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' REPLY FACTUM RE ATTORNEY GENERAL OF CANADA'S FACTUM

(LEE CARTER et al., APPELLANTS)

(Pursuant to the Order of Rothstein J. dated September 4, 2014)

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OVERVIEW

1. In reliance on Prof. Montero, AGC now for the first time challenges findings of fact as being palpably wrong, including findings that: (a) any risks that inhere in assisted dying can be very greatly minimized;[1] and (b) the Canadian cultural context provides a meaningful distinction from some of the evidence of other jurisdictions.[2] AGC's arguments attribute undue import and weight to the Montero Affidavit and urge an approach inconsistent with the high standard of deference owed to a trial judge in matters of fact. AGC also throughout casts as "facts" AGC's selective account of *evidence*, without acknowledging or challenging Smith J.'s findings. AGC's "assertions" do not represent findings below, are taken out of context, mislead, ignore the body of evidence on most if not all of the points in question, and must be rejected. AGC's evidentiary "assertions" are too numerous to be addressed in reply.[3] AGC places the appellants and this Court in an impossible position. This Court should reject the solicitation to hear the matter *de novo*; *Bedford* and *Tsilhqot'in* state absent proper challenge, this Court accepts trial findings.[4]

2. ***No Evidence of a Slippery Slope in Belgium:***[5] Montero Affidavit cannot undermine Smith J.'s findings. It proves no "slippery slope" in Belgium either by virtue of physician non-compliance or as a result of interpretations of the *Act*.[6]

3. Smith J. dealt with physician compliance in Belgium at length and in detail. She accepted there was some non-compliance with legislative requirements for PAD in foreign jurisdictions, but she concluded that the majority of that was procedural and explicable as mislabelling by physicians based on the drugs used. She concluded it was not evidence of abuse or disregard.[7] The Montero Affidavit does not provide evidence that undermines that conclusion.

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[1] AGC Factum, ¶¶94, 96, 100
[2] AGC Factum, ¶99
[3] Interveners adopted AGC's "facts" and we have addressed many of those submissions in reply to interveners.
[4] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, ¶¶48-56, ABoA v I, Tab 10; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, ¶¶50, 60-61, RA v II, Tab 46
[5] AGC Factum, ¶¶55-60
[6] AGC implies this re-opens *all* trial findings for consideration because Smith J. said evidence of a practical slippery slope *might* be a basis for asserting that a complete prohibition was required: TJ Reasons, ¶1366, JR v II, A.R. 180.
[7] "Practical slippery slope" is the concern "it will be impossible to avoid **abuse** without a legal bright line prohibiting intentional killing." TJ Reasons, ¶244, JR v I, A.R. 75 [emphasis added]. Abuse (not benevolent extension or innocent mistakes) appears to be the majority's concern in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 as well, e.g. ¶¶160-62, ABoA v III, Tab 67. Montero's Affidavit is not evidence of "abuse".

4. Smith J. found the Netherlands and Belgium had unique cultural and historical components which "mean that possible concerns about the level of compliance with legislation in those countries do not necessarily transpose into concerns about Canada."[8] She found that non-compliance by physicians in these countries takes place in a context of existing medical (e.g., life ending acts without explicit request ("LAWER")) and legal (e.g., the criminal defence of necessity) practices into which the permissive legislation was introduced.[9] She noted *AGC's own expert witness*, Dr. Hendin, testified that physicians in those countries occupy a strong cultural position and may, accordingly, feel entitled to disregard the law, *but that there was no parallel in North American physicians*.[10] She concluded little could be inferred from those countries regarding anticipated compliance of Canadian physicians if PAD were legalized here, and declined to draw any inference about compliance in Canada based on the experience in those countries.[11] She was not speculating, as AGC contends; she was declining to draw an inference based on the evidence, *including AGC's own evidence*, and gave reasons for declining to do so.

5. AGC argues the Federal Control and Evaluation Commission ("FCEC") has interpreted the *Belgian Act* to permit euthanasia in cases beyond Parliament's original intention and thus evidences another kind of "practical" slippery slope. The *Belgian Act* is not express on all points that arise and requires FCEC to interpret and apply it. FCEC notes its interpretative decisions in reports the *Act* requires it to produce to Parliament. Parliament has not taken issue with FCEC's interpretations, nor amended to "correct" these interpretations. There is no basis to suppose FCEC's interpretations do not accurately capture Parliament's intent, let alone result in unacceptable practices, and no basis to say its interpretations are part of any slippery slope.[12]

6. Unlike the Belgian Parliament, Prof. Montero disagrees with FCEC's interpretations.[13] He asserts Parliament's original intentions have been departed from by reference to statements made by various persons or bodies in the discussions and parliamentary debates leading up to the

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[8] TJ Reasons, ¶683, JR v I, A.R. 197

[9] TJ Reasons, ¶¶655-60, 679-80, JR v I, A.R. 190-91, 196. Smith J. further held that while none of the systems where PAD is legal have achieved "perfection," the "predicted abuse… has not materialized." TJ Reasons, ¶¶684-85, JR v I, A.R. 197.

