Court File No. 35591

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

B E T W E E N :

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

Appellants

\- and -

THE ATTORNEY GENERAL OF CANADA and THE ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondents

\- and -

THE ATTORNEY GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF QUEBEC, COUNSEL OF CANADIANS WITH DISABILITIES AND THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING, CHRISTIAN LEGAL FELLOWSHIP, CANADIAN HIV/AID LEGAL NETWORK AND THE HIV & AIDS LEGAL CLINIC OF ONTARIO, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, PHYSICIANS' ALLIANCE AGAINST EUTHANASIA, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA, CANADIAN FEDERATION OF CATHOLIC PHYSICIANS' SOCIETIES, DYING WITH DIGNITY, CANADIAN MEDICAL ASSOCIATION, CATHOLIC HEALTH ALLIANCE OF CANADA, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), FAREWELL FOUNDATION FOR THE RIGHT TO DIE, ASSOCIATION QUEBECOISE POUR LE DROIT DE MOURIR DANS LA DIGNITE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE AND PROTECTION OF CONSCIENCE PROJECT, ALLIANCE OF PEOPLE WITH DISABILITIES WHO ARE SUPPORTIVE OF LEGAL ASSISTED DYING SOCIETY, CANADIAN UNITARIAN COUNSEL, and EUTHANASIA PREVENTION COALITION AND EUTHANASIA PREVENTION COALITION – BRITISH COLUMBIA

Interveners

REPLY TO THE INTERVENRS FROM THE ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500
Ottawa ON, K1A 0H8

Robert J. Frater
Donnaree Nygard
Tel: 613-670-6289
Fax: 613-954-1920
Email: robert.frater@justice.gc.ca

Counsel for the Respondent Attorney General of Canada

DEPUTY ATTORNEY GENERAL OF CANADA
50 O'Connor Street, Suite 500
Ottawa ON, K1A 0H8

William F. Pentney
Per: Robert Frater
Tel: 613-670-6289
Fax: 613-954-1920
Email: robert.frater@justice.gc.ca

Solicitor for the Respondent Attorney General of Canada

ORIGINAL TO: THE REGISTRAR

COPIES TO:

ATTORNEY GENERAL OF BRITISH COLUMBIA
Legal Services Branch
6th Floor – 1001 Douglas Street
PO Box 9280 Stn. Prov. Govt.
Victoria BC, V8W 9J7

Bryant A. Mackey
Christina Drake
Tel: 250-356-9280
Fax: 250-356-9154
Email: bryant.mackey@gov.bc.ca
christia.drake@gov.bc.ca

Counsel for the Respondent Attorney General of British Columbia

BURKE-ROBERTSON
441 MacLaren Street, Suite 200
Ottawa ON, K2P 2H3

Robert E. Houston, Q.C.
Tel: 613-236-9665
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Respondent Attorney General of British Columbia

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 4th Floor
Toronto, ON M5G 2K1

Zachary Green
Tel: 416-326-4460
Fax: 416-326-4015
Email: zachary.green@ontario.ca

Counsel for the Intervener Attorney

BURKE-ROBERTSON
441 MacLaren Street, Suite 200
Ottawa ON, K2P 2H3

Robert E. Houston, Q.C.
Tel: 613-236-9665
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Ottawa Agent for the Intervener Attorney

General of Ontario

General of Ontario

ATTORNEY GENERAL OF QUEBEC
1200, Route de l'Église, 2ème étage
Quebec QC, G1V 4M1

Sylvain Leboeuf
Syltiane Goulet
Tel: 418-643-1477
Fax: 418-644-7030
Email: sylvain.leboeuf@justice.gouv.qc.ca

Counsel for the Intervener Attorney General of Quebec

NOËL & ASSOCIÉS
111 Champlain Street
Gatineau QC, J8X 3R1

Pierre Landry
Tel: 819-771-7393
Fax: 819-771-5397
Email: p.landry@noelassocies.com

