their submissions as relating to the proper "role" of courts in reviewing MAID assessments, this, in my view, is simply a different means of asking whether Mrs. Sorenson has raised a justiciable issue. Absent a justiciable issue, there is no role for either this Court, or the court below.

[61] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, Justice Rowe describes justiciability as follows:

> [32] This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

---

[16] Notwithstanding the concerns raised by Dr. Bachman regarding Mr. Sorenson's mental health, the only MAID assessor who opined that Mr. Sorenson lacked capacity to consent to MAID was NP Giffin.

> [33] Lorne M. Sossin defines justiciability as
>
> > a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> (*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)
>
> Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.
>
> [34] There is no single set of rules delineating the scope of justiciability. **Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter**: see *Sossin*, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

(Emphasis added)

[62] I will now consider the two factors underlying justiciability—legitimacy and the institutional capacity of the courts.

[63] A court's legitimacy to adjudicate a matter includes a consideration of whether the subject matter advanced for judicial scrutiny has been placed with another decision maker. As I will explain below, it is clear Parliament fully intended, provided it is undertaken in a manner consistent with the law, the determination of MAID eligibility should rest with authorized medical and nursing professionals not with judges. The Province of Nova Scotia has not enacted legislation that contemplates judicial intervention in assessing MAID eligibility.[17] I am also satisfied the institutional capacity of the courts is not well-suited to respond to the time-sensitive nature of challenges advanced in relation to MAID eligibility assessments.

[17] It is not within the scope of this appeal to comment on whether such legislation would raise any constitutional issues.

[64] For clarity, I am not suggesting courts could never have a role in matters relating to MAID. Clearly, challenges to the constitutionality of the MAID provisions fall squarely within the jurisdiction of the courts and have been entertained accordingly.[18] Questions as to whether policies governing MAID within a province or health authority are in compliance with the *Criminal Code* could be a subject for judicial determination. Of course, allegations that assistance in dying was provided or counselled in contravention of the MAID exemptions in the *Criminal Code* would be dealt with in the courts[19]. These are just examples of where courts would be tasked with deciding justiciable issues relating to MAID. This is not such a case.

Legitimacy

[65] In determining whether Parliament intended courts to have a role in MAID eligibility assessments, including the determination of capacity, one must look at the process that preceded and informed the legislative response.

[66] Parliament's legislative response was necessitated by *Carter*. That decision informed where Parliament placed the responsibility for determining MAID eligibility, including in relation to individuals who may be particularly vulnerable. The Court observed:

> *The Feasibility of Safeguards and the Possibility of a "Slippery Slope"*
>
> [114] At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.
>
> [115] The evidence accepted by the trial judge does not support Canada's argument. **Based on the evidence regarding assessment processes in**

---

[18] *Truchon v. Procureur général du Canada*, 2019 QCCS 3792.
[19] By way of example, an alleged contravention of s. 241.31(4).

> **comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making**. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. **The risks that Canada describes are already part and parcel of our medical system**.
>
> [116] As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. **We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity**.
>
> [117] The trial judge, on the basis of her consideration of various regimes and how they operate, found **that it is possible to establish a regime that addresses the risks associated with physician-assisted death. We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards**.
>
> (Emphasis added)

[67] I turn now to the history of the legislative response and how, in my opinion, it explains why Parliament resolved that the determination of MAID eligibility would rest with approved assessors. Along with my own review of the process leading to Parliament's passing of *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, two decisions have been of assistance to me in reaching the above conclusion: *A.B. v. Canada (Attorney General)*, 2017 ONSC 3759[20] and *Y. v. Swinemar*, 2020 NSCA 56.

[20] This decision was cited and relied upon by Mrs. Sorenson regarding the meaning of "grievous and irremediable medical condition" and "reasonable foreseeability".

[68] In *A.B. v. Canada (Attorney General)*, a difference in opinion amongst doctors as to whether A.B. was eligible for MAID was the impetus for her bringing legal action. There, two doctors had assessed A.B. and found she met the criteria for MAID. A third doctor, who had treated A.B. in the past, disagreed. When one of the assessing doctors learned of the differing opinion, they declined to assist A.B. in obtaining MAID due to liability concerns. A.B. sought a declaration she was eligible for MAID. The respondents, the federal and provincial Attorney Generals, argued the matter was not one which should be considered by the court:

> [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.
>
> …
>
> [12] Canada adopts the position of Ontario.

(Emphasis added)

[69] In his decision, Justice Perell set out the legislative history of s. 241.2:

> [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 [medical] 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.
>
> ...
>
> 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.
>
> ...
>
> 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 [be] 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.

(Emphasis added)

[70] With respect to the respondents' submission that courts had no role in making eligibility determinations, Justice Perell wrote:

> [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 "<u>personally</u>" 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.

(Emphasis in original)

[71] Justice Perell did find it appropriate given the evidence before him to declare A.B.'s death was reasonably foreseeable within the meaning of the *Criminal Code*. He wrote:

> [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.

(Emphasis added)

[72] In her chambers decision declining a stay pending appeal,[21] Justice Van den Eynden also found that Parliament intended eligibility for MAID to be determined outside the judicial realm. She wrote:

> [33] It is important to keep in mind Parliament delegated the assessment of MAID eligibility criteria to medical professionals–not to the courts. This is demonstrated in the *Criminal Code*, which states a medical practitioner or nurse practitioner must be satisfied that the person seeking MAID meets the eligibility criteria (s. 241.2(3)). This interpretation is well-supported by the Hansard transcripts, which reveal that members of Parliament turned their minds to the question of whether eligibility assessments should be made by physicians and nurse practitioners or by the courts. Parliament decided that the assessments were properly within the purview of medical professionals.

