No. S165851
Vancouver Registry

In the Supreme Court of British Columbia

Between

JULIA LAMB and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

Defendant

RESPONSE TO CIVIL CLAIM

Filed by: The Defendant, the Attorney General of Canada

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1—Defendant's Response to Facts

1. The facts alleged in paragraphs 3, 5, 39 (in part), 42, 44, 45, 46, 47, 49-64 (in part), of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 4, 43, 65 and 66 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41and 48 of Part 1 of the notice of civil claim are outside the knowledge of the defendant.

Division 2—Defendant's Version of Facts and Additional Facts

The *Carter* Case

4. *Carter v. Canada (Attorney General)*, 2015 SCC 5, rev'g 2013 BCCA 435; 2012 BCSC 886 ("*Carter*") was a case about whether the total criminal prohibition on assistance in dying was consistent with the *Charter of Rights and Freedoms* (the "*Charter*").

5. In response to paragraph 39 of the Notice of Civil Claim, the Defendant admits that the British Columbia Civil Liberties Association ("BCCLA") was an institutional Plaintiff in *Carