

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET, THE
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and GLORIA
TAYLOR

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

PARTICIPANT
(*Constitutional Question Act*)

AND:

FAREWELL FOUNDATION FOR THE RIGHT TO DIE (Represented by Russel
Ogden, Erling Christensen, Laurence Cattoire, John Lowman and Paul Zollmann),
THE CHRISTIAN LEGAL FELLOWSHIP, CANADIAN UNITARIAN
COUNCIL, EUTHANASIA PREVENTION COALITION and EUTHANASIA
PREVENTION COALITION – BRITISH COLUMBIA and AD HOC
COALITION OF PEOPLE WITH DISABILITIES WHO ARE SUPPORTIVE OF
PHYSICIAN-ASSISTED DYING (As Represented by Jeanette Andersen,
Margaret Birrell, Donald Danbrook, Michelle Des Lauriers, Zofja (Zosia) Anna
Ettenberg, Craig Langston, and Paul A. Spiers)

INTERVENORS

MEMORANDUM OF ARGUMENT
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OVERVIEW

1. The Farewell Foundation generally supports the Plaintiffs' position in respect of the infringements of ss.7 and 15 of the *Charter of Rights and Freedoms* and the failure of the Governments of Canada and British Columbia to demonstrate that the infringements are justified in a free and democratic society.
2. The Farewell Foundation supports the granting of the relief set out at paragraphs 2 and 3 on page 17 of the Plaintiffs' Amended Notice of Civil Claim, with a definition of "physician-assisted dying" that is tailored to ensure the protection of the public policy interest in protecting individuals from various kinds of involuntary death. In particular, the declared constitutional exception for "physician-assisted dying" should be defined to require the following:
 - a. A person requesting assisted dying must be assessed by a qualified physician or psychologist to be capable of informed decision-making ("the decisional capacity of the person must be confirmed by a physician");
 - b. An individual's decision to end his or her own life must be adequately informed of the individual's diagnosis and prognosis, potential palliative and medical treatments, and social and environmental options available to that individual ("the choice must be informed");
 - c. An individual's request for assisted dying must be voluntary, demonstrable and sustained ("there must be a public record that assistance was consistently requested"); and
 - d. Assisted dying cannot be unduly influenced by third parties, including by the person providing assistance ("the choice must be free from undue influence").
3. The Farewell Foundation respectfully submits that assistance rendered by medical professionals is necessary and important for assessing the capacity of the individual seeking to end his or her life and is necessary and important for

ensuring that individuals are adequately informed of their diagnosis, prognosis and treatment options when deciding to end their lives.

4. However, it has not been shown that it is necessary that physicians document the request for end-of-life assistance or to ensure that end-of-life assistance is free from undue influence. The Farewell Foundation respectfully submits that those responsibilities are not of a medical nature. And, of course, there is no evidence to suggest that it is necessary to ensure that only a physician may physically cause an end to an individual's life. Physicians are generally trusted and respected in our society, but they need not be required by law to take a general supervisory role over all aspects of physician-assisted dying.

PART I: STATEMENT OF FACTS

The Farewell Foundation

5. The Farewell Foundation is an unincorporated entity represented by five named individuals: Russel Ogden, a criminologist and faculty member at Kwantlen Polytechnic University and one of Canada's leading researchers on end-of-life issues; Paul Zollmann, a retired information technology consultant; Laurence Elisabeth Cattoire, a translator who works in communications and media relations; Professor John Lowman, a criminologist and faculty member at Simon Fraser University; and Erling Christensen, a sociologist and faculty member at Kwantlen Polytechnic University.
6. Farewell Foundation was established for the purpose of providing individuals with assistance in ending their lives, and will assist in doing so if this challenge is successful. Farewell Foundation has a growing membership which currently stands at over 200 members. It has a constitution and bylaws regulating its membership and activities. It is the author of a best-practices policy for assisted suicide entitled "Procedural Safeguards for Self-Chosen Death".

The Purpose and Aspirations of the Farewell Foundation

7. The purpose and aspiration of the Farewell Foundation is to serve in perpetuity as a non-profit institution to provide information, support and assistance for persons who wish to end their own lives within the framework of effective legal safeguards and under the consistent oversight of public authorities. The Farewell Foundation consists of members who wish to end their own lives and members who are prepared to offer other members assistance with ending their own lives.
8. Farewell Foundation does not expect that the resolution of these legal issues will conclude the social and moral controversy surrounding end-of-life decisions. As with the abortion context, end-of-life issues engage competing moral claims that cannot be resolved by empirical proofs. Farewell Foundation intends to provide reliable data about end-of-life decisions to inform and enhance the quality of the moral debate, and to ensure accountability to the law.
9. Farewell Foundation perceives a need for a compassionate and responsible organization to provide assistance to its members to act upon their end-of-life choices. Individuals who are capable of deciding to end their lives but are physically unable to do so will not always be able to or want to rely on family, friends or professionals to provide information, support and assistance. Farewell Foundation fulfills an important role in bridging these relationships, enhancing relationships, and in helping members to define how they wish those relationships to be at the end of life.
10. Whatever the outcome of this trial, s.241(a) of the *Criminal Code of Canada* will continue to enact the offence of counseling suicide. Farewell Foundation considers the criminal prohibition against encouraging and counseling suicide to be indispensable for the protection against coercion and undue influence of vulnerable individuals.
11. Farewell Foundation is in favor of a model for assisted suicide that is informed by the procedural safeguards currently in place in various jurisdictions. The most

compassionate and responsible approach to assisted suicide, in the submission of Farewell Foundation, is a best practices approach that adopts the most efficacious protections to deal with the genuine concerns and jettisons unnecessary and superfluous restrictions on the exercise of the right to make end-of-life choices. That is, Farewell Foundation believes that a less restrictive balance can be found to ensure the protection of vulnerable persons while ensuring personal freedom and the right to autonomy and self-determination.

12. It is in this spirit that Farewell Foundation commends the virtues of the Swiss regulatory model to this Court. The Swiss regulatory model is one among many reasonable regulatory structures that provide an adequate baseline of protections to individuals to ensure that human life is not ended involuntarily or otherwise inappropriately. The Swiss regulatory model successfully regulates assisted dying without imposing a general supervisory role on the medical profession.

Regulation of Assisted Suicide in Switzerland

13. Assisted suicide is regulated in Switzerland by virtue of s. 115 of the Swiss Penal Code, which prohibits any individual who, for selfish motives, assists another to suicide.¹ If the assistance is not provided for personal gain the provision of assistance in ending another's life is not illegal.
14. In addition to the protection afforded by the prohibition against assistance for personal gain, the Swiss Penal Code prohibits by implication any individual from ending the life of an individual who lacks decisional capacity. An individual who lacks decisional capacity cannot give consent to his or her death and therefore the act cannot be considered suicide.² The implicit prohibition on ending the life of an individual who lacks decisional capacity is reinforced by the legislated standard for decision-making capacity in Article 16 of the Swiss Civil Code.³

¹ Affidavit #1 of Bosshard, paras. 30 – 32

² Affidavit #1 of Bosshard, para. 32

³ Affidavit #1 of Lewis, Exhibit L (page 194)

15. Death due to assisted suicide is considered a “non-natural”, so-called “extraordinary death,” and must therefore be reported to and investigated by the criminal authorities.⁴ This provision ensures prompt retrospective oversight of assisted suicides by public authorities and successfully encourages documentation of the capacity and consent of the person who wishes to end to his or her own life. The Farewell Foundation respectfully submits that this reporting system is superior to the reporting compliance approaches in other jurisdictions. The Swiss reporting requirements are akin to the reporting requirements for non-natural deaths under s.2 of the British Columbia *Coroners Act*.⁵
16. The Swiss Federal Council recently decided that it would not introduce any specific provisions in criminal law with respect to organized assisted suicide services by Non-Government Organizations.⁶ The internet link to the news report in Dr. Bosshard’s affidavit is no longer available, but the information is available in the June 29, 2011 press release issued by the Swiss Federal Council entitled “Assisted Suicide: Strengthening the Right of Self-Determination.”⁷
17. Currently in Switzerland the government does not limit who may render assistance to individuals who wish to end their lives. Assistance may be rendered by family members, trusted friends, medical professionals or non-profit organizations that operate with the government’s consent, provided they are not acting from selfish motive.
18. Four non-profit organizations in Switzerland currently provide assistance to those request assistance to end their lives: EXIT Deutsche Schweiz , which serves primarily the German-speaking part of Switzerland and has approximately 50,000 members; EXIT Association Pour le Droit de Mourir dans la Dignité, which serves primarily the French-speaking portion of Switzerland and has approximately 10,000 members, EX International, which has no membership statistics, and serves international applicants, and Dignitas, which has

⁴ Affidavit #1 of Bosshard, para. 30

⁵ *Coroners Act*, [SBC 2007]

⁶ Bosshard #1, para. 41

⁷ <http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=39905>

approximately 5000 members and provides assistance throughout Switzerland.⁸ Of these four organizations, only Dignitas and EX International provide assistance to persons who are not Swiss nationals.

19. The four organizations operate independently of the government and are not subject to specialized regulation, but each organization has its own closely monitored internal procedures that are transparent to, accountable to, and routinely investigated by police investigators. The procedures used by the four organizations do not differ in material respects. The procedure followed by Deutsche Schweiz, one of the largest such organizations, is indicative of the procedures that all these organizations follow.⁹
20. Deutsche Schweiz' approach is centered around ensuring that an individual's choice to die is deliberate and stable, that the person has a hopeless prognosis, and that their suffering is unbearable. Patients visiting Deutsche Schweiz are assessed by two volunteers who meet with the patient to discuss their choice and ensure it is well-considered, stable, and not the result of mental disorder. The purpose of these meetings is to ensure the individual has made a clear, consistent choice to end his or her life, and that the individual is competent to make his or her own decisions in this regard. The organization will not provide assistance to individuals who do not meet its membership criteria in this area.¹⁰
21. Deutsche Schweiz volunteers routinely recommend hospice care or meetings with family to these individuals. Volunteers are prohibited from encouraging or counseling patients to commit suicide or unduly affect their decision on the issue. All individuals who wish to obtain assisted suicide must be examined by a doctor and all of the assisted suicides performed by the organizations are performed pursuant to physician's prescription for life-ending drugs. The doctor is required by law to confirm that the individual being examined has decisional capacity before prescribing the necessary drugs, which are strictly controlled under the

⁸ Affidavit #1 of Bosshard, para. 36

⁹ Affidavit #1 of Bosshard, paras. 37 - 40

¹⁰ Affidavit #1 of Bosshard, para. 39

Swiss narcotics law.¹¹ If the patient does not have capacity then the act is not considered a suicide and the doctor is legally culpable for providing the lethal drugs.¹² It is standard practice to have at least two documented meetings between the doctor and patient before the drug is prescribed. Zurich's Chief Medical Officer requires that the doctor "examine" the patient.¹³

22. The four Swiss organizations maintain a strict chain of custody of the prescription to ensure safe handling of the life-ending medication.¹⁴ The prescription for sodium pentobarbital is filled by a volunteer and stored at the organization's offices until the day of the assisted suicide. This ensures that the drugs are controlled and the individual ends his or her life only when supervised by the organization. Assistance will not be provided if the member does not express a wish to end his or her life on the day of the assisted suicide. One of the organization's volunteers will mix the medicine into a cup of water and provide it to the individual wishing to end his or her life.¹⁵

23. The ultimate act of taking the medication at issue must be performed by the individual wishing to end his or her life. The police must be notified once the life-ending act is complete. A police officer generally attends the location of the assisted suicide soon after notification with a medical officer to investigate what occurred.¹⁶

24. EXIT Deutsche Schweiz has a few paid staff but most of its work is performed by volunteers, many of whom are caregivers such as clergy, nurses and social workers. The screening process for such volunteers is rigorous and requires interviews, including in-depth interviews with two psychologists at the Basel Institute for Psychology as well as other psychological testing. Once a volunteer is approved, he or she receives in-depth training and is assigned a mentor to