[73] In the court below, and in her submissions to this Court, Mrs. Sorenson argues judicial intervention was and continues to be warranted because of the perils associated with "doctor shopping". She submits this Court must intervene to protect vulnerable persons from being pushed from doctor to doctor until sufficient medical opinions favouring the MAID criteria are obtained. She says the *Criminal Code* provisions do not preclude such judicial oversight and provincial statutory regimes require it.

[74] In her chambers decision, Justice Van den Eynden also addressed how Parliament fully considered this concern:

> [38] The idea of "doctor shopping", as Mrs. Y calls it, was also aired in Parliament. Garrett Genuis, MP for Sherwood Park–Fort Saskatchewan argued that a "system of advance legal review by competent authority would eliminate

---

[21] *Y. v. Swinemar*, 2020 NSCA 56.

doctor shopping" (2 May 2016). He argued the "requirement that two doctors sign off merely encourages doctor shopping". He addressed Parliament as follows:

> There are multiple options here, some better than others. The criteria are not worth the paper they are written on if someone with competent legal authority is not making a determination in advance to ensure the legal criteria are met.
>
> The government, though, wants to force doctors into this role. However, doctors do not constitute competent legal authority. Doctors do not make these types of decisions in other parts of their work, given how aberrant the taking of life is from the normal medical process of protecting life, and the proposed legislation's allowance for doctor shopping does not actually mean that the doctor providing the prior care would provide advance review, since the patient, or worse, someone else, could simply go on the Internet to find a doctor with a more liberal interpretation of the criteria.

[39] Parliament understood these "doctor shopping" concerns but chose not to amend the Bill to prohibit it. Parliament also chose not to require unanimity among the opinions of all medical assessors. Instead, it required only two independent medical assessors approve a person for MAiD. As noted in ¶21 above, Parliament included s. 241.2(7) in the *Criminal Code* mandating MAiD "must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial law, rules or standards". The Nova Scotia Health Authority's Interdisciplinary Clinical Policy and Procedure on MAiD clearly sets out the process for medical assessors to follow where there is disagreement, reproduced at ¶27 above. It states that an assessor who decides a patient is ineligible must advise that patient that they can request another assessment from a different assessor.

[40] The issue of advance legal review was thoroughly debated in Parliament. The following exchange, which occurred during Second Reading of the Bill on April 22, 2016, provides a useful example:

> **Mr. Garnett Genuis (Sherwood Park–Fort Saskatchewan, CPC):**
>
> [...]
>
> We have seen significant studies from Belgium and other Benelux countries that show that without an effective system of advance legal review, which need not be onerous, and one suggestion has been to use consent and capacity boards which already exist at the provincial level, a simple system of not onerous advance review could be added to this legislation which would ensure that we do not go down the road that many of the studies have shown us going down in the Benelux countries. What is wrong with adding that basic protection?
>
> **Mr. Murray Rankin:**
>
> Mr. Speaker, I appreciate the opportunity to be more specific.

> Advance legal review would be an absolute barrier for many people, particularly in remote communities. I have confidence in doctors. Doctors do these things every day. They look after us in life, and I trust them to look after us in the last days of our life as well. To talk about a consent and capacity board which one province has and others do not is not helpful. We need to figure out how we can do this. We are absolutely required to address the needs of the vulnerable, but we cannot provide an untenable barrier to people whose constitutional rights are affected. That would not work, and we would oppose such an amendment.

[75] In addition to the references made in the decisions above, I am further satisfied the existence of a patient's mental illness, such as alleged here by Mrs. Sorenson, is something that was fully considered in Parliament's legislative response.[22] It should not be used as a reason to justify judicial oversight of MAID eligibility determinations. The *Report of the Special Joint Committee on Physician-Assisted Dying*,[23] issued in February 2016, observed:

> Any individual applying for MAID would need to satisfy all the criteria, including irremediability and capacity. As several witnesses reminded the Committee, health professionals will need to strike an appropriate balance between the rights of all Canadians to access this constitutionally protected right, and the protection of those vulnerable persons who might be coerced into requesting MAID. **Cases involving mental illness may prove challenging to address for health care practitioners, but the Committee has faith in the expertise of Canadian health care professionals to develop and apply appropriate guidelines for such cases**. …

(Emphasis added)

[76] The Special Joint Committee was particularly attuned to concerns relating to vulnerable individuals improperly receiving MAID. In its Report, it outlined the various submissions received which established "the overarching need to have safeguards to protect the vulnerable". The Committee wrote:

---

[22] Mrs. Sorenson directly and through the affidavit of Dr. Bachman raised concerns regarding Mr. Sorenson's hypochondriacal tendencies, bizarre thought processes, and depression as reasons this Court must undertake a review of the MAID eligibility assessments.

[23] On December 11, 2015, motions were passed in the House of Commons and the Senate to establish a joint committee "to review the report of the External Panel on Options for a Legislative Response to *Carter v. Canada* and other recent relevant consultation activities and studies, to consult with Canadians, experts and stakeholders, and make recommendations on the framework of a federal response on physician-assisted dying that respects the Constitution, the *Charter of Rights and Freedoms*, and the priorities of Canadians."

> The Committee understands the concerns with respect to both protecting vulnerable persons and respecting their autonomy, and is recommending a number of safeguards which are both described throughout this report and summarized in the introduction.
>
> As noted by the Supreme Court of Canada in *Carter*:
>
> > The evidence supports … [the trial judge's] finding that a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error.
>
> The Court also noted that "[w]e should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse".
>
> … Safeguards and oversight are the best way to ensure informed consent and voluntariness while not refusing access to individuals who may be experiencing intolerable and enduring suffering. The process of evaluating a request for MAID must include consideration by the relevant health care provider(s) of any factors affecting consent, such as pressure from others, feelings of being a burden or lack of supports. Training will also be crucial to ensure that such factors are identified appropriately.