[10] TJ Reasons, ¶679, JR v I, A.R. 196

[11] TJ Reasons, ¶¶680-83, JR v I, A.R. 196-97

[12] Affidavit of Jacqueline Herremans made July 30, 2014 ("Herremans Affidavit"), ¶¶45, 49-52, 57, Appellants' Supplementary Record ("ASR"), S.R. 11-15

Belgian Act. Parliamentary debates are of limited use in statutory interpretation under Belgian law.[14] It is particularly futile to suggest such use in the context of these particular debates - which went on for weeks, in a multi-party parliamentary setting, and during which many opposing, conflicting or inconsistent suggestions for amendments were made and not accepted for various reasons.[15] Prof. Montero's assertion that the FCEC has disregarded clear legislative intent cannot be accepted. The Montero Affidavit cannot support a finding of any slippery slope in Belgium; it does not even establish his assertion of Parliamentary intent, let alone an *expansion* beyond it.

7. The *Belgian Act* does not expressly address assisted suicide. FCEC concluded that, *so long as the physician is present and overseeing the termination of life*, patient self-administration of lethal drugs is implicitly permitted as a *method* of euthanasia.[16] The *Belgian Act* does not expressly address whether psychiatric pathology is a serious and incurable pathology under the *Act*.[17] FCEC concluded it can be, and has noted this category and reported the related statistics in its Reports.[18] The *Belgian Act* does not expressly address whether suffering from fear of future problems arising from the reasonably expected progression of existing pathologies constitutes suffering. FCEC concluded that dread and anxiety are aspects of present suffering.[19] The *Belgian Act* does not expressly address whether multiple incurable pathologies[20] that, either collectively or synergistically, have a serious impact on a patient's life can constitute a serious and incurable pathology for purposes of the *Act*. FCEC concluded they can.[21] Consideration of age (in relation to, e.g., the likelihood of meaningful recovery) can be relevant to the assessment of the suffering

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[13] Prof. Montero's ill-founded interpretative concerns could be addressed by Canadian Parliament enacting different legislation that, e.g., excludes categories of patients or creates an *a priori* approval process or makes a psychiatric evaluation mandatory or provides for patient advocates or set a waiting period for eligibility based on disability.

[14] Appellants object to AGC's attempt, by letter of August 8, 2014, to put in evidence in the form of counsel's submissions and a foreign case which requires proof by a legal expert in Belgian law. Ms. Herremans deposed: "Parliamentary debates are rarely used *as an interpretative aid* in Belgium," Herremans Affidavit, ¶54, ASR, S.R. 14 [emphasis added]. AGC failed to dispel that testimony. The case provided concerned an application by pro-life and Catholic organizations challenging the *Belgian Act*. The Court rejected the application noting it was based on an unsubstantiated assumption that people who suffer from a serious, incurable condition or pathology and who were suffering unbearably are incapable of exercising autonomy and that the *Belgian Act itself* provided ample protections to ensure decisions were made in a fully autonomous manner. The Court did not use the Parliamentary materials to interpret the *Act*, or to glean the intentions of the legislature; it referred to those materials as evidence to show the Senate and House of Representatives had continually concerned themselves with this very issue.

[15] Herremans Affidavit, ¶¶53-58, ASR, S.R. 13-15

[16] Herremans Affidavit, ¶57, ASR, S.R. 14-15

[17] Lewis Affidavit, Ex F, JR v XVI, 2771-77

[18] Herremans Affidavit, ¶¶64-70, Ex F-J, ASR, S.R. 17-18 ; Montero Affidavit, ¶61, RR, R.R. 50-51

[19] Herremans Affidavit, ¶¶48-49, ASR, S.R. 12

[20] See e.g. AGC Factum, ¶50

[21] Herremans Affidavit, ¶¶40-45, Ex D, ASR, S.R. 10-11

experienced by the patient, however, that is distinct from accepting "weariness of life" as a basis for euthanasia. The *Belgian Act* requires a serious and incurable pathology in all cases and FCEC does *not* accept "weariness of life" as a medical condition.[22]

8. Prof. Montero does not provide this Court with a fair understanding of the FCEC's interpretations of the *Act*. FCEC's interpretations are informed by expertise and experience.[23] Prof. Montero's characterization of them is sensationalistic, incomplete and lacks credibility.[24]

9. ***So-Called Controversial Cases*:** Prof. Montero does not dispute that the referenced individual cases fall under the *Belgian Act* as interpreted by FCEC. Rather, he says these cases[25] illustrate the "error" of FCEC's interpretations and the "harm" caused by the alleged departure from "legislative intention." These cases add no support to Prof. Montero's slippery slope assertions. If FCEC's interpretations are consistent with the *Belgian Act* (and there is no evidence to the contrary), there is no further basis for complaint regarding the individual cases.

10. The basis on which FCEC approves physician reports is confidential. The media reports only partial, sensationalized versions of the facts,[26] which media is the basis of Prof. Montero's account. Media reports cannot be treated as evidence. As demonstrated by Prof. Montero's description of the Verbessem case (which omits significant information included in widely reported press coverage),[27] Prof. Montero's descriptions of the reports made is *itself* problematic.