Ottawa Agent for the Intervener Attorney General of Quebec

BORDEN LADNER GERVAIS LLP
1200 – 200 Burrard Street
Vancouver, B.C. V7X 1T2

Agnus M. Gunn, Q.C.
Tel: 604-687-5744
Fax: 604-687-1415

Counsel for the Intervener Alliance of People with Disabilities who are Supportive of Legal Assisted Dying Society

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener Alliance of People with Disabilities who are Supportive of Legal Assisted Dying Society

FARRIS, VAUGHAN, WILLS & MURPHY LLP
25th Floor, 700 West Georgia Street
Vancouver BC, V7Y 1B3

Tim A. Dickson
R.J.M. Andersoff
Tel: 604-661-9341
Fax: 604-661-9349
Email: tdickson@farris.com

Counsel for the Intervener Canadian Unitarian Council

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener Canadian Unitarian Council

GRATL & COMPANY
302-560 Beatty Street
Vancouver, BC V6B 2L3

Jason B. Gratl
Alison M. Latimer
Tel: 604-697-1919
Fax: 604-608-1919

Counsel for the Intervener Farwell Foundation for the Right to Die

GOWLING LAFLEUR HENDERSON
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlings.com

Ottawa Agent for the Intervener Farwell Foundation for the Right to Die

MILLER THOMPSON LLP
3000, 700 – 9th Avenue SW
Calgary, AB T2P 3V4

Gerald D. Chipeur, Q.C.
Tel: 403-298-2425
Fax: 403-262-0007

Counsel for the Intervener Christian Legal Fellowship

SUPREME ADVOCACY LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener Christian Legal Fellowship

GEOFFREY TROTTER LAW CORP.
Suite 1700 – 1185 West Georgia Street
Vancouver, BC V6E 4E6

Geoffrey Trotter
Tel: 604-678-9190
Fax: 604-259-2459
Email: gt@gtlawcorp.com

Counsel for the Intervener Evangelical Fellowship of Canada

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: 613-241-2701
Fax: 316-241-2599
Email: albertons@vdg.ca

Ottawa Agent for the Intervener Evangelical Fellowship of Canada

SCHER LAW PROFESSIONAL CORP.
69 Bloor Street East, Suite 210
Toronto, ON M4W 1A9

Hugh R. Scher
Geoff Cowper, Q.C.
Tel: 416-515-9686
Fax: 416-969-1815
Email: hugh@sdlaw.ca

Counsel for the Intervener Euthanasia Prevention Coalition and Euthanasia Prevention Coalition – British Columbia

FASKIN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 6L5

Yael Wexler
Tel: 613-236-3882
Fax: 613-230-6423
Email: ywexler@faskin.com

Ottawa Agent for the Intervener Euthanasia Prevention Coalition and Euthanasia Prevention Coalition – British Columbia

BAKERLAW
4711 Young Street, Suite 509
Toronto ON M2N 6K8

David Baker
Sarah Mohamed
Tel: 416-533-0040
Fax: 416-553-0050
Email: dbaker@bakerlaw.ca

Counsel for the Interveners Council of Canadians with Disabilities and the Canadian Association for Community Living

SUPREME ADVOCACY LLP
100 – 340 Gilnour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Interveners Council of Canadians with Disabilities and the Canadian Association for Community Living

NORTON ROSE FULBRIGHT CANADA LLP
1, Place Ville Marie, Bureau 2500
Montreal, QC H3B 1R1

Pierre Bienvenu
Andres C. Garin
Vincent Rochette
Tel: 514-847-4452
Fax: 514-286-5474
Email: pierre.bienvenu@nortonrose.com

Counsel for the Intervener Physicians' Alliance Against Euthanasia

NORTON ROSE FULBRIGHT CANADA LLP
1500-45 O'Connor Street
Ottawa, ON K1P 1A4

Sally Gomery
Tel: 613-780-8604
Fax: 613-230-5459
Email: sally.gomery@nortonrose.com

Ottawa Agent for the Intervener Physicians' Alliance Against Euthanasia

VINCENT DAGENAIS GIBSON LLP

260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: 613-241-2701
Fax: 316-241-2599
Email: albertons@vdg.ca