(Footnotes omitted)

[77] On the issue of capacity, the Joint Committee recommended:

> That the capacity of a person requesting medical assistance in dying to provide informed consent **should be assessed using existing medical practices**, emphasizing the need to pay particular attention to vulnerabilities in end-of-life circumstances.

(Emphasis added)

[78] It is important to emphasize the Joint Committee had heard submissions relating to whether judicial review or pre-authorization of MAID was warranted. The Report provides:

> Some witnesses recommended that to ensure that eligibility criteria are met, the MAID request should be reviewed by some type of panel or a judge. Other witnesses opposed the idea of any prior review of a request for MAID for a number of reasons, including that such prior review "is not a safeguard, it is a barrier". The Hon. Steven Fletcher stated that if there is a panel to approve requests, "you might as well have kept the law the way it is, because the end result is the same. People would not be able to access physician-assisted death, they'll take the actions on their own, and they will suffer in the interim. The External Panel Report listed three prior review options that were put forward by

> stakeholders they consulted: prior judicial authorization, prior authorization by administrative tribunal, and a MAID panel.
>
> **The Committee agrees that requiring a review by either a panel or a judge would create an unnecessary barrier to individuals requesting MAID.**

(Emphasis added; footnotes omitted)

[79] With respect to prior authorization, the Committee 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**.

(Emphasis added)

[80] I now turn to consider Nova Scotia's response to *Carter*, and whether, as argued by Mrs. Sorenson, there is a role for courts to play in the assessment of Mr. Sorenson's MAID eligibility. In making this argument, she relies heavily on section 241.2(7) of the *Criminal Code* which provides "[m]edical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards". Mrs. Sorenson argues several statutes in Nova Scotia provide courts with a supervisory role in capacity determinations and there is no reason why the same role should not be exercised in relation to MAID. In particular, she relies on the *Adult Capacity and Decision-making Act*,[24] the *Hospitals Act*,[25] the *Personal Directives Act*,[26] and the *Judicature Act*.[27]

[81] Nova Scotia has not enacted legislation that addresses MAID. That does not mean, however, that the province has not considered how to respond to *Carter* and the *Criminal Code* amendments. Quite the contrary. In August 2015, 11 participating provinces and territories, including Nova Scotia, appointed a nine-member Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying. After extensive consultation, a report was released on November 30, 2015.[28] The mandate of the Advisory Group was stated to be:

---

[24] S.N.S. 2017, c. 4, as amended.
[25] R.S.N.S. 1989, c. 208, as amended.
[26] S.N.S. 2008, c. 8.
[27] R.S.N.S. 1989, c. 240, as amended.
[28] The report was referenced in the written and oral submissions of the NSHA and submitted in its Book of Authorities. No objection was made to the report being before the Court.

> Our mandate is to provide non-binding advice to participating Provincial-Territorial Ministers of Health and Justice on issues related to physician-assisted dying. The advice is meant to assist provinces and territories in deciding what policies and procedures should be implemented within their jurisdictions in response to the Supreme Court's decision in *Carter*.

[82] The report, completed well before the introduction of the federal government's amendments to the *Criminal Code*, included "recommendations that ask provinces and territories to advocate for certain changes to federal legislation".

[83] The Advisory Group considered the issue of "competency and consent". The report noted:

> **During our consultations, we heard from some stakeholder groups who felt that a panel of doctors, a tribunal or judge, or a specially-trained professional should be required to conduct a vulnerability assessment for all persons with disabilities seeking physician-assisted dying**. We also heard that a mental health assessment should be required for all persons seeking physician-assisted dying.
>
> We share these group's concerns about the protection of vulnerable populations and the need for safeguards to do so. **However, our research and discussions lead us to believe that existing mechanisms are sufficient to ensure that patients are making an informed choice and that physicians can effectively assess patient competence**. …
>
> . . .
>
> Governments undoubtedly have an obligation to protect individuals who might seek physician-assisted dying while they are not capable of making an autonomous choice. However, we do not feel those who fall into these categories should automatically be denied the right to physician-assisted dying.
>
> Instead, we acknowledge the need for heightened scrutiny during assessments of the eligibility criteria for physician-assisted dying in the face of any signals that might indicate compromised autonomy (including, but not limited to psychiatric illness, disability, or age). **Just as they already do for other end-of-life decisions, where a health care provider has concerns, doubts, or uncertainty about whether an individual is competent and is making a free and informed choice, the provider should take whatever time and consult any additional experts as is necessary to reach the conclusion that the person does or does not meet the eligibility criteria.** Health care providers must assess the components of a valid consent on a regular basis and often in circumstances in which the decision is complex and the consequences dire. The same skills (and time and additional expertise) that are used for assessing the elements of informed choice for other end-of-life decisions are transferable and adequate for making such assessments for the physician-assisted dying decision.

(Emphasis added)

[84] The Advisory Group did not agree with some stakeholders' suggestions that where there were concerns regarding a patient's capacity to consent, resort to a third-party arbiter was required. Rather, it concluded that determination could be made by health care providers, including by seeking out additional opinions.

[85] The Advisory Group also considered what mechanisms should be implemented in the event of disputes surrounding capacity:

> **Existing provincial/territorial mechanisms allow patients to appeal decisions related to competency and set out the circumstances in which a patient has a right to appeal**. For example, in Ontario, if a physician has determined that a patient is not competent to consent to treatment the patient has the right to appeal to the Consent and Capacity Board. No new system to handle competency disputes is required for physician-assisted dying.

And recommended:

> For decisions related to competency, existing mechanisms in the health care/legal system by which **patients** can appeal competency decision should be used.

