SCC 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

- and -

ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

- and -

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INTERVENERS

FACTUM OF THE INTERVENERS,
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TABLE OF CONTENTS

PART I - STATEMENT OF FACTS

The Interveners

1. The Council of Canadians with Disabilities ("CCD") is a national umbrella organization representing persons with disabilities in Canada. It is accountable to a membership of several hundred thousand members with disabilities through its provincial and national member organizations.

2. The Canadian Association for Community Living ("CACL") is one of Canada's ten largest not-for-profit organizations, composed of ten provincial and three territorial associations, with over 400 local associations and 40,000 members.

3. They are the organized national representatives of persons with disabilities in Canada, which have a lengthy history of championing the rights of persons with disabilities with government and before Canadian courts and tribunals.

4. Included amongst their members are persons living with (1) irremediable pain; (2) shortened life expectancy; (3) lost control of bodily functions; (4) a limited range of methods available to commit suicide; (5) dependence upon others for accommodation and intimate care; and (6) an inability to express agency and autonomy through conventional means. CCD/CACL's members are fully aware and sensitive to the dangers of paternalism and to the profound losses endured by many persons with disabilities, including during the period leading up to the end of their lives.

The Record in this Proceeding

5. The interveners adopt the facts as set out in the factum of the Attorney General of Canada ("AGC").[1]

6. Contrary to assertions at paragraph 61 of the appellants' draft Reply Factum,[2] the AGC did challenge the fairness of the evidentiary constraints imposed upon it at trial.[3] It renewed its challenge before the British Columbia Court of Appeal ("BCCA").

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[1] Factum of the Respondents dated July 4, 2014 at paras. 6-60 [Respondent's Factum].
[2] Draft Reply Factum of the Appellants dated July 31, 2014 [Appellants' draft Reply Factum].
[3] Respondent's Factum, *supra* note 1 at para. 21.

Unfortunately, it failed to adduce the evidence it was prevented from introducing at trial[4] and has decided it cannot correct its error before this Court.[5] CCD/CACL raised this issue both before the BCCA[6] and in its application for leave to intervene on the appellants' leave application before this Court.[7]

7. As a result the trial record in this proceeding is incomplete and unbalanced on crucial issues including: (1) the widespread suicidal ideation initially experienced by persons with disabilities responding to their disabilities;[8] (2) relevant exploitation and abuse to which people with disabilities and the elderly are subjected;[9] (3) prejudice faced by persons with disabilities in society at large and in the medical community;[10] (4) the impact the lack of palliative care and support services has on suicidal ideation;[11] (5) the impaired agency of persons with disabilities in dependent circumstances;[12] (6) evidence of clinicians about the impact resulting from a state sanctioned paradigm shift legalizing assisted suicide and euthanasia ("AS/E");[13] and (7) the impact on the judgment of doctors of functioning in an environment of increasing health costs and budget constraints.[14]

8. CCD/CACL request that the Court be cognizant of legislative facts and take active judicial notice in order to correct deficiencies in the trial record.

9. The voices of the people with disabilities who avail themselves of AS/E in permissive jurisdictions go virtually unheard in the trial record. A notable exception is the list of "end of life concerns" relayed through assisting physicians to the Oregon Health

