S.C.C. FILE NO. 35591

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

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

APPELLANTS
(Respondents/Cross-Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant/Cross-Respondent)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Appellant)

[style of cause continued on inside cover]

APPELLANTS' RESPONSE TO MOTIONS TO INTERVENE

(Pursuant to Rules 49 and 57 of the *Rules of the Supreme Court of Canada*)

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- and -

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TABLE OF CONTENTS

APPELLANTS' MEMORANDUM OF ARGUMENT IN RESPONSE TO MOTIONS TO INTERVENE

PART I: STATEMENT OF FACTS

1. In addition to the intervention of the Attorneys General for Ontario, Quebec and British Columbia pursuant to subrule 61(4), nineteen applications for leave to intervene have been filed. The appellants have already responded to the merits of the Advocates Society's application. The appellants' global response to the remaining applications and to the terms of any interventions allowed is as follows.

PART II: STATEMENT OF QUESTION IN ISSUE

2. Whether the proposed interveners should be granted leave to intervene in this appeal and, if so, on what terms.

PART III: STATEMENT OF ARGUMENT

3. The appellants **consent** to the motions for leave to intervene of:

   a. The Alliance of People with Disabilities Who are Supportive of Legal Assisted Dying Society ("APD Society");

   b. The Canadian Civil Liberties Association ("CCLA");

   c. The Canadian Unitarian Council ("CUC");

   d. Criminal Lawyers' Association (Ontario) ("CLA-O");

   e. David Asper Centre for Constitutional Rights ("DAC");

   f. Dying with Dignity ("DWD");

   g. Canadian HIV/AIDS Legal Network and The HIV & AIDS Legal Clinic Ontario ("CHAL"); and

   h. Farewell Foundation for the Right to Die and Association Québecoise pour le Droit de Mourir dans la Dignité ("FF").

Each of these interveners has a real interest in the appeal and has outlined proposed submissions that will be useful and distinct from the main parties. Some of these interveners are also important because they will balance the arguments being advance by other proposed interveners.

4. **Subject to the conditions set out below**, the appellants **take no position** on the motions for leave to intervene of:

a. Christian Legal Fellowship ("CLF");

b. The Evangelical Fellowship of Canada ("EFC"); and

c. The Association for Reformed Political Action Canada ("ARPA").

However, there is almost complete overlap between the proposed submissions of these proposed interveners. All seek to make submissions in respect of the principle of the sanctity or inviolability of life which they say informs *Charter* analysis and means that there can be no intentional killing.[1] In addition, CLF and EFC seek to make submissions that (a) the objective of the law includes the protection of all human life;[2] (b) there is an ethical distinction between physician assisted dying ("PAD") and other end of life care;[3] (d) s. 1 justifies the law;[4] (e) the role of the court is limited in life and death matters;[5] and (f) consent can never justify intentional killing.[6] In addition, the CLF proposes to argue that the trial judge should have found herself bound by *stare decisis*,[7] a position with which EFC is unlikely to disagree.[8] All three seek to make these submissions from an interdenominational Christian perspective.[9] If these proposed interveners are allowed to intervene, they ought to intervene as a single coalition with the requirement that they be permitted to file only one factum and with only one opportunity to make oral submissions.

5. The appellants **object** to the motions for leave to intervene of:

a. The Catholic Health Alliance of Canada ("CHAC");

b. The Christian Medical and Dental Society of Canada and The Canadian Federation of Catholic Physicians' Societies ("CMDS"); and

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[1] CLF memorandum of argument ("Argument"), ¶16(c); EFC Argument, ¶18(a) and (c); ARPA Argument, ¶¶11, 18-22
[2] CLF Argument, ¶16(a); EFC Argument, ¶18(a)
[3] CLF Argument, ¶16(b); EFC Argument, ¶18(b)(i)
[4] CLF Argument, ¶16(d); EFC Argument, ¶18(b)
[5] CLF Argument, ¶16(f); Affidavit of Bruce J. Clemenger (EFC), ¶22
[6] CLF Argument, ¶16(g); Affidavit of Bruce J. Clemenger (EFC), ¶23(c)(ii)
[7] CLF Argument, ¶16(e)
[8] EFC Argument, ¶3
[9] Affidavit of Ruth AM Ross (CLF), ¶5; Affidavit of Bruce J. Clemenger (EFC), ¶3; Affidavit of Mark Penninga (ARPA), ¶4

c. Catholic Civil Rights League, Faith and Freedom Alliance and Protection of Conscience Project ("CCRL"),