(Emphasis added)

[86] I do not view the above recommendation as being suggestive that spouses, children, or other third-parties should have the ability to use the courts to challenge capacity decisions made in the context of MAID.[29]

[87] As noted earlier, Nova Scotia did not legislatively respond to *Carter*, or to the federal *Criminal Code* amendments. Rather, the oversight and administration of MAID in this province rests with the NSHA, a body corporate created by the *Health Authorities Act*, S.N.S. 2014, c. 32. By virtue of that legislation, the NSHA governs, manages, and provides health care services in the Province.[30] Further, the NSHA assists the Minister of Health in the development and implementation of health policies and standards.[31]

[88] I have previously referenced the NSHA's policy relating to MAID. It is pursuant to this policy that Mr. Sorenson applied and was assessed for MAID. If not for the litigation commenced by Mrs. Sorenson, it is this policy that would

---

[29] It is worthy of note that the Advisory Group recommendations predated the introduction of Bill C-14.
[30] *Health Authorities Act*, s. 50.
[31] *Ibid.*, s. 19

have governed the administration of MAID to him on either of the two previously scheduled occasions.

[89] Under "Guiding Principles and Values", the policy provides:

> 1.1 The Act recognizes the need for processes to ensure accountability and oversight. NSHA, through this policy, monitors the implementation of MAID.
>
> 1.2 NSHA adheres to legislative regulatory requirements in relation to oversight of MAID processes.[32]
>
> …
>
> 7.1 This policy recognizes that protection of Vulnerable Persons is of great importance and that robust procedures and processes, in accordance with the Act, are essential to prevent harm from undue influence of others.

[90] The policy sets out the procedure to be followed after receiving a request for MAID. It outlines the responsibilities of physicians and nurse practitioners when assessing a patient's eligibility. The eligibility criteria mirror those set out in s. 241.2(1) of the *Criminal Code*, including that the patient must be "capable of making decisions with respect to their health".

[91] The policy clearly contemplates assessors may not find the patient to meet the eligibility criteria. In such an instance, the policy directs that finding be communicated directly to the patient with an explanation of the reasons, and includes a positive obligation on the assessor to advise the patient they can seek out another assessment.[33] The NSHA policy anticipates assessors may not agree on whether a patient meets eligibility criteria and has provided a mechanism accordingly. The policy does not support Mrs. Sorenson's view that differing opinions, even with respect to capacity determinations, is something sinister that should trigger the involvement of the courts.

[92] As the above legislative history demonstrates, it was the intention of Parliament that eligibility assessments be made by health assessors. Calls for judicial oversight or review of eligibility assessments were rejected. The NSHA

---

[32] The "Act" referenced is the federal "*an Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*", passed June 17, 2016. The referenced legislative regulatory requirements are those subsequently introduced by the federal Minister of Health as directed by virtue of s. 241.31(3) of the *Criminal Code*.

[33] NSHA Interdisciplinary Clinical Policy and Procedure at 3.1.4.3.1

policy demonstrates that as the provincial authority responsible for the provision of MAID, its approach is entirely consistent with Parliament's response.

[93] Further, a review of the legislation relied upon by Mrs. Sorenson does not support her view the courts should or must entertain the type of challenge she has launched. As framed in her written submissions in the court below, Mrs. Sorenson "questions the assessments conducted in support of a request for assisted suicide" by Mr. Sorenson. She has not argued the assessments were undertaken contrary to NSHA policy, or that the policy is inconsistent with the *Criminal Code*. Although the courts are called upon to determine questions of capacity in other contexts and within other legislative regimes, there is no legal basis to do so in this case.

[94] This leads to the second consideration set out in *Highwood, supra* for determining whether the matter before the court has raised a justiciable issue.

Institutional Capacity of the Courts

[95] In her arguments before this Court, Mrs. Sorenson has focused her argument on the role of the courts in the assessment of capacity for MAID. I agree the courts have the ability to assess whether individuals have capacity in a variety of other contexts. Examples can be found in the *Adult Capacity and Decision-making Act*, the *Hospitals Act*, and the *Personal Directives Act*. This does not mean that a similar institutional capacity exists for the court to undertake reviews of MAID eligibility assessments. The matter before us demonstrates the difficulties with having the courts entertain challenges to eligibility assessments where time is of the essence—particularly for the individual who has been approved.

[96] If an individual has been found to be eligible for MAID, they have a grievous and irremediable medical condition and are "**enduring** physical or psychological **suffering** that is **intolerable** to them and cannot be relieved under conditions that they consider acceptable" (emphasis added).[34] Forcing an individual to live under such circumstances against their will has been found to be unacceptable and a violation of their right to liberty and security of the person.[35]

[97] The courts simply do not have the institutional capacity to review challenges to eligibility assessments in a manner that respects the urgency inherent in the MAID context. This matter demonstrates that despite an individual having been

---

[34] *Criminal Code*, s. 241.2(2)(c).
[35] *Carter* at para. 68.

found eligible for MAID (which includes experiencing enduring suffering), involving the court would mean that individual may have to wait for the outcome of production motions, discoveries, and court hearings where health professionals and others are required to testify.

[98] Mrs. Sorenson argues the courts have the ability to direct important matters be heard on an urgent basis. That may be true, but the realities of finding courtrooms, judges, staff, and juggling the availability of counsel, not to mention the availability of professional witnesses, call into question how quickly even the most "urgent" of matters can be heard and decided. Although Mrs. Sorenson was able to have her *ex parte* motion for an interim injunction heard on the same day she filed the motion (without notice to Mr. Sorenson or the other respondents), and the motion for an interlocutory injunction heard a week later, the speediness of these hearings is cold comfort to Mr. Sorenson who is suffering while legal proceedings he did not want continue.

[99] Mrs. Sorenson argues the Application in Court could have been heard by September 15, 2020. She says the motion judge erred by relying on the existence of the Covid-19 pandemic to conclude the matter would take months to resolve. I reject this submission.