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[4] Reasons for Judgment of the Court of Appeal of British Columbia dated October 10, 2013 at paras. 183-198 (Finch CJBC dissenting) (Joint Appeal Record ("JR"), Vol. III, pp. 90-93) [CA Reasons].
[5] The Affidavit of Professor Etienne Montero sworn April 23, 2014 (English translation) (Respondent's Record ("RR"), Tab 3) [Montero Affidavit] was presented and accepted by this Court as new evidence. Order of the Honourable Justice Rothstein dated May 16, 2014 (Respondent's Record, Tab 1 at p. 1).
[6] British Columbia Court of Appeal, Oral Submissions of the Council of Canadians with Disabilities (CCD) and the Canadian Association for Community Living (CACL), online: The Courts of British Columbia <http://www.courts.gov.bc.ca/Court_of_Appeal/webcast/webcast.html>, 3:45:00 onwards.
[7] Notice of Motion for Intervention in the Application for Leave to Appeal (CCD and CACL) dated November 22, 2013 at paras. 4, 9.
[8] Tom Shakespeare, *Disability Rights and Wrongs* (Abingdon: Routledge, 2006) at 129 (Book of Authorities [BOA], Tab 5). as quoted in Exhibit "B": Opinion of Sheila McLean and Laura Williamson attached to Affidavit #1 of Sheila McLean filed November 7, 2011 at 51 (JR, Vol. XLVII at 13411R) [Shakespeare, "Disability Rights and Wrongs"].
[9] CA Reasons, *supra* note 4 at para. 195 (JR, Vol. III at 92).
[10] *Ibid.* at para. 195; see also *Washington v. Glucksberg*, 521 U.S. 702 (1997) at p. 732 (BOA, Tab 1) [*Glucksberg*].
[11] Shakespeare, "Disability Rights and Wrongs", *supra* note 8 at 129.
[12] Patricia S. Mann, "Meanings of Death" in Margaret P. Battin, Rosamond Rhodes, and Anita Silvers, eds., *Physician Assisted Suicide: Expanding the Debate* (New York: Routledge, 1998) at pp. 11-27 (BOA, Tab 6) [Mann, "Meanings of Death"].
[13] *Fleming v. Ireland*, [2013] IEHC_2 at paras. 57-69, aff'd SC IESC 19 (BOA, Tab 2) [*Fleming*].
[14] *Ibid.* at para. 68; Gordon DuVal, "Assisted Suicide and the Notion of Autonomy", (1995-1996) 27:1 Ottawa L. Review 30 (BOA, Tab 7) [DuVal, "Assisted Suicide and Autonomy"].

Division.[15] The most commonly cited reasons for requesting AS/E were not pain-related but rather "losing autonomy", "less able to engage in activities making life enjoyable", "loss of dignity", "losing control of bodily functions", and being a "burden on family, friends/caregivers". In evidence overlooked by the trial judge, Professor Catherine Frazee stated that these are "[c]onditions that become routine aspects of life for disabled people…[that] give rise to deep and persistent unease among persons immersed in the values of an ableist culture."[16] As Frazee and Rhonda Wiebe point out, this unease is bluntly expressed in the frequently expressed view one "would rather be dead than live with a disability."[17]

10. The affidavit of Professor Montero is the only source on the record where persons who were subsequently euthanized provide their unmediated reasons for choosing to die.

11. CCD/CACL regard the evidence of Drs. Chochinov,[18] Rodin[19] and Professor Heisel[20] concerning the "late-life sucide ideation" of persons with disabilities being situational and transitory to be balanced, credible and consistent with the "end of life concerns" collected by the Oregon Health Division and the evidence of Professor Montero. The trial judge's reasons for preferring the "empirical evidence" of Professor Battin are unconvincing.[21] These studies are based on forms completed after the fact by the physicians who have both authorized and performed AS/E. Common sense would indicate that persons potentially facing criminal and/or professional sanction would ensure these forms indicate compliance with the law.[22]

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[15] Reasons for Judgment of the British Columbia Supreme Court dated June 15, 2012 at para. 400 (JR, Vol. II at 230) [TJ Reasons].
[16] Expert Report of Professor Catherine Frazee filed October 21, 2011 at para. 35 (JR, Vol. XLIV at 12109) [Expert Report of Professor Catherine Frazee]; see also CA Reasons, *supra* note 4 at para. 86 per Finch C.J. (dissenting) and the response of the majority at para. 280 (JR, Vol. III at 64-65, 120-121).
[17] TJ Reasons, *supra* note 15 at para. 848 (JR Record Vol. II at 37-38) quoting Affidavit #1 of Rhonda Wiebe filed October 5, 2011 at para. 17 (JR, Vol. XXXI at 7817) [Wiebe Affidavit].
[18] Expert Report of Dr. Chochinov filed October 14, 2011 at para. 19 (JR, Vol. XXXV at 9282) [Expert Report of Dr. Chochinov].
[19] Expert Report of Dr. Rodin filed October 26, 2011 at 5-9 (JR, Vol. XLVI at 12854-12858) [Expert Report of Dr. Rodin].
[20] Expert Report of Dr. Heisel at paras. 26-32 (JR, Vol. XLV at 12468-12472).
[21] TJ Reasons, *supra* note 15 at paras. 621-645, 647-672 and 827-830 (JR, Vol. I at 189-190 & II at 230-231); see also *Fleming*, *supra* note 13 at paras. 25-31, 61-67.
[22] Which is not to say that the level of non-compliance on the face of these forms is not disturbing: see *Fleming*, *supra* note 13 at paras. 70-71, 94-105.