as each of these organizations represent a religious perspective that is no different in substance from that of the CLF and the EFC. Furthermore, each of these proposed interveners' main submission appears to be that no physician and/or medical institution should be compelled to assist in a patient's death because this would violate that physician's freedom of religion and conscience. As the appellants have never argued that any physician should be compelled to perform PAD, these proposed interveners seek to raise issues not properly before the Court. To the extent these proposed interveners seek to discuss other issues such as (a) the sanctity and/or inviolability of life, (b) dignity, and (c) that physician assisted dying is not medical treatment, these submissions are substantively the same are being advanced by CLF and EFC. If these proposed interveners are allowed to intervene, they ought to intervene as a single coalition with the requirement that they be permitted to file only one factum and with only one opportunity to make oral submissions. The CHAC and the CMDS are in fact represented by the same law firm and their proposed submissions are virtually identical. Any difference between their respective submissions and also those of the CCRL is one of nuance and not substance.

6. **Subject to the conditions set out below**, the appellants **take no position** on the motions for leave to intervene of:

a. Counsel of Canadians with Disabilities and The Canadian Association for Community Living ("CCD/CACL"); and

b. Euthanasia Prevention Coalition and Euthanasia Prevention Coalition - BC ("EPC").

However, again, there is substantial if not complete overlap between the proposed submissions of these two proposed interveners who both purport to speak for, *inter alia*, the disabled community. Both seek to make submissions in respect of: (a) PAD not being health care;[10] (b) Parliament's role and history of reviewing and upholding the absolute prohibition against PAD;[11] (c) the dangers of striking down the law including the possible impacts on disabled and aging people and those with diminished mental capacity as supported by evidence from other

[10] CCD Notice of Motion ("NoM"), ¶17(a), (d); EPC Argument, ¶9(t). This submission is likely to be advanced by the respondents and is also sought to be advanced by CHAC, CMDS, CCRL, EFC, and the Collectif des médecins contre l'euthanasie.

[11] CCD NoM, ¶17(b); EPC Argument, ¶9(i)

jurisdictions;[12] (d) the difficulty or impossibility of limiting PAD to a defined group and that it will be made available to ever expanding groups of people as supported by evidence from other jurisdictions;[13] (e) that there is no right to commit suicide;[14] (f) that the prohibition of PAD is consistent with the equality rights of disabled people;[15] (g) that the legal norm in other jurisdictions is the prohibition of PAD;[16] and (h) that the choice of PAD is not a true choice absent appropriate access to health care.[17] In addition, CCD/CACL seeks to make submissions about the significance of intent as a basis of distinction between PAD and other end-of-life care,[18] a submission that is sought to be made by EFC and CLF.[19] It also seeks to make submissions that decriminalizing PAD sends a signal to those deemed eligible that their lives are not worth living,[20] a submission that has been made by the Attorney General of Canada at *each level of* court. EPC also seeks to make submissions about *stare decisis*,[21] a topic that will be covered by the Attorney General of Canada and about which CLF also proposes to make submissions.

7. Even more troubling than this near complete overlap between the proposed submissions and perspective of the CCD/CACL and EPC, is the fact that both groups make clear that they intend to retry the facts in this Court.[22] EPC has stated its desire to make submissions such as that: (a) the availability of PAD undermines the autonomy of disabled people and puts disabled people and seniors at risk;[23] (b) the evidence from permissive jurisdictions suggests that in operation, safeguards are ignored, illusory and have resulted in abuses;[24] (c) requests for PAD are transitory in nature;[25] and (e) the fallibility of diagnosis and prognosis is commonplace.[26] The trial judge made extensive findings of fact in respect of each of these issues which directly contradict the EPC's evidentiary contentions.

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[12] CCD NoM, ¶17(b), (g), (h), (l)-(m); EPC Argument, ¶9(b), (d), (e), (f), (h), (l)-(u)
[13] CCD NoM, ¶17(h), (k)-(l); EPC Argument, ¶9(p)-(s)
[14] CCD NoM, ¶17(i); EPC Argument, ¶9(g)
[15] CCD NoM, ¶17(j); EPC Argument, ¶9(c), (e)-(k)
[16] CCD NoM, ¶17(n); EPC Argument, ¶9(a)
[17] CCD NoM, ¶17(o); EPC Argument, ¶9(e)
[18] CCD NoM, ¶17(e)-(f)
[19] CLF Argument, ¶16(b); EFC Argument, ¶18(b)(i)
[20] CCD NoM, ¶17(p)
[21] EPC Argument, ¶9(w)
[22] CCD NoM, ¶9(c), (f), (h), (k)-(p); EPC, ¶9(b)-(d), (f), (h), (l)-(r), (u)
[23] EPC Argument, ¶9(e)-(h), (q)
[24] EPC Argument, ¶9(d), (l)-(s), (u)
[25] EPC Argument, ¶9(o)
[26] EPC Argument, ¶9(r)