¹¹ Affidavit #1 of Bosshard, Exhibit C, (pages 44 and 45)

¹² Swiss Civil Code, Article 16

¹³ Affidavit #1 of Luley, Exhibit A (page 8)

¹⁴ Affidavit #1 of Bosshard, para. 37; Affidavit #1 of Luley, Exhibit A (page 8)

¹⁵ Affidavit #1 of Bosshard, para. 37

¹⁶ Affidavit #1 of Bosshard, paras. 30 and 37, and Exhibit C

accompany and assist him or her in performing duties.¹⁷ A similar model is followed by all the other right-to-die organizations in Switzerland.¹⁸ For instance, Affidavit #1 of Luley sets out the process followed by Dignitas at Exhibit A.

25. Dignitas is the organization that assisted Kay Carter in ending her life. There is no plausible suggestion that Ms. Carter's experience at Dignitas involved undue influence, counselling suicide, lack of decisional capacity or lack of informed consent. There is also no suggestion that Ms. Carter's experience with Dignitas was out of the ordinary or out of keeping with the procedural safeguards in place at Dignitas.
26. Dignitas required significant proof of Ms. Carter's intention to end her life, including a signed letter of support from her family members indicating they supported whatever decision she would make,¹⁹ and a letter from her indicating her request to end her life.²⁰ Ms. Carter's medical records were reviewed by a physician.
27. Ms. Carter was examined twice by a doctor who ensured she was of sound mind before writing the prescription.²¹ She voluntarily drank the life-ending medication. She did so with her family present, who supported her throughout the whole process. After the end of life event occurred, the police were called to investigate the incident to ensure that the death did not result from any untoward circumstances.²² No charges resulted from the investigation. These safeguards ensured that she was competent, and had made a well-considered and consistent decision in ending her life. Ms. Carter's experience at Dignitas is consistent with the definition of "physician-assisted dying" proposed by Farewell Foundation.
28. The only regrettable aspect of the manner in which Ms. Carter ended her life was the fact that Ms. Carter was forced to end her life away from home and travel to

¹⁷ Affidavit #1 of Bosshard, para. 38

¹⁸ Affidavit #1 of Bosshard #1, para. 40

¹⁹ Affidavit #1 of Carter, para. 22

²⁰ Affidavit #1 of Carter, para. 24

²¹ Affidavit #1 of Carter, para. 35

²² Affidavit #1 of Carter, para. 40

Switzerland at great personal expense and hardship to herself and her family to end her life at the time of her choosing.

29. There are many more requests for assistance than actual assisted deaths in Switzerland. It is calculated that of the approximately 62,000 deaths per year, 0.3% to 0.4% of all Swiss deaths are assisted suicides.²³ The mean age of the persons receiving assistance in ending their lives by one such organization was 72 years.²⁴

Critical Appraisal of the Swiss Regulatory Model

30. The Swiss regulatory model for assisted suicide ensures that individuals who require assistance to end their own lives receive the help they require while preventing vulnerable individuals from being harmed. Published peer-reviewed studies and reports confirm the efficacy of the precautions adopted by the Swiss regulatory model.²⁵
31. In assessing the efficacy of the precautions adopted by the Swiss regulatory approach, it is important not to hold the precautions to a standard of perfection. The efficacy of the German model of public and private funding for health care, for example, was not held to a standard of perfection by the Supreme Court of Canada in *Chaoulli*.
32. Studies have shown that procedures are almost always closely followed, and there are no major issues to how the rules of these organizations are enforced in practice. A recent study conducted in the City of Zurich for a 10 year period spanning 1990 to 2000 found that all 147 assisted suicides that were performed by the group EXIT were reported to the authorities as required.²⁶ These findings correspond with the numbers of major studies created by a large-scale

²³ Affidavit #1 of Bosshard, Exhibit C (page 49/477)

²⁴ Affidavit #1 of Bosshard, Exhibit C (page 50/478)