PART II - ISSUES

12. Five constitutional questions have been stated by the Chief Justice. Additionally the Court must consider whether the decision of this Court in *Rodriguez* should be followed in accordance with the doctrine of *stare decisis*.

PART III – ARGUMENT

(A) *Stare Decisis* and the Role of Parliament

13. This Court in *Rodriguez* held that the impugned section of the *Criminal Code* "is valid and desirable legislation which fulfils the government's objectives of preserving life and protecting the vulnerable."[23] It held the legislation did not violate s. 7 of the *Charter*. Without deciding it violated s. 15, the Court would have upheld it pursuant to s. 1 because: "first, the active participation by one individual in the death of another is intrinsically morally and legally wrong, and second, there is no certainty that abuses can be prevented by anything less than a complete prohibition."[24]

14. CCD/CACL submit that this appeal does not raise any new legal issue not addressed by this Court in *Rodriguez*, nor was any new evidence shown to exist which would justify this Court reversing itself.[25] On the contrary, there is evidence of (1) improvements in palliative medicine meaning virtually no one needs to die in pain,[26] (2) end-of-life interactions with health care providers which are increasingly stressed by budgetary considerations,[27] and (3) exponential growth of AS/E in permissive jurisdictions confirming that once the "ethos" changes to validate the view that the lives of persons with disabilities are not worth living, safeguards cannot contain the proliferation of AS/E.[28]

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[23] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para. 140 (BOA, Tab 3) [*Rodriguez*].
[24] *Ibid.* at para. 162.
[25] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 42, 44, (Joint Book of Authorities [JBA], Vol. 1, Tab 10) [*Bedford*].
[26] Expert Report of Dr. Chochinov, *supra* note 18; Expert Report of Dr. Rodin, *supra* note 19; The Honourable Sharon Carstairs, "Raising the Bar: A Roadmap for the Future of Palliative Care in Canada," The Senate of Canada, June 2010 (BOA, Tab 8).
[27] Expert Report of Professor Catherine Frazee, *supra* note 16; DuVal, "Assisted Suicide and Autonomy", *supra* note 14; *Fleming*, *supra* note 13; Montero Affidavit, *supra* note 5.
[28] Professor Mary Shariff, "Assisted death and the slippery slope—finding clarity amid advocacy, convergence and complexity," (2012) 19:3 Current Oncology Daily Mail (BOA, Tab 9) [Shariff, "Assisted death and the slippery slope"]; Steve Doughty, "Don't Make Our Mistake," Daily Mail, July 9, 2014 (BOA, Tab 10) [Doughty, "Don't Make Our Mistake"].

15. End of life issues have been before Parliament on an ongoing basis since *Rodriguez*. Parliament conducted public hearings and did extensive research.[29] Parliament has consistently accepted CCD/CACL's call[30] to retain the impugned *Criminal Code* sanctions, thus refraining from establishing a publicly funded program for regulating/delivering AS/E.

16. The appellants assert the courts are institutionally superior to Parliament to address the moral and social dilemmas inherent in the AS/E issue.[31] CCD/CACL respond that the considered judgment of Parliament to maintain legislation which underpins a social paradigm based on respect for the lives of all Canadians, however disabled, is entitled to great deference.[32] These interveners further respond that courts are ill equipped to overule Parliament's position on moral or ethical issues, unless that position inherently violates the *Charter*.