[100] It is entirely unrealistic that a contested motion for production, discoveries, and a multi-day hearing with the cross-examination of numerous witnesses could be resolved as suggested by Mrs. Sorenson, even with the most diligent of efforts. And while Covid-19 has disrupted many aspects of society, including the functioning of the courts, it is equally unrealistic to suggest that even without a pandemic, a challenge to Mr. Sorenson's MAID eligibility could be heard in a manner that respected his s. 7 right to life, liberty and security of the person.

Conclusion on Justiciability

[101] For the reasons outlined above, I am satisfied Mrs. Sorenson has not, in seeking to challenge Mr. Sorenson's eligibility for MAID, raised a justiciable issue. The determination of eligibility for MAID, including whether an individual has capacity, is one that should be left to approved healthcare assessors. A supervisory or reviewing role for judges was considered and rejected by Parliament. In Nova Scotia, the NSHA policy adopted the federal approach and created a comprehensive regime for the administration of MAID. It places the determination of eligibility with physicians and nurse practitioners.

[102] Further, courts do not possess the institutional capacity to hear and determine challenges to eligibility determinations made under the MAID regime.

Standing

[103] My conclusion that Mrs. Sorenson has not raised a justiciable issue impacts directly on whether she has standing. Mrs. Sorenson asserts she enjoys both private and public interest standing. Mr. Sorenson disagrees, as does the NSHA and Ms. Swinemar.

[104] The purpose of the law of standing was explained by Justice Cromwell in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 as follows:

> [1] … The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government… .

[105] Private interest standing derives from a party having a direct personal interest in a question to be determined by the court. Mrs. Sorenson argues she has private interest standing on the following bases:

- The *Adult Capacity and Decision-making Act*, the *Hospitals Act*, and the *Personal Directives Act* allow her to make an application to the court.
- She has automatic standing because Mr. Sorenson has appointed her his substitute-decision maker.
- She is his spouse.

[106] Mrs. Sorenson does not have private interest standing to challenge Mr. Sorenson's MAID eligibility. As I have discussed, Mrs. Sorenson's pleadings do not give rise to a justiciable issue. Further, there is nothing in the legislation she relies upon that gives her standing to raise the issue she wants to litigate. Those Acts do not apply to MAID eligibility assessments. She has not asked the courts to provide her with relief under those statutes.

[107] Mrs. Sorenson's assertion that her husband appointed her his substitute-decision maker has been raised for the first time on appeal. I note:

- Neither her Notice of Application in Court, nor the Amended Notice of Application in Court identify her as commencing the proceedings in her capacity as substitute-decision maker.
- Her affidavit in support of the motion in the court below does not reference she has been appointed Mr. Sorenson's substitute-decision maker.
- A review of the record, including transcripts of the appearances before Justice Campbell and Justice Rosinski, does not reveal any reference to Mrs. Sorenson being appointed as Mr. Sorenson's substitute-decision maker.
- Her written submissions in the court below are silent as to the existence of a Power of Attorney or Personal Directive by which Mrs. Sorenson is appointed as her husband's substitute-decision maker.

[108] Before concluding anyone has standing to bring legal action by virtue of a power of attorney or personal directive, it would be necessary to consider the contents of the document as well as whether it was still in effect. I note the following provisions of the *Personal Directives Act*:

- A personal directive may contain conditions and restrictions on how it is used (s. 5). (The terms may not permit legal action being taken by the substitute-decision maker).
- Unless a personal directive expressly provides otherwise, where, after making a personal directive in which the maker's spouse is appointed as delegate, the spouse is no longer a spouse, the appointment of the spouse as delegate is revoked (s. 6).
- A "spouse" is defined as a person who is cohabiting with the maker in a conjugal relationship as a married spouse, registered domestic partner or common-law partner (s. 2(m)). (A marital separation may result in a personal directive no longer being valid).
- A personal directive is in effect whenever the maker lacks capacity to make a personal-care decision (s. 9).
- A personal directive has no effect in respect of a personal-care decision, whenever the maker has capacity (s. 12(1)). (A personal care

directive can not be used by a substitute-decision maker to challenge the personal care decisions of a person with capacity).

- A delegate's authority under a personal directive ceases when revoked by the maker (s. 13(b)).

[109] Finally, I do not accept Mrs. Sorenson has private interest standing to challenge Mr. Sorenson's MAID eligibility assessment because of her status as his spouse. Undoubtedly, she loves him deeply and wants what she feels is in his best interests. The thought of losing him must be very painful for her.

[110] However, these feelings do not give her standing to challenge the determination he meets the eligibility criteria for MAID. As set out earlier, the Supreme Court of Canada in *Carter* recognized personal autonomy in medical decision-making was to be respected and protected. Permitting Mrs. Sorenson standing to question the outcome of the MAID assessment because of her status as his spouse would fail to acknowledge this fundamental right of her husband.

[111] In *Downtown Eastside, supra*, Justice Cromwell said the following with respect to public interest standing:

> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

[112] I have already concluded Mrs. Sorenson has not raised a justiciable issue. The issue as framed in her pleadings is not one that the courts should entertain for the reasons I have given. The lack of a judiciable issue is fatal to Mrs. Sorenson's claim that she has public interest standing to challenge Mr. Sorenson's eligibility for MAID.

Other Issues Raised by Mrs. Sorenson on Appeal

[113] For the reasons above, this appeal should be dismissed because Mrs. Sorenson has not raised a justiciable issue and does not have standing. Notwithstanding, I will address the issues raised on appeal by Mrs. Sorenson

relating to the motion judge's determination an interlocutory injunction was not warranted.[36]

[114] Mrs. Sorenson sets out 25 "grounds of appeal" in her Amended Notice of Appeal (General). Many of the alleged grounds are submissions and allegations of fact, rather than proper grounds of appeal. The factum filed on behalf of Mrs. Sorenson raises several arguments that appear to constitute alleged errors not articulated in her pleadings. Grounds of appeal being raised for the first time in written or oral argument is to be discouraged. Parties are well-advised to keep in mind that the Court may exercise its discretion to decline to consider new matters not previously pled.