²⁵ Affidavit #1 of Bosshard, Exhibit C

²⁶ Affidavit #1 of Bosshard, para. 43

international study on end-of-life decisions.²⁷ Further, studies regarding the number of assisted suicides performed in Switzerland by right to die organizations indicate that the numbers of deaths reported by these organizations closely match the numbers found by the studies, again indicating that reporting is effective.²⁸

33. Research shows that the measures enforced by the four Swiss organizations are rigidly enforced and, in practice, exclude a large number of individuals who are not considered suitable for obtaining assistance in suicide for various reasons. One study indicated that between 1997 and 2001, only 100 out of approximately 300 to 400 persons who requested assistance in ending their lives from one organization were given assistance in ending their lives.²⁹ This indicates that the review processes are more than pro-forma, but rather represent a clear, coherent analysis of individuals and their reasons for seeking and willingness to obtain assisted suicide. This may also indicate that many individuals may ultimately find what they are seeking by obtaining assurances that they have the right and power to end their lives when they choose to do so.
34. There is no evidence that the four Swiss organizations routinely assist individuals who are not competent to end their lives and very little evidence that inappropriate deaths ever occur. A recent study addressing the reasons for which individuals request assisted suicide cited pain as the most severe concern that motivated these decisions, and other physical reasons as important factors. Social concerns, such as alienation and separation from ones' family were far less likely to be referred to as motivations for individuals seeking assisted suicide.³⁰ The vast majority of those who seek assisted suicide are individuals who wish to end their physical suffering and are otherwise not psychologically disabled. The Farewell Foundation adopts the position of the plaintiffs that it is more than possible to distinguish between depressed persons and determined persons who request assistance with dying.

²⁷ Affidavit #1 of Bosshard, para. 43

²⁸ Affidavit #1 of Bosshard, para. 43 and Exhibit C

²⁹ Affidavit #1 of Bosshard, Exhibit C (477 fn 77)

³⁰ Affidavit #1 of Bosshard, Exhibit K (pages 108 – 113)

35. A further safeguard was recently developed by the Swiss Federal Court, which determined that a person who suffers from a psychological condition must be denied the right to assisted suicide unless they have been interviewed by a psychiatrist who certifies that the decision to end their life is not the product of a curable temporary problem but a well-considered decision based on rational judgment.³¹ This legal determination further underscores the practical ability of medical professionals to discern decisional capacity as well the public interest in involving medical professionals in the assessment of decisional capacity.
36. The record reflects the fact that an absolute criminal prohibition against assisting suicide does not prevent medical professionals from rendering assistance within Canada. And we may respect the momentous contributions of the medical profession to the well-being of Canadians while recognizing that the medical profession is neither beyond reproach nor immune from error. No form of legal or medical regulation will usher forth a world free from imperfections.
37. The Swiss regulatory model demonstrates that the medical eye need not surveil every second of an assisted suicide to prevent misconduct or involuntary death. To lament that the Swiss regulatory model does not at every stage incorporate a medical doctor is to succumb to professional elitism or to yield to unarticulated or speculative suspicions about the value of freedom in a democracy.
38. Many of the core requirements of the Swiss regulatory model, including the requirement that each assisted suicide is reported to the authorities, are prescribed by law. Other core requirements of the Swiss regulatory model, including requirement that an individual be examined twice by a doctor, are prescribed by professional authorities. While the government does not directly regulate the four Swiss organizations, the government has jurisdiction to pass regulations if they prove necessary. The Swiss Federal Council decided this year that it was unnecessary to do so.³² The lack of regulation beyond the strictures imposed by the Swiss Penal Code and the Swiss Civil Code are an indication that the system

³¹ Affidavit #1 of Bosshard, Exhibit M (page 123)

³² Affidavit #1 of Bosshard, para 41, see note 7, above

as currently regulated is functioning well within the tolerances of the citizens of Switzerland.