(B) <u>Disability Rights Under Sections 7 and 15 of the *Charter*</u>

17. Section 7 of our *Charter* recognizes that every person's life is worthy of respect. It would be contrary to Section 7 to entrench in law the presumption that any life is not worth living.[33]

18. Through history there have been societies in which suicide and euthanasia have been encouraged and condoned for the elderly and persons with disabilities.[34] This is antithetical to Canadian and *Charter* values.

19. Suicide in Canada is discouraged through public and personal intervention, and the existence of powerful societal norms.[35] Under the current law Parliament does not provide anyone with a publicly funded means of committing suicide.[36]

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[29] As set out in TJ Reasons, *supra* note 15.
[30] In the United States, where plebiscites have occurred, and in the United Kingdom, where Parliament is reviewing the issue, the organized voice of the disability rights movement is actively opposing AS/E.
[31] Appellants' draft Reply Factum, *supra* note 2 at para. 60.
[32] *Rodriguez*, *supra* note 23 at para. 189.
[33] Where the presumption is based on an enumerated or personal characteristic such a presumption would also offend section 15. See *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 54, 59 (JBA, Vol. 1, tab19). *Report of House of Lords Select Committee on Medical Ethics* (1994) at p. 48 [House of Lords Select Committee Report].
[34] Expert Report of Professor Catherine Frazee, *supra* note 16 at para. 65; Leighton and Hughes, "Notes on Eskimo Patterns of Suicide," (1955) 11:4 Southwestern Journal of Anthropology II 327 at 327-328 (BOA, Tab 11); Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide, (USA: Basic Books, 1986) c. 2, "Euthanasia: Direct Medical Killing" p. 45 (BOA, Tab 12).
[35] *Rodriguez*, *supra* note 23 at paras. 187-188.

20. The impugned criminal law sanctions represent an important component of our societal norms discouraging suicide.[37] Simply removing these criminal law sanctions would expose Canadians to intolerable danger.[38] The appellants ask this Court to remove these sanctions, but only for persons with disabilities. No one is suggesting the competent and autonomous wishes of non-disabled persons warrant their being exposed to the dangers inherent in AS/E. CCD/CACL submit Section 7 does not establish a positive right to the state's assistance in ending one's life.

21. If the lives of persons with disabilities are equally valued, they are entitled to the same protections the impugned provisions provide to non-disabled persons.[39] The decriminalization of suicide did not make it a positive right to which equality claims attach. CCD/CACL agree with McLaughlin J. (as she then was) when she stated, "... I am of the view that this is not at base a case about discrimination under s. 15 of the *Canadian Charter of Rights and Freedom*, and that to treat it as such may deflect the equality jurisprudence from the true focus of s. 15...."[40]

(C) <u>AS/E Distinct from End-of-Life Treatment</u>

22. CCD/CACL submit that there is a logical, factual, ethical and legal distinction between AS/E and end of life treatment, based on intention. AS/E are not medical treatment.[41]

23. They reject the Attorney General of Canada's concession at trial that the Canadian criminal law does not recognize a distinction between intentionally killing a person and committing an act knowing death may be a likely or foreseeable outcome. The trial judge relied upon this concession as the basis for her conclusion that there is no meaningful distinction. [42]

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[36] *Rodriguez*, *supra* note 23 at paras. 173-174, 187.
[37] TJ Reasons, *supra* note 15 at para. 1265. CCD/CACL adopt the AGC submissions at paras. 146-147, 156, 162; see *Fleming*, *supra* note 13 at para. 68
[38] TJ Reasons, *supra* note 15 at paras. 748-853
[39] *Rodriguez*, supra note 23 at paras. 173-174, 187.
[40] *Ibid.* at para. 196. CCD/CACL note that the s. 15 remedy granted by the trial judge bears no relation to membership in the group of persons who are severely limited in the means of committing suicide available to them. It sweeps in many persons whose disability imposes no relevant limitation whatsoever.
[41] Donald Boudreau and Margaret Somerville, "Euthanasia is not Medical Treatment," (2013) 106 British Medical Bulletin 45 (BOA, Tab 13); CCD/CACL adopt the AGC Response at paras. 63-75 on interjurisdictional immunity.
[42] TJ Reasons, *supra* note 15 at paras. 327-328.

