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Our File No.: 32926-1

December 8, 2015

BY EMAIL

Supreme Court of Canada
301, rue Wellington Street
Ottawa ON K1A 0J1

Attention: Registry

Dear Sirs/Mesdames:

Re: Carter et al. v. AGC (SCC Docket 35591)

I represent the Canadian Unitarian Council ("CUC"), an intervenor in the above-noted proceeding. I write in response to the Notice of Motion filed by the Attorney General of Canada on December 3, 2015. The CUC opposes Canada's motion.

As this Court found at paragraph 90 of its judgment, "the impact of the prohibition [on physician-assisted dying] is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assistance in dying". Since the judgment's release, the impact of the prohibition on affected individuals will only have grown more severe, in that their right to physician-assisted dying has been recognized and yet is still denied to them. For some individuals that will have meant enduring intolerable suffering when they would have chosen to die, had assistance been available. Other individuals will have suffered the mental anguish of not knowing whether assistance in dying will be available if their condition degrades such that they need it.

Canada asks this Court to extend the suspension of invalidity for another six months. The most obvious effect of such an order would be to extend the prohibition's severe impact on affected individuals for that length of time, an impact to which Canada gives shockingly little weight in its factum on the motion. While Canada concedes that there will be "an undeniable impact" (para. 20), it thereafter turns immediately to emphasizing other interests (paras. 20-22), and generally Canada focuses in its factum on the challenge of framing legislative responses to the judgment.

The CUC respectfully submits that this Court must keep uppermost in mind the impact on affected individuals that would flow from acceding to Canada's request. The question this Court must ask itself is whether there are such compelling interests requiring a further temporary extension of the prohibition that the continuation of the suffering of affected individuals is justified. The CUC submits there are not.

A primary argument Canada advances on its motion is that the scope of the declaration of invalidity is unclear and creates legal uncertainty. That argument, however, is utterly groundless. The Court made perfectly clear that "s. 241 (*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person" who meets the two conditions the Court set out (para. 127; underlining added). Such a declaration simply reflects s. 52 of the *Constitution Act, 1982*, which pronounces that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". Sections 241(b) and 14 remain in force except to the extent that they prohibit physician-assisted dying where the two conditions are met. While it should not be necessary, the Court could make that point even clearer in its judgment on Canada's motion.

Once the declaration of invalidity comes into effect, therefore, physicians who consider acceding to a request for physician-assisted dying will need to ensure that those conditions are met in order to avoid being liable for murder or assisting suicide. There is every reason to believe that physicians will undertake that analysis with the utmost conscientiousness. Indeed, without specific regulatory regimes in place, it is likely that physicians will proceed even more cautiously. Fortunately this Court did define the two conditions specifically enough to allow physicians to proceed in clear cases. They should be allowed to do so while Parliament and the provincial legislatures consider adding further regulation.

Canada submits it has acted diligently following the release of the judgment but, respectfully, Canada's actions have not nearly reflected the urgency merited. For the most part that is the responsibility of the previous government. The CUC hopes the new government will move more expeditiously, but the government comes before this Court with very little evidence indicating that it will. In particular, it appears to have no new and well-defined plan for developing a regulatory regime. Rather, the Attorney General has just been vaguely mandated to "lead a process, supported by the Minister of Health, to work with the provinces and territories to respond to the Supreme Court of Canada decision regarding physician-assisted death" (Morency Affidavit, paras. 19-20).

The CUC respectfully submits that patients who would meet the two conditions for physician-assisted dying should not be required to endure intolerable suffering further while they wait for Parliament to act. This Court should ensure that the prohibition will not stand in the way of accessing such assistance after February 6, 2016. The CUC submits that the Court should do so by denying Canada's motion, but if the Court is inclined to grant a brief further extension, then at the very least it should provide for a constitutional exemption process for the period of that extension.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Tim Dickson