[115] In considering the complaints regarding the motion judge's determination an interlocutory injunction was not warranted, I would identify the issues this Court should determine as follows:

1. Did the motion judge err by failing to permit full production of medical information?
2. Did the motion judge err by admitting into evidence the contents of the NSHA affidavit?
3. Did the motion judge err by failing to permit cross-examination of the medical assessors referenced in the NSHA affidavit?
4. Did the motion judge err in his treatment of the affidavit evidence of Dr. Bachman?
5. Did the motion judge err in his identification of the test for an interlocutory injunction?
6. Did the motion judge err in his assessment of the balance of convenience?

The Nature of Interlocutory Injunctions and the Standard of Review

[116] The standard of review that governs how this Court will assess allegations of error is dependent not only on the issues raised by an appellant, but also the nature of the decision under appeal. The decision in the present instance, a refusal of a motion judge to grant an interlocutory injunction, is particularly important to keep in mind.

---

[36] The issue of Mrs. Sorenson's standing was never addressed in relation to these issues in the court below.

[117] As described by Justice Robert Sharpe in *Injunctions and Specific Performance*, Fifth ed. (2017), a motion judge's task is not to make determinations on the merits when considering a request for an interlocutory injunction, but rather to balance the risks of harm which may befall each party. He wrote:

> **2.60** The problem posed by interlocutory injunction applications may best be understood in terms of balancing the relative risks of granting or withholding the remedy before full adjudication of the legal rights at issue. These risks may be stated as follows. The plaintiff must show a risk that his or her rights will be destroyed by the defendant's actions before the court has rendered its judgment at trial. The risk to the plaintiff is that if an immediate remedy is not granted, his or her rights will be so impaired by the time of trial and judgment that it will be simply too late to afford an adequate remedy.
>
> **2.70** Against this risk to the plaintiff must be balanced the risk of harm to the defendant, should the injunction be granted. This risk is inherent in awarding a remedy before judgment. On an interlocutory application, the court cannot afford the defendant the full procedural rights of a trial and it may well transpire that although the plaintiff now appears to have a reasonable prospect of success, the plaintiff will fail if and when the case is tried. At this early stage of the proceedings, the parties will not have fully prepared the case and the judge hearing the matter as an interlocutory motion will have less time to sift the factual and legal issues than at trial. It will only be in exceptional cases that the motions judge will have the benefit of hearing *viva voce* evidence. Usually, the case will be presented on affidavits. Without the benefit of pleadings and full discovery, the factual and legal issues may well be only roughly defined and, perhaps, not even fully investigated by the parties themselves. […] Inherent in the exercise of granting a remedy before the rights of the parties have been determined lies the risk of harming the defendant by enjoining a course of conduct that ultimately may be found to be lawful.

[118] This Court has repeatedly applied a highly deferential standard of review in such cases. In *Lavy v. Hong,* 2018 NSCA 28 the Court explained:

> [27] An appellate court will only intervene in an appeal from an interlocutory injunction if it is persuaded that wrong principles of law have been applied; there are clearly erroneous findings of fact; or if failure to intervene would give rise to a patient injustice (*Whitman Benn and Associates Ltd. v. AMEC E & C Services Ltd.*, 2003 NSCA 126).

[119] A party seeking to challenge an interlocutory discretionary order has a heavy onus.[37]

Analysis

Did the Motion Judge Err by Failing to Permit Full Production of Medical Information?

[120] In her factum, Mrs. Sorenson alleges:

> 27. The Appellant was denied full productions relative to the medical evidence in the possession of the parties and of relevant non-party medical assessors. She was prevented from cross-examining the authors of the medical opinions on which the decision to set aside the interim injunction and to justify the assisted death were purportedly based despite repeat requests for such cross-examinations and productions.

[121] Later she appears to recognize that the motion for production was not before the court on August 7, 2020:

> 50. On July 31, 2020 Justice Campbell directed that only the motion for an interim injunction would be addressed by the Court and adjudicated on August 7, 2020, but not the Appellant's production motion.

[122] It is important to note Mrs. Sorenson has not appealed Justice Campbell's order. Further, the Notice of Motion she filed identified the only issue for consideration on August 7th as being the request for an interlocutory injunction.

[123] Mrs. Sorenson had made a separate motion seeking production, but this was not before the motion judge. What was scheduled was an urgent motion seeking to stop a medically assisted death approved through the NSHA's policy. While hearing the motion for the interlocutory injunction, the motion judge was not asked to put off making that determination until such time as the motion for production had been heard.

[124] In no way did the motion judge deny production as asserted by Mrs. Sorenson. That issue was not before him, and he made no determination in that regard.

---

[37] *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26 at para. 33 (rev'd on different grounds, 2012 SCC 46)

Did the Motion Judge Err by Admitting into Evidence the Contents of the NSHA Affidavit?

[125] Mrs. Sorenson submits the motion judge improperly admitted into evidence the various medical assessments exhibited to the NSHA affidavit. In her written submissions, she asserts:

> 25. The Court made findings of fact and credibility based on inadmissible hearsay evidence that can't properly be relied on for the truth of its contents. This was a legal error and undermined the Court's analysis of the balance of convenience in this case.