24. As stated by this Court in *Rodriguez*, the distinction is fundamental to both the criminal law and maintenance of a bright line between palliation and homicide.[43] No factual or legal change has subsequently occurred which could alter this. It is logically and ethically inconsistent to conflate well-accepted rights to refuse treatment and pain management with AS/E which is employed for the precise purpose of causing death.[44]

25. Instead of treating AS/E as if it were medical treatment, which it clearly is not, CCD/CACL submit greater attention ought be paid to whether the law of battery adequately addresses protection issues when life-ending decisions are being made.[45]

(D) Autonomy to Choose Death

26. It cannot be denied that people with disabilities are vulnerable to society's "prejudice, negative stereotypes and societal indifference."[46]

27. The trial judge dismissed the evidence of leading clinicians, researchers and palliative care experts about the situational and transitory nature of suicidal ideation amongst persons with disabilities approaching the ends of their lives, but overlooked comparable evidence which was relied upon by a key witness for the appellant.[47]

28. The common law paradigm of individual autonomy and self-determination to characterize the "choice" made by a person who is dependent on others for treatment and care is problematic and misleading.[48] Because of the nature of the decision and the circumstances in which it would be made, CCD/CACL agree that "It would be next to impossible to ensure that all acts of euthanasia were truly voluntary".[49]

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[43] *Rodriguez*, *supra* note 23 at paras. 173, 215.
[44] John Keown, "A Right to Voluntary Euthanasia? Confusion in Canada in Carter," (2014) 28:1 Notre Dame J. L. Ethics & Public Policy 1 at pp. 4-17 (BOA, Tab 14) [Keown, "A Right to Voluntary Euthanasia"].
[45] Expert Report of Professor Catherine Frazee, *supra* note 16; DuVal, "Assisted Suicide and Autonomy", *supra* note 14 at p. 30.
[46] Shakespeare, "Disability Rights and Wrongs", *supra* note 8 p. 129; *Glucksberg*, *supra* note 10 at p.732 ; Expert Report of Professor Catherine Frazee, *supra* note 16; Carol Gill, "Suicide Intervention for People with Disabilities: A lesson in inequality," (1992) 8:1 Issues in Law and Medicine 37 (BOA, Tab 15).
[47] Shakespeare, "Disability Rights and Wrongs", *supra* note 8 at p. 130: "...It is normal to fear disability and death, and it is often traumatic to incur or be diagnosed with incurable impairment or terminal illness... Experience shows that the initial anger and distress at diagnosis often gives way to a more balanced and accepting attitude over time. Therefore, people who have recently developed or been diagnosed with impairment or terminal illness should be prevented from exercising the choice of assisted suicide...until they come to terms with their situation."
[48] Mann, "Meanings of Death", *supra* note 12. Just as a prisoner's capacity to give consent to experimental treatment is suspect. DuVal, "Assisted Suicide and Autonomy", *supra* note 14 at pp. 24-30; Expert Report of Professor Catherine Frazee, *supra* note 16 at paras. 37-40.
[49] House of Lords Select Committee Report, *supra* note 33 at p. 49.

29. Since autonomy, together with compassion are the cornerstones of the appellant's case, it is disturbing that both ethicists relied upon in the trial judgment endorse non-voluntary euthanasia.[50] This is consistent with a trial judgment that attaches no *Charter* significance to the autonomous death wishes of non-disabled people, or to the situational and transitory nature of the death wishes of persons with disabilities.