11. As to Prof. Montero's analysis of the increase in psychiatric cases from 2006 through to 2012, he has improperly added together two report categories when one is actually a subset of the other. The true percentage of persons with psychiatric diagnoses, as a percentage of total persons obtaining euthanasia, has increased 1.6% over the period referenced.[28] AGC's claim that the psychiatric numbers have increased "more than tenfold" is manifestly inaccurate.

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[22] Herremans Affidavit, ¶¶46-47, ASR, S.R. 11-12

[23] Ms. Herremans notes, at ¶26, ASR, S.R. 6-7, FCEC is not satisfied with a formal review; it makes best efforts to conduct a substantive review in each case. Also ¶31, ASR, S.R. 8. Discussions and advice is taken on some issues: see e.g. ¶¶45, 48-51, ASR, S.R. 11-13.

[24] Herremans Affidavit, ¶¶35-36, Ex D, ASR, S.R. 9, 78-80

[25] Nine individual cases out of literally thousands.

[26] Herremans Affidavit, ¶¶27-36, ASR, S.R. 7-9

[27] Herremans Affidavit, Ex D, ASR, S.R. 78-80, is provided not because it is accurate, but to demonstrate even on the basis of popular media reports, Prof. Montero's account was selective. Ms. Herremans deposed that, on FCEC review of their files, the twins met the requirements of the Act-both necessity and consent were established.

[28] Montero Affidavit, ¶61, RR, R.R. 50-51 and Herremans Affidavit, ¶¶64-70, Ex F-J, ASR, S.R. 17-18

12. ***Belgium Legislation Regarding Minors*:** Prof. Montero says Belgian law allows euthanasia for mature minors in narrower circumstances than adults.[29] The possible extension to mature minors was known at trial.[30] AGC called expert evidence about it,[31] cross-examined appellants' expert Dr. Bernheim about it,[32] and the parties made submissions about inferences to draw from it. The change is not a slippery slope - it shows Belgian Parliament acting as a democratic legislator. It is irrelevant to this case, which is about whether appellants have a constitutional right, and not whether Parliament should extend the right to PAD beyond any declaration made.

13. ***Assertion re State of the Health System*:** Prof. Montero asserts, outside his expertise and contrary to trial evidence regarding public opinion about the Belgian health system, that Belgians are wary of palliative care as a result of PAD.[33] This evidence should be wholly disregarded.

14. ***Nicklinson*:** *Nicklinson* makes clear a blanket prohibition is not justified if there are a "number of possible schemes" that "could be practically feasible."[34] *Nicklinson* suffered from inadequate arguments and evidence.[35] No judge in *Nicklinson* who thought the Court was competent to consider the issue held that *no* amount of evidence would ever suffice to determine the issue, and two would have struck down the law even on the limited evidence/arguments available.[36] An *a priori* system appeared to allay the concerns of a majority of the judges.[37]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 18, 2014

Joseph J. Arvay, Q.C., Sheila M. Tucker and Alison M. Latimer
Counsel for the Appellants

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[29] Montero Affidavit, ¶¶79-81, RR, R.R. 55. The *Belgian Act* has always applied to emancipated minors on narrower terms than for adults; the *Dutch Act* has always applied to mature minors on narrower terms than adults.

[30] Newborns may be euthanized in the Netherlands under the Groningen Protocol. The Protocol is based on the criminal defence of "necessity" and exists outside the 2002 *Dutch Act*. The case law establishing the defence of necessity can apply to suffering newborns *precedes* the 2002 *Act*: Legemaate #1, ¶26, JR v XVI, 2525. The Protocol is irrelevant to the right posited here (based on ***both*** necessity (mercy) ***and*** consent (autonomy)).

[31] Pereira Report, Ex G, p. 265, JR v XXXVII, 10042; Pereira Cross, November 23, 2011, 549, JR v VII, 549; Pereira Cross Ex 53, JR v LI, 14413

[32] Bernheim Cross, pp. 43-48, JR v XLVIII, 13871-76

[33] Montero Affidavit, ¶103, RR, R.R. 61; Bernheim #1, ¶19, JR v XII, 1112

[34] *R (Nicklinson) v Ministry of Justice*, [2014] UKSC 38 [*Nicklinson*], ¶107 per Lord Neuberger, RA v II, Tab 34

[35] *Nicklinson*, ¶121 per Lord Neuberger; ¶¶176-82 per Lord Mance; ¶197 per Lord Wilson; ¶224 per Lord Sumption; ¶291 per Lord Clarke, RA v II, Tab 34

[36] *Nicklinson*, ¶¶300, 318-20 per Lady Hale; ¶326 per Lord Kerr, RA v II, Tab 34

[37] *Nicklinson*, ¶¶108, 123, 125 per Lord Neuberger; ¶¶186-87 per Lord Mance; ¶¶197(g), 205, per Lord Wilson, ¶¶314-16 per Lady Hale, ¶355 per Lord Kerr, RA v II, Tab 34

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