[126] Later, she expands upon this argument:

> 107. The Court committed a palpable error of law in finding that medical opinion hearsay evidence that goes to the central issue in dispute was admissible for the truth of its contents and could ground the Court's factual foundation for its balance of convenience analysis.
>
> 108. The Court improperly relied on hearsay medical opinion and conclusions drawn from reports attached to a non-medical third party affidavit. The Court accordingly misconstrued the extent to which hearsay medical evidence could be relied upon as a business record and similarly misapplied the rule regarding reliance on such hearsay medical opinion evidence without affording the Appellant the opportunity to cross-examine the authors of the contested medical reports.

[127] Mrs. Sorenson relies on several authorities in support of her position the medical reports attached to the NSHA were inadmissible, and the motions judge erred in relying on them "for the truth of their contents".[38]

[128] I do not agree the motions judge erred in his treatment of the NSHA affidavit, in particular his use of the reports attached thereto.

[129] The motion judge did not use the materials attached to the NSHA affidavit to make factual determinations going to the central issues in dispute. The purpose of the NSHA affidavit was to demonstrate that Mr. Sorenson had applied for MAID, he was assessed in accordance with NSHA policy, the policy was compatible with the *Criminal Code* eligibility provisions, and he had been found to be eligible by at

---

[38] *Bezanson v. Sun Life Assurance Co. of Canada*, 2015 NSSC 1; and *Tingley v. Wellington Insurance*, 2008 NSSC 317.

least two assessors. None of these factual determinations was challenged either in the court below, or on appeal.

[130] Contrary to Mrs. Sorenson's assertions, the motion judge did not conclude Mr. Sorenson had capacity, was suffering from a grievous and irremediable medical condition, or that his death was reasonably foreseeable. Given he did not reach those conclusions, the motion judge can hardly be said to have relied on the various reports for the "truth of their contents". He did not and cannot be faulted for using the NSHA affidavit in the manner he did.

Did the Motion Judge Err by Failing to Permit Cross-examination of the Medical Assessors Referenced in the NSHA affidavit?

[131] This complaint is similar to the earlier allegation that the motion judge failed to permit production.

[132] This assertion of error is contained in ground 7 of the Amended Notice of Appeal, as well as para. [27] of Mrs. Sorenson's factum referenced earlier. She described the motion judge's failure to permit cross-examination as follows:

> 55. Each of these assessors and reports formed part of the motion for productions brought by the Appellant and the Appellant made clear throughout her intention to cross-examine the assessors in question.
>
> 56. By virtue of the form of affidavit submitted and the refusal of the Court to address the full productions motion of the Appellant and the Appellant's request to cross-examine the medical assessors, the Appellant was deprived of the ability to cross-examine the medical assessors who conducted the MAID assessments relative to X prior to a determination of the motion for an interim injunction.

[133] The record simply does not support the assertion that on August 7th, the motion judge was either asked to permit cross-examination of the medical assessors, to delay the hearing until that could be arranged, or more importantly, that the motion judge denied a request for cross-examination.

[134] The record supports Mrs. Sorenson wanted the opportunity to cross-examine the various assessors and made that wish known. However, it is also clear this would not be undertaken at the August 7th hearing. The allegation the motion judge refused a request to cross-examine the medical assessors is not borne out by the record.

Did the Motion Judge Err in his Treatment of the Affidavit Evidence of Dr. Bachman?

[135] In the Amended Notice of Appeal, Mrs. Sorenson argues "the court's decision disregards the only direct affidavit and non-hearsay evidence including medical evidence in support of the request for an injunction".

[136] Mrs. Sorenson identifies the nature of the motion judge's error in her factum:

> 70. The Court rejected sworn non hearsay medical evidence submitted by the Appellant. The Court did so based on an incorrect finding of fact that Doctor Bachman was not licensed. This is incorrect. As noted in the affidavit, the doctor is Board certified in family medicine for the past 27 years through the State Board of Florida. He previously practiced in Nova Scotia after graduating from medical school from Dalhousie.

And further:

> 103. Disqualification of the affidavit evidence and opinions of this doctor for reason that he is not licensed to practice medicine is wrong and amounts to a legal error. He is licensed and has practiced medicine in the State of Florida for 27 years and previously practiced in Nova Scotia where he did his training. If this ruling is permitted to stand, this would fundamentally undermine the practice of medical malpractice lawsuits in this province and across the country as foreign experts are commonly relied upon to provide expert opinion evidence as to the standard of care in medical malpractice cases in this province and across the country.

[137] This complaint lacks merit. A review of the motion judge's reasons makes it clear he did not "reject" the opinion evidence on the basis of an erroneous conclusion Dr. Bachman is not licensed to practice medicine. The motion judge acknowledged he was licensed to practice medicine in the State of Florida. He observed Dr. Bachman did not appear to be licensed to practice in Nova Scotia, or any Canadian jurisdiction. This observation corresponds with the information in Dr. Bachman's c*urriculum vitae*.

[138] Dr. Bachman was being offered to provide opinion on whether Mr. Sorenson met the MAID criteria in Canadian law. However, there was nothing in his affidavit or qualifications that spoke to his knowledge or experience in that context. It is also important to observe the motion judge did not find his evidence to be inadmissible, rather, he found it was not deserving of any weight.

[139] Mrs. Sorenson has not established the motion judge erred in his treatment of Dr. Bachman's evidence.[39]

Did the Motion Judge Err in his Identification of the Test for an Interlocutory Injunction?

[140] Mrs. Sorenson questions the correctness of the test relied upon by the motion judge in considering her request for an interlocutory injunction. This relates specifically to the use of the "balance of convenience" as a factor:

> 75. Courts in other jurisdictions have questioned the propriety of applying the three part test identified in *RJR* in the context of end of life situations. Courts have noted that such cases almost always give rise to serious issues to be tried and to irreparable harm by virtue of death. There is thus serious reason to question whether the balance of convenience test allows for appropriate nuance in such life and death cases. Accordingly, other courts have applied a best interests test when assessing an injunction request related to an end of life matter.