(E) <u>Persons with Disabilities are Vulnerable</u>

30. Suffering, physical and/or psychological, defines the human condition. It occurs along a highly subjective spectrum. As members of a caring society we feel compassion and we want to help all those who suffer.[51] The assistance sought by the appellants is a publicly funded AS/E program.[52]

31. In *Rodriguez* the Court declined to find a s. 7 or 15 *Charter* right to AS/E existed, but went on to say the impugned provisions would in any event be upheld because, *inter alia*, "The formulation of safeguards to prevent excesses has been unsatisfactory and has failed to allay fears that a relaxation of the clear standard set by the law will undermine the protection of life and will lead to abuses of the exception."[53]

32. CCD/CACL concur with Professor Montero's conclusion that an *a posteriori* control system, vague criteria in the hands of physicians with a wide range of opinion on AS/E[54] and a social ethos or philosophy based on autonomy prevailing over all other considerations mean it is "illusory to think [AS/E] can .... be narrowly circumscribed."[55]

33. There has been exponential growth in the AS/E death rates in the three comparator nations examined at trial. These rates continue to climb with no end in sight.[56]

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[50] Keown, "A Right to Voluntary Euthanasia?" at pp. 24-25, *supra* note 44.
[51] Canada's rates of palliative care and home care are a source of grave humanitarian and human rights concern. Fully 81-85% of Canadians requiring palliative care cannot get it. A humane and compassionate society would not offer its disabled citizens a "choice" between suffering and intentional death. Shakespeare, "Disability Rights and Wrongs", *supra* note 8 at p. 129 and Mann, "Meanings of Death", *supra* note 12 at p. 16.
[52] The Appellants request attention be focused on a hypothetical person with a disability who is unable to end his/her own life and who is about to die in irremediable pain.
[53] *Rodriguez*, *supra* note 23 at para. 187.
[54] In an era of an aging population and scarce health care resources, the end of life period is becoming increasingly perilous for persons with disabilities, necessitating this Court's intervention in the often fraught relations between persons with disabilities, physicians involved in providing and withdrawing their end of life care and protection agencies established by the State: *Cuthbertson v. Rasouli*, 2013 SCC 58, [2013] 3 S.C.R. 341 (BOA, Tab 4); *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 (JBA, Vol. 1, Tab 1).
[55] *Rodriguez*, *supra* note 23 at paras. 30, 69-70.
[56] Shariff, "Assisted death and the slippery slope", *supra* note 28; Doughty, "Don't Make Our Mistake", *supra* note 28.

CCD/CACL believes[57] the only possible explanation is that once inflicting death is legalized and normalized physicians will respond to pressure to address an even broader range of suffering. The suffering is further and further from the circumstances of the hypothetical person offered as justification for the *Criminal Code* exemption.

34. The rates of death in Benelux countries are truly frightening to persons with disabilities.[58] Equally concerning is their abandonment of any regard for a prerequisite of autonomy, and their documented unwillingness to enforce adherence to their law.[59] Oregon has not yet reached the same levels, probably because in the United States the prevailing ethos remains opposed to AS/E.[60] Even there, however, the average annual growth rate has been 14% per year.[61]

35. The evidence is clear that persons are being exempted from criminal law protections in these jurisdictions based on "psychological suffering" arising from "weariness with living" "refusing to impose one's deterioration on others",[62] feelings of anger and distress which are "normal" for those who "incur or [are] diagnosed with incurable impairment or terminal illness",[63] "negative images of disability and dying" which are pervasive in our society,[64] and the difficulty of distinguishing psychological suffering from depression.[65]

36. While CCD/CACL has no desire to disparage the vast majority of families who are loving and supportive of their dying family members, this Court is entitled to take judicial notice of the fact that persons with disabilities and the elderly are subject to far higher than average levels of exploitation and abuse, and they are never so vulnerable as when they are dying. CCD/CACL note as well that persons with disabilities are

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[57] This interpretation is consistent with the evidence of the Montero Affidavit, *supra* note 5, the findings of the Irish H.C. in *Fleming*, *supra* note 13.

[58] The average annual growth in the number of AS/E deaths, starting from the first complete year for which data is available is 48% for Belgium and 64% for the Netherlands. Numbers sources from TJ Reasons, supra 15 at paras. 475, 518; Doughty, "Don't Make Our Mistake", supra note 28.

[59] Montero Affidavit, supra note 5; Fleming, supra note 13 .