Counsel for the Interveners Christian Medical and Dental Society of Canada

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Tel: 613-241-2701
Fax: 316-241-2599
Email: albertons@vdg.ca

Counsel for the Intervener Canadian Federation of Catholic Physicians' Societies

ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA
1 Rideau Street, Suite 700
Ottawa, ON K1N 8S7

Andre Schutten
Tel: 613-297-5172
Fax: 613-670-5701
Email: andre@arpacanada.ca

Counsel for the Intervener Association for Reformed Political Action Canada

PALIARE, ROLAND, ROSENBERG, ROTHSTEIN LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Gordon Capern
Michael Fenrick
Tel: 416-646-4311
Fax: 416-646-4301
Email: gordon.capern@paliareroland.com

SUPREME ADVOCACY LLP
100 – 340 Gilnour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855 x102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Interveners Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic of Ontario

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Cynthia Petersen
Kelly Doctor
Tel: 416-977-6070
Fax: 416-591-7333
Email: cpetersen@sgmlaw.com

Ottawa Agent for the Interveners Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic of Ontario

SACK GOLDBLATT MITCHELL LLP
500 – 30 Metcalfe Street
Ottawa, ON K1P 5L4

Raija Pulkkinen
Tel: 613-235-5327
Fax: 613-235-3041
Email: rpulkkinen@sgmlaw.com

Counsel for the Intervener Dying with Dignity

POLLY FAITH LLP
80 Richmond Street West, Suite 1300
Toronto, ON M5H 2A4

Harry Underwood
Tel: 416-365-6446
Fax: 416-365-1601
Email: hunderwood@polleyfaith.com

Ottawa Agent for the Intervener Dying with Dignity

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlings.com

Counsel for the Intervener Canadian Medical Association

VINCENT DAGENAIS GIBSON LLP
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4

Russell G. Gibson
Albertos Polizogopoulos
Tel: 613-241-2701 x229
Fax: 316-241-2599
Email: russell.gibson@vdg.ca

Ottawa Agent for the Intervener Canadian Medical Association

Counsel to the Intervener Catholic Health Alliance of Canada

GRATL & COMPANY
302-560 Beatty Street
Vancouver, BC V6B 2L3

Jason B. Gratl
Alison M. Latimer
Tel: 604-697-1919
Fax: 604-608-1919

Counsel for the Intervener Association québécoise pour le droit de mourir dans la dignité

GOWLING LAFLEUR HENDERSON
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlings.com

Ottawa Agent for the Intervener Association québécoise pour le droit de mourir dans la dignité

BORDEN LADNER GERVAIS LLP
Scotia Plaza, 40 King Street West
Toronto, ON M5H 3Y4

Christopher D. Bredt
Ewa Krajewska
Margot Finley
Tel: 416-367-6165
Fax: 416-361-7063
Email: cbredt@blg.com

Counsel for the Intervener Canadian Civil Liberties Association

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: 613-237-5160
Fax: 613-230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener Canadian Civil Liberties Association

BENNETT JONES LLP
Suite 3400, PO Box 130
One First Canadian Place
Toronto, ON M5X 1A4

Robert W. Staley
Ranjan K. Agarwal
Jack R. Maslen
Tel: 416-777-4857
Fax: 416-863-1716
Email: staleyr@bennettjones.ca

Counsel for the Interveners Catholic Civil Rights League

BENNET JONES LLP
1900 – 45 O'Connor Street
World Exchange Plaza
Ottawa, ON K1P 1A4

Sheridan Scott
Tel: 613-683-2302
Fax: 613-683-2323
Email: scotts@bennettjones.com

Ottawa Agent for the Interveners Catholic Civil Rights League

BENNETT JONES LLP
Suite 3400, PO Box 130
One First Canadian Place
Toronto, ON M5X 1A4

Robert W. Staley
Ranjan K. Agarwal
Jack R. Maslen
Tel: 416-777-4857
Fax: 416-863-1716
Email: staleyr@bennettjones.ca