39. The Swiss approach to assisted suicide has been shown through academic studies to have effective safeguards that ensure that vulnerable individuals are not induced to suicide, and only individuals who have made a competent decision to do so are assisted in ending their lives.
40. Dr. José Pereira, who was called by the Government of Canada and qualified as an expert in medicine and palliative care, agreed that physician-assisted dying regulations at the Swiss hospital in which he worked were “very sensible criteria.”³³ The criteria include the involvement of NGO groups such as Dignitas and EXIT.
41. Dignitas’ practice of video-taping the final moment that a patient requests and receives assistance to die is an additional safeguard to demonstrate voluntariness. Dr. Marcia Angell testified that this is a safeguard she believed would be useful for the Washington and Oregon models.

So it is televised and the patient is asked “Are you sure you want to do this? You can stop at any time” and so forth. All right, now you do it and he triggers the medication. I think something like that could add safeguards that I would want to see in the US. I’m not sure about Canada or the Netherlands.³⁴

Findings of Fact May Affect the Intervenor and its Members

42. The findings of fact of this honourable Court, even those that are made by way of *obiter dictum*, will chart the course of the Farewell Foundation for the foreseeable future. The Farewell Foundation respectfully asks this Court to arrive at a supportive appraisal of the Swiss regulatory approach. While the involvement of

³³ Cross-examination of Dr. Pereira, November 23, 2011, p.101, ll.3 to 102 (see also written submission of the plaintiffs, paras. 7 -8.

³⁴ Cross-examination of Dr. Angell, November 16, 2011, p. 61, ll.14 to 21

the medical profession in assessing and documenting decisional capacity and informed consent is necessary to satisfy the public interest, all aspects of the end of life need not be confined to the exclusive domain of the physician.

PART II: LEGAL ARGUMENT

43. Farewell Foundation has two legal arguments: firstly, the criminal prohibition on assisted suicide deprives Canadians of their right to life, liberty and security of the person under s. 7 of the *Charter*, and this deprivation is not in accordance with the principles of fundamental justice because the prohibition is overbroad; and secondly, the infringement of s. 7 of the *Charter* imposed by s. 241(b) of the *Criminal Code* does not impair the rights granted by s.7 as little as possible, and therefore this infringement is not justified in a free and democratic society pursuant to s.1 of the *Charter*.

Overbreadth and Minimal Impairment

44. The intervenor Farewell Foundation is in substantial concurrence with the arguments of the Plaintiffs on the issues of overbreadth and minimal impairment. The law with respect to overbreadth and minimal impairment may be simply stated: the government cannot impair fundamental freedoms more than it needs to in order to accomplish its legitimate objectives. Farewell Foundation takes the position that the prohibition against assisted suicide is overbroad and fails to satisfy the minimal impairment standard.

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at para.160

Harper v. Canada (Attorney General), 2004 SCC 33 (CanLII) at para.110

Lavigne v. Ontario Public Service Employees Union, [1991] 2 SCR 211

R. v. Oakes, [1996] 1 SCR 103 at para.70

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 at para.94

R v. Heywood, [1994] 3 S.C.R. 76

R v. Clay, 2003 SCC 75

PART III: RELIEF SOUGHT

45. The intervenor Farewell Foundation seeks an Order declaring that to the extent that the impugned provisions prohibit “physician-assisted dying”, the provisions unjustifiably infringe ss.7 and 15 of the *Charter* and are, to that extent, of no force and effect. Farewell Foundation asks that the Order define “physician-assisted dying” as a suicide in respect of which:

- a. The decision of the deceased was assessed at or near the time of the suicide by a medical professional to be the product of a mind capable of informed decision-making;
- b. At or near the time of his or her suicide, the deceased was adequately informed by a medical professional of his or her diagnosis and prognosis and treatments available to him or her;
- c. Assistance was rendered to the deceased at the documented and sustained request of the deceased for assistance in ending their own life, by a person or persons from whom the assistance was requested; and
- d. The decision by the deceased to end his or her life was not the product of undue influence by third parties, including undue influence by the person providing assistance.

46. The founding directors of Farewell Foundation ask that no order of costs be made for or against them.

Dated this third day of December, 2011

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