[60] Glucksberg, supra note 10. Plebiscites continue to be held and while most uphold the need for criminal sanctions against AS/E, a small number have followed Oregon.

[61] I. G. Finlay and R. George "Legal Physician assisted suicide in Oregon and the Netherlands—another perspective on Oregon's data" (2011) 37:3 J. Med. Ethics 171 (BOA, Tab 16) as quoted in Exhibit "C": Affidavit of Baroness Ilora Finlay filed October 19, 2011 [partial redaction] (JR, Vol. XXXVI at 9707).

[62] *Ibid.*; Montero Affidavit, *supra* note 5.

[63] Shakespeare, "Disability Rights and Wrongs", *supra* note 8 at p. 130.

[64] Shakespeare, "Disability Rights and Wrongs", *supra* note 8; Expert Report of Professor Catherine Frazee, *supra* note 16; *Glucksberg*, *supra* note 10 at p. 732.

[65] Montero Affidavit, *supra* note 5 at para. 60; *Fleming*, *supra* note 13.

susceptible to the same self-abusive reasons for considering suicide as non-disabled people.

37. We know that terminal prognoses are notoriously unreliable. [66] Acknowledging this the trial judge responded by broadening the criteria from Oregon's "terminal diseases [that] will produce death within six months" to "in a state of advanced weakening capacities with no chance of improvement."[67] That would describe virtually all persons with disabilities.[68]

38. Finally CCD/CACL are concerned about the impact striking down the impugned provisions would have on the prevailing social ethos discouraging suicide. The evidence of widespread disregard for "safeguards" and the unwillingness of oversight bodies to refer offenders for prosecution clearly demonstrates that when the state provides a publicly sactioned and financed program of AS/E, justified as compassion and packaged as "medical treatment", the lives of persons with disabilities are gravely endangered.[69]

PART IV and V – COSTS AND ORDER REQUESTED

39. CCD/CACL request to be permitted fifteen (15) minutes of oral argument.

Dated at Toronto, Ontario this 28 th day of August, 2014.

SIGNED BY:

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[66] *Fleming*, *supra* note 13 at para. 57 citing submissions to The Select Committee on the Assisted Dying for the Terminally Ill Bill.
[67] Oregon Death with Dignity Act [ODDA] s. 1.01(12) (BOA, Tab 17), cited in TJ Reasons, *supra* note 15 at paras. 393, 1393.
[68] This is but one example. CCD/CACL point out that the criteria established by the trial judge are broader in virtually all respects than those in the comparator jurisdictions, and bear no relation to the circumstances of the appellants' "hypothetical person".
[69] Montero Affidavit, *supra* note 5; *Fleming*, *supra* note 13.

PART VI - TABLE OF AUTHORITIES

CASES

1. *Cuthbertson v. Rasouli*, 2013 SCC 58, [2013] 3 S.C.R. 341
2. *Fleming v. Ireland*, [2013] IEHC 2 at paras. 3, 25-31, 57-69, 61-67, 69-70, 70-71, 94-105, 162,
3. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at para. 140, 187, 188, 189, 196
4. *Washingon v. Glucksberg*, 521 U.S. 702 (1997) at p. 732

SECONDARY SOURCES

5. Shakespeare, *Disability Rights and Wrongs* (Abingdon: Routledge, 2006) at pp. 129 - 130
6. Patricia S. Mann, "Meanings of Death" in Margaret P. Battin, Rosamond Rhodes, and Anita Silvers, eds, *Physician Assisted Suicide: Expanding the Debate* (New York: Routledge, 1998)
7. Gordon DuVal, "Assisted Suicide and the Notion of Autonomy", (1995-1996) 27:1 Ottawa L. Review
8. The Honourable Sharon Carstairs, "Raising the Bar: A Roadmap for the Future of Palliative Care in Canada," The Senate of Canada, June 2010
9. Professor Mary Shariff, "Assisted death and the slippery slope—finding clarity amid advocacy, convergence and complexity," (2012) 19:3 Current Oncology
10. Steve Doughty, "Don't Make Our Mistake," Daily Mail, July 9, 2014
11. Leighton and Hughes, "Notes on Eskimo Patterns of Suicide," (1955) 11:4 Southwestern Journal of Anthropology II 327 at 327-28
12. Robert Jay Lifton, The Nazi Doctors: Medical Killing and the Psychology of Genocide, (USA: Basic Books, 1986) c. 2, "Euthanasia : Direct Medical Killing"
13. Donald Boudreau and Margaret Somerville, "Euthanasia is not Medical Treatment," (2013) 106 British Medical Bulletin 45
14. John Keown, "A Right to Voluntary Euthanasia? Confusion in Canada in Carter," 28:1 (2014) Notre Dame J. L. Ethics & Public Policy 1