Faith and Freedom Alliance and Protection of Conscience Project

BENNET JONES LLP
1900 – 45 O'Connor Street
World Exchange Plaza
Ottawa, ON K1P 1A4

Sheridan Scott
Tel: 613-683-2302
Fax: 613-683-2323
Email: scotts@bennettjones.com

Faith and Freedom Alliance and Protection of Conscience Project

SACK GOLDBLATT MITCHELL LLP
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

Marlys Edwardh
Tel: 416-979-4380
Fax: 416-979-4430
Email: medwardh@sgmlaw.com

Daniel Sheppard
Tel: 416-979-9442
Fax: 416-979-4430
Email: dsheppard@sgmlaw.com

Counsel for the Intervener Criminal Lawyers' Association (Ontario)

GOWLING LAFLEUR HENDERSON LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlings.com

Ottawa Agent for the Intervener Criminal Lawyers' Association (Ontario)

Respondent's Argument in Reply to the Interveners

A) The Mistaken Approach to Party Liability

1. The Criminal Lawyers' Association ("CLA") argues that s. 241 is overbroad by presenting an elaborate and novel theory about party liability. Its argument, however: a) fails to recognize that those guilty of assisting suicide are principals, not parties; b) erroneously characterizes s. 241 as "unique in all the law of Canada,"[1] when it is, like many other offences, aimed at preventing a socially-undesirable result the victim might nevertheless desire; and c) wrongly seeks to make a malevolent motive a constitutionally-required feature of this offence.

2. Much of the CLA's argument is focused on the use of language in s. 241 and other offences aimed at identifying party liability, words such as "counsel," "aid" or "abet." But a "party to an offence" in s. 21 of the *Criminal Code* includes the person who "actually commits it" ("quiconque la commet réellement"),[2] that is, the principal. The fact that s. 241 uses words normally associated with party liability should not divert attention from the fact that the only person who commits an offence under s. 241 is the one who does the counselling, the aiding or the abetting. That person is, by definition, the principal.

3. Nomenclature matters here. Characterizing those committing the offences in s. 241 as principals is consistent with the treatment of other actors in similar types of offences. It undermines the CLA's attempt to portray this offence as both unusual and unfair because the "principal" (who, on their version, is the person who commits suicide) is not criminally liable. For this offence, and others like it, the person whom the CLA would characterize as a "principal" is more properly viewed as a "victim."

4. The offences in the *Criminal Code* and other federal statutes listed by the CLA show that an individual may desire certain conduct that would not attract criminal sanction for that person, but the law nevertheless forbids another from assisting the individual in achieving that goal. All of the sexual offences described by the CLA[3] may involve consensual activity by "rational and

[1] CLA's factum, para. 29
[2] *Criminal Code*, s. 21(1)(a)
[3] CLA factum, para. 25, Appendix, pp.19-22, 30-32

autonomous moral agents,"[4] but Parliament has decided to prohibit individuals from relying on such consent. In the case of sexual offences, it is because Parliament prescribes an age of consent.

5. The CLA's list is also incomplete. For example, it is not a crime to consume dangerous drugs such as heroin or methamphetamine, or to ask for assistance in consuming. However, the person who sticks the needle in the drug user's arm is guilty of trafficking by administration, if the drug user lives,[5] and manslaughter, if the drug user dies.[6]

6. The CLA's argument involves a failure to appreciate that for certain offences, Parliament has deemed the presence or absence of consent irrelevant. And even where the consenting party could be prosecuted, not all of them will be: polygamous spouses and incestuous relatives may be mature, rational and willing, but spared from prosecution. Neither our substantive criminal law, nor the *Charter*, has ever required some sort of symmetry between the liability of parties to transactions that might be seen as consensual; indeed, s. 23.1 of the *Criminal Code* makes it abundantly clear that there is no necessity that there be symmetry of liability between aiders and abetters and the persons they assist.[7]