[141] This argument should be rejected for several reasons. In her Amended Notice of Appeal, Mrs. Sorenson does not raise as a ground of appeal an allegation the motion judge erred by using the balance of convenience test, as opposed to the best interests test. Further, Mrs. Sorenson's written submissions to the motion judge specifically set out her view that the proper test for an interlocutory injunction required a consideration of the balance of convenience. Mrs. Sorenson is now seeking to fault the motion judge for relying on the law she asked him to apply.

[142] The traditional test for an interlocutory injunction is as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

> 43 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It

---

[39] As discussed earlier, Mrs. Sorenson relies on the *Adult Capacity and Decision-making Act* in her arguments. I note Dr. Bachman would not qualify as an assessor under that legislation.

> may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[143] Mrs. Sorenson relies on two authorities in advocating to modify the traditional test for an interlocutory injunction: *Rasouli v. Sunnybrook Health Sciences Centre*, 2011 ONSC 1500 and *Sweiss v. Alberta Health Services*, 2009 ABQB 691. Both are trial level decisions, and neither are in the context of MAID.

[144] Having considered those authorities, I find no basis for concluding the motion judge erred in law by applying the balance of convenience factor.

[145] The above decisions are not of binding authority. Further, the balance of convenience test as set out in *RJR-MacDonald* has continued to be employed regularly by courts, including in circumstances of medical urgency. See for example: *Carter v. Canada (Attorney General)*, 2012 BCCA 336; *Rabi v. University of Toronto*, 2020 ONCA 305; *A.B. v. C.D. and E.F.*, 2019 BCSC 254; and *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396.

Did the Motion Judge Err in his Assessment of the Balance of Convenience?

[146] In the court below, the evidence established Mr. Sorenson has been found eligible to receive MAID pursuant to the NSHA policy. There was no suggestion the policy was not in compliance with the *Criminal Code* eligibility requirements. There was no argument advanced that the MAID amendments are unconstitutional.

[147] Mr. Sorenson had been found to be capable to consent to MAID pursuant to the NSHA policy. He was, and is, presumed to have capacity to consent to personal care and medical decisions unless the contrary is shown. Mr. Sorenson, through counsel, asserted he was capable and wished to receive MAID. He opposed his wife's motion for an interlocutory injunction.

[148] In assessing the balance of convenience, the motion judge was required to consider which party, Mrs. Sorenson or Mr. Sorenson, would suffer greater harm. If Mrs. Sorenson would suffer greater harm if the injunction were refused, then the balance of convenience favoured injunctive relief. If Mr. Sorenson would suffer greater harm if the injunction were granted, then the balance of convenience favoured not granting the motion. Although set out earlier, the motion judge's conclusion bears repeating:

> 11. … [I am NOT so satisfied – I conclude that there is significant compelling evidence that X has reasonably been determined to have "a grievous and irremediable medical condition" as defined in section 241.2 (2) of the *Criminal Code of Canada*, and that the other eligibility conditions have been met. X is constitutionally entitled to take this course of action, and given that he has some level of ongoing dementia, which could, by itself or in addition to other phenomena such as cerebrovascular disease, render him incapable, and therefore no longer qualified to consent to his presently chosen MAID process, there is a real risk here that he will be deprived of his present choice. He has also been found by MAID assessors to be presently enduring "a grievous and irremediable medical condition and his natural death has become reasonably foreseeable, taking into account all of his medical circumstances". Further delay entails further suffering for X. I conclude he would suffer irreparable harm if the injunction is granted. On balance, the harm he would suffer is significantly greater than what his wife would suffer.]

[149] Mr. Sorenson has a right to pursue MAID. He has been found eligible to receive it. Withholding MAID would be contrary to Mr. Sorenson's fundamental right to personal autonomy and medical self-determination. He has been found to be suffering due to a grievous and irremediable medical condition. Preventing him from accessing MAID constitutes significant harm.

[150] What harm did Mrs. Sorenson put forward in terms of assessing the balance of convenience? Without an interlocutory injunction, she was at risk of losing her husband. I see no error in the motion judge's assessment the harm to Mr. Sorenson, should the injunction be granted, was far greater than any harm to Mrs. Sorenson. She does not have a right to keep her husband alive against his wishes.

Conclusion

[151] For the reasons above, I would dismiss the appeal. But is more required given the conclusions I have reached above?

[152] To answer the question I have posed, I note:

- Mr. Sorenson has been found eligible for MAID in a manner consistent with the *Criminal Code* and NSHA policy.
- Preventing or delaying an eligible person from receiving MAID is a violation of their s. 7 *Charter* rights.
- Mrs. Sorenson has not raised a justiciable issue in her Amended Notice of Application in Court.

- Mrs. Sorenson does not have standing in the court below or in this Court.
- If through the passage of time Mr. Sorenson becomes incapable of consenting to MAID, he will be unable to fulfill his wish and thus be precluded from exercising his right of medical self-determination.

[153] In light of the above, in addition to dismissing the appeal, I would dismiss Mrs. Sorenson's Amended Application in Court.

[154] Although Mrs. Sorenson asserts costs on the appeal should not be awarded due to the "public interests" engaged, I note she sought costs against the respondents, including Mr. Sorenson, in her Amended Notice of Application in Court, as well as in the Notice of Motion advancing her request for an interlocutory injunction.

[155] I am satisfied an award of costs is appropriate and the quantum should take into account the contested stay motion. Mrs. Sorenson shall pay costs on appeal to Mr. Sorenson in the amount of $2,500.00, inclusive of disbursements. Mrs. Sorenson shall further pay to the NSHA and Ms. Swinemar costs on appeal in the amount of $2,500.00, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Wood C.J.N.S

Derrick J.A.