15. Carol Gill, "Suicide Intervention for People with Disabilities: A lesson in inequality," (1992) 8:1 Issues in Law and Medicine 37

16. I.G. Finlay and R. George, Legal Physician assisted suicide in Oregon and the Netherlands—another perspective on Oregon's data" (2011) 37:3 J. Med. Ethics 171

STATUTES

17. Oregon Death with Dignity Act [ODDA] s. 1.01(12)

PART VII – LEGISLATIVE PROVISIONS

THE OREGON DEATH WITH DIGNITY ACT
OREGON REVISED STATUTES

(General Provisions)

(Section 1)

Note: The division headings, subdivision headings and leadlines for 127.800 to 127.890, 127.895 and 127.897 were enacted as part of Ballot Measure 16 (1994) and were not provided by Legislative Counsel.

127.800 §1.01. Definitions. The following words and phrases, whenever used in ORS 127.800 to 127.897, have the following meanings:

(1) "Adult" means an individual who is 18 years of age or older.

(2) "Attending physician" means the physician who has primary responsibility for the care of the patient and treatment of the patient's terminal disease.

(3) "Capable" means that in the opinion of a court or in the opinion of the patient's attending physician or consulting physician, psychiatrist or psychologist, a patient has the ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available.

(4) "Consulting physician" means a physician who is qualified by specialty or experience to make a professional diagnosis and prognosis regarding the patient's disease.

(5) "Counseling" means one or more consultations as necessary between a state licensed psychiatrist or psychologist and a patient for the purpose of determining that the patient is capable and not suffering from a psychiatric or psychological disorder or depression causing impaired judgment.

(6) "Health care provider" means a person licensed, certified or otherwise authorized or permitted by the law of this state to administer health care or dispense medication in the ordinary course of business or practice of a profession, and includes a health care facility.

(7) "Informed decision" means a decision by a qualified patient, to request and obtain a prescription to end his or her life in a humane and dignified manner, that is based on an appreciation of the relevant facts and after being fully informed by the attending physician of:

(a) His or her medical diagnosis;

(b) His or her prognosis;

(c) The potential risks associated with taking the medication to be prescribed;

(d) The probable result of taking the medication to be prescribed; and

(e) The feasible alternatives, including, but not limited to, comfort care, hospice care and pain control.

(8) "Medically confirmed" means the medical opinion of the attending physician has been confirmed by a consulting physician who has examined the patient and the patient's relevant medical records.

(9) "Patient" means a person who is under the care of a physician.

(10) "Physician" means a doctor of medicine or osteopathy licensed to practice medicine by the Board of Medical Examiners for the State of Oregon.

(11) "Qualified patient" means a capable adult who is a resident of Oregon and has satisfied the requirements of ORS 127.800 to 127.897 in order to obtain a prescription for medication to end his or her life in a humane and dignified manner.

(12) "Terminal disease" means an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months. [1995 c.3 §1.01; 1999 c.423 §1]

(Written Request for Medication to End One's Life in a Humane and Dignified Manner) (Section 2)

SCC File No. 35591

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM 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

APPLICANTS

- and -

ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTs

FACTUM OF THE INTERVENERS COUNCIL OF CANADIANS WITH DISABILITIES AND THE CANADIAN ASSOCIATION FOR COMMUNITY LIVING

(Filed this day of August, 2014)

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