7. There are good policy reasons to hold one side of certain transactions, and one side only, to account. For assisted suicide, the law tells potential assisters that they should not assume the desire to die is "static, unchangeable, or indeed paramount."[8] Suicide prevention is a compelling public policy goal. The potential assister is in a special relationship to the person desiring death, possibly that person's only avenue of hope. The law requires potential assisters to be unflinching in their encouragement of the desire to live, rather than confirming the suicidal person's present belief that their life is not worth living.[9]

8. The CLA also contends that s. 241 is overbroad because it fails to distinguish the "genuinely loving spouse" from the "greedy heir."[10] However, motive has long been considered

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[4] CLA factum, para. 31
[5] *Controlled Drugs and Substances Act*, ss. 2, 5
[6] *R. v. Creighton*, [1993] 3 S.C.R. 3 at 53-54, 74-75 (per McLachlin J.); *R. v. Worrall* (2009), 189 C.C.C.(3d) 79 (Ont.S.C.J.), at pp. 81-83,86-87, 93-94
[7] *Criminal Code*, s. 23.1
[8] J. A. Laing, "Assisting Suicide," 54 J. Crim. L. 106 at p.110 (1990)
[9] J.A.. Laing, at p. 110
[10] CLA's factum, paras. 32, 37

irrelevant to criminal culpability,[11] and there is no principled reason malevolent motives should be constitutionally required to prevent overbreadth. Furthermore, attempting to distinguish good motives from bad, or dealing with cases involving multiple motives, would render prosecution challenging. What the CLA demands (or says the *Charter* demands) is that the Canadian law replicate the Swiss law, which criminalizes only those assisters who act for selfish reasons.[12]

B) The Interveners and the Slippery Slope

9. To a remarkable extent, the factums of the interveners who advocate striking down the present laws demonstrate the legitimacy of concerns for the slippery slope that would ensue following any declaration of invalidity. The language they use shows the lack of any firm consensus even among themselves about the definition of the group for whom the present law is overbroad, and a misplaced confidence in doctors' ability to distinguish the vulnerable from the non-vulnerable. Absent firm consensus and manageable boundaries, the risk to vulnerable individuals will inevitably increase.

10. Underlying each factum are unstated assumptions and conflicting criteria about how a scheme of assisted suicide would operate. The HIV/Aids Legal Network ("HIV Network") contemplates a law that allows "those capable of making a voluntary decision to [die],"[13] a law that is unburdened by "bureaucratic barriers."[14] The Unitarian Council wants a law for people who are "decisionally competent, terminally ill and grievously suffering."[15] The Alliance of People with Disabilities ("Alliance") would add "people with a progressive disability" to the Unitarians' list,[16] a highly significant expansion of the group. Dying with Dignity objects to the trial judge's blanket exclusion of the clinically depressed.[17] Both the HIV Network[18] and the Farewell Foundation/AQDMD ("Farewell Foundation")[19] would not limit the class of potential assisters to doctors. The Farewell Foundation would not impose limitations such as terminal

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[11] *U.S.A. v. Dynar*, [1997] 2 S.C.R. 462 at para.79; *Lewis v. The Queen*, [1979] 2 S.C.R. 821 at pp. 831-838
[12] Shariff Report at paras. 25, 31 and attached article at p. 6930 (JR, Vol. XXVIII, pp. 6831, 6833, 6930); TJ Reasons at paras. 67, 68, 205, 368, 589-593 (JR, Vol. 1, pp. 24, 63, 113, 174-175).
[13] Legal Network factum, para. 22
[14] Legal Network factum, paras. 30-32
[15] Canadian Unitarian Council factum, paras. 18, 27
[16] Alliance factum, para. 7
[17] Dying with Dignity factum, para. 19
[18] Legal Network factum, para. 26
[19] Farewell Foundation factum, para. 28

illness, but permit it for people who are simply "weary of life;"[20] in short, a full-fledged right to assisted suicide, which lies at the bottom of the slippery slope.