8. CCD/CACL seeks to make submissions that: (a) PAD is inherently dangerous;[27] (b) the record in this case is deficient and great weight should be given to Professor Montero's new affidavit in revising the trial judge's conclusions of fact with respect to the vulnerability of persons seeking PAD, the effectiveness of the safeguards in foreign jurisdictions and the effectiveness of the criteria in the trial judge's order;[28] (c) it is ethically inconsistent to equate end-of-life care with PAD;[29] (d) non-voluntary euthanasia is prohibited by the statutes in the Netherlands and Belgium, is routinely performed in these countries and is a cause for concern with respect to PAD;[30] (e) it is impossible to limit PAD to a discrete group of individuals and this is consistent with the evidence about experience in permissive jurisdictions which shows a widening practice;[31] and (e) decriminalization would make the lives of persons with disabilities more perilous and vulnerable.[32] Again, the trial judge made extensive findings of fact in respect of each of these issues which directly contradict the EPC's evidentiary contentions.

9. More fundamentally, evidentiary submissions such as those proposed by the EPC and CCD/CACL misconstrue the appropriate role of an intervener and the role of this Court. They will also likely enlarge the appeal between the parties, and will be prejudicial to the appellants who will then be required to move to file a detailed reply in support of the trial judge's *findings* of fact (as opposed to merely pieces of evidence relied on by the interveners).

10. The appellants ask that this Court make it an explicit term of any order granting intervener standing that the interveners have no role in challenging findings of fact or developing findings of fact and must limit their submissions to legal arguments. Even if their submissions are so constrained, the CCD/CACL and EPC should also be required to file a single factum to avoid repetition and over-representation of their perspective.

11. **Subject to our concerns** about the CMA seeking to adduce new evidence, the appellants **take no position** on the motions for leave to intervene of:

a. Canadian Medical Association ("CMA"); and

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[27] CCD NoM, ¶17(b)
[28] CCD NoM, ¶17(c)
[29] CCD NoM, ¶17(f)
[30] CCD NoM, ¶17(h)
[31] CCD NoM, ¶17(k)
[32] CCD NoM, ¶17(p)

b. Collectif des médecins contre l'euthanasie ("CMCE").

12. If this Court grants leave to any proposed interveners, they should not be permitted to file any new evidence including evidence in the guise of "authorities." This is of particular concern with respect to the CMA which has not sought an order permitting it to introduce new evidence but has made extensive reference to new evidence in its application materials. The appellants object to the introduction of such evidence.

PARTS IV AND V: COSTS SUBMISSION AND NATURE OF ORDERS SOUGHT

13. The appellants seek orders as follows with regard to the motions for leave to intervene:

a. the motions for leave to intervene of APD Society, CCLA, CUC, CLA-O, DAC, DWD, CHAL and FF be granted;

b. the motions for leave to intervene of CHAC, CMDS and CCRL be dismissed;

c. if leave to intervene is granted to any of the following proposed interveners, it be on the following terms:

i. ARPA, CLF and EFC be entitled to serve and file a single joint factum not to exceed 10 pages in length;

ii. CCRL, CHAC and CMDS be entitled to serve and file a single joint factum not to exceed 10 pages in length;

iii. CCD/CACL and EPC be entitled to serve and file a single joint factum not to exceed 10 pages in length;

d. any interveners granted standing be entitled to file a factum not to exceed 10 pages in length;

e. all interveners be directed to coordinate more closely with each other and other interveners to ensure that they avoid making duplicative arguments;

f. no interveners be entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties;

g. no intervener is to make arguments challenging any finding of fact;

h. the appellants and respondents may file a reply factum in response to all intervener facta not to exceed 30 pages in length;

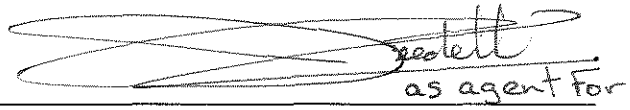
i. no interveners be granted a right of reply;

j. pursuant to Rule 59(1)(a) of the *Rules of the Supreme Court of Canada*, the interveners shall pay to the appellants and respondents any additional disbursements incurred by the appellants and respondents as a result of their respective interventions; and

k. the requests to present oral argument be deferred to a date following receipt and consideration of the written arguments of the parties and the interveners.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, the 20th day of June, 2014.



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