11. The existence of any set of criteria will ultimately depend on the assisters' fine judgments. Dying with Dignity is confident that doctors can distinguish between: rational death-seekers and those with distorted thought processes;[21] the ambivalent and the resolute;[22] the truly consenting from the non-consenting;[23] those whose decisions are compromised by social prejudices, internalized biases, and family pressures, and those who do not face such pressures.[24] Significantly, however, the Canadian Medical Association says that the challenges that will be faced by doctors in this regard have been "understated," having regard to factors such as resource constraints and the intricacy of the patient-doctor relationship.[25] This frank and cautionary admission stands in stark contrast to the confident assertions of the interveners and the trial judge.

C) There is No Infringement of the Right to Life

12. Some interveners argue for an expansive reading of the right to life in s.7 of the *Charter*,[26] anchored in a right to autonomous decision-making about personal or private matters. In the context of refusing medical treatment, this Court and other courts have accepted that autonomy underlies s.7's liberty and security of the person interests.[27] Even if the right to life similarly evinces concern for autonomy (which is not conceded), what the interveners seek is recognition of a much more robust form of protection than has been recognized for liberty and security of the person interests.

13. The previous decisions of this Court have emphasized that the right to engage in autonomous decision-making is not absolute.[28] Section 7 does not protect all matters of personal

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[20] Farewell Foundation factum, para. 24
[21] Dying with Dignity factum, para. 10
[22] Dying with Dignity factum, para. 9
[23] Dying with Dignity factum, para.9
[24] Dying with Dignity factum, para. 10
[25] CMA factum, paras. 24 and 25
[26] Canadian Civil Liberties Association (CCLA) factum, paras.4-18; Dying with Dignity factum, para. 3
[27] *A.C. v. Manitoba (Director of Child and Family Services),* [2009] 2 S.C.R. 181; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.)
[28] *Blencoe v. British Columbia* (*Human Rights Commission*), [2000] 2 S.C.R. 307 at para.54

preference,[29] and protection is limited to private and personal decision-making.[30] As with s. 8 of the *Charter*, the notion of privacy that s. 7 guarantees is protection against state interference.[31]

14. Context matters greatly in s. 7 interpretation, and what the interveners fail to acknowledge is that the right claimed here is not the shield of protecting one's body from assault (as in the cases on which they rely), but the sword of a right to the involvement of others in suicide. This argument finds no support in the general s.7 law, the refusal of treatment cases in particular, or by strained analogies to the heroic acts of Good Samaritans and soldiers.[32]

15. The state has a compelling interest in the act of assisted suicide, as all judges in *Rodriguez* found,[33] because it is an act involving critical social interactions, not private ones. To paraphrase Wilson J. in *Operation Dismantle*,[34] unrestrained autonomy is incompatible with living in organized society. To give broad effect to the value of autonomy as part of the right to life in s. 7 would be to deny the state interest, to render the three s.7 rights indistinct, and to dismantle the necessary limits placed on autonomy by this Court.

D) The Blurring of the Rights Analysis

16. In their s.7 analysis, the Canadian Civil Liberties Association ("CCLA") frequently change the definition of the group to which they say the s. 7 right applies, such that it is difficult to determine exactly what right is sought to be protected. At times the CCLA refers to "all individuals who are physically incapable of ending their own lives;"[35] at other times to "those who, with sound mind, voluntarily want to … control the timing and manner of their death;"[36] and yet at other times to "informed, terminally ill and suffering individuals."[37] None of these articulations match the appellants' definition, and carefully defining the class alleged to be unfairly affected is critical to the overbreadth analysis.

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[29] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, at para. 86
[30] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66
[31] *R. v. Monney*, [1999] 1 S.C.R. 652, at para.44
[32] CCLA factum, para. 10
[33] *A.C. v. Manitoba*, para. 137
[34] *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at p. 488
[35] CCLA factum, para. 16.
[36] CCLA factum, para. 17.
[37] CCLA factum, para. 18.

17. The HIV Network also blurs the rights analysis, by conflating the analysis under ss. 7, 12 and 15 of the *Charter*, arguing that the alleged discriminatory effects of the prohibitions, and the alleged cruel impacts, should be considered under s. 7. The analyses of separate rights must be kept distinct. Where a specific claim is captured by another section, it should be dealt with under the analytical framework set out by this Court for that section, and not the more general framework of s.7.[38] Incorporating an equality argument into s.7, particularly as has been done by the HIV Network, improperly equates discrimination with distinction and avoids the full analysis that this Court requires in determining whether a distinction is in fact discriminatory. Furthermore, this conflation of ss.15 and 7 overlooks the fact that the appellants' claim under s.7 is not limited to those who are unable to end their lives without assistance. Similarly, any s.12 claim should be dealt with under the framework for analysis developed by this Court for that section, including a determination of whether an individual is subject to "treatment" by the state. Section 12 was raised and rejected in *Rodriguez*,[39] and is not the subject of a constitutional question in this case.

E) There is no Violation of Section 15

18. The Alliance and Dying with Dignity allege that the respondent's position is patronizing and paternalistic because it is based on the view that persons with disabilities are incapable of autonomous decision making.[40] This is a misstatement of the respondent's position. All individuals considering suicide, whether they have disabilities or not, are potentially vulnerable. The additional risk to those with disabilities lies not in their capacity to make an autonomous decision, but in society's prejudicial reaction to a request for death from such individuals. The risk is created by society's tendency to automatically support such a request as a result of an assumption that the lives of individuals with disabilities are less valuable. The protection provided by the prohibitions against assisted suicide and euthanasia is not patronizing, paternalistic or discriminatory. The prohibitions seek to protect *all* vulnerable individuals from

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[38] *Re Pacificador and Republic of the Philippines* (1993), 83 C.C.C.(3d) 210 (Ont.C.A.), at pp.226-227

[39] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, at pp. 611-612

[40] Dying with Dignity factum, para. 15; APD factum, para. 16.

those who are affected by a prejudice that the lives of persons with disabilities are less worthy of living - a prejudice which the evidence at trial showed was all too commonly held.[41]

F) Section 1 of the *Charter*

19. The interveners focus on the absolute nature of the prohibition in s. 241(b) as being unjustifiable for the inconsistently-defined group of individuals that they say are adversely impacted by the law. While to a large degree their s.1 arguments are simply repetitions of arguments made with respect to arbitrariness or gross disproportionality analysis under s. 7, certain features of them merit comment.

20. Both the CCLA[42] and the Farewell Foundation[43] suggest that something less than an absolute prohibition is workable, because there are other laws available to protect the vulnerable, such as the law of homicide in s. 222 of the *Code*. But a more relaxed law, one that would allow all those who want to die to ask for help, and allow some of those who are asked to help to decide to give it, can reasonably be expected to lead to more deaths than the current law; and many questionable ones, if we can judge by the Belgian experience. Homicide laws are not a perfectly effective deterrent. Parliament must be able to cast the net more broadly to achieve the legislative purpose, which is to keep vulnerable people alive, not just to prosecute their killers.

21. Moreover, as the Canadian Medical Association points out,[44] distinguishing the vulnerable from the non-vulnerable will remain a challenge. The hypothetical class of the non-vulnerable, subject to wide-ranging definitional challenges, may have members very close to the line who will benefit from an absolute law's protection. Parliament is entitled to a large measure of deference in concluding that only an absolute proscription will meet its objectives.

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[41] TJ Reasons at paras. 194, 811, 819, 848-853 (JR, Vol. I, p. 60 and Vol. II, pp. 29, 31, 37-38); Martin Affidavit at paras. 10, 12-14 (JR, Vol. XXVII, pp. 6817-6818); Wiebe Affidavit at paras. 17-23, 27-38 (JR, Vol. XXXI, pp. 7817-7818, 7820-7823); Frazee Report at paras. 31, 33-40 (JR, Vol. XLIV, pp. 12107-12110).
[42] CCLA factum, para. 25
[43] Farewell Foundation factum, paras. 16-17, 26-30
[44] CMA factum, paras. 24-25

All of which is respectfully submitted.

Dated at Ottawa this 11th day of September, 2014

Robert J. Frater

for Donnaree Nygard

Counsel for the Respondents, the Attorney General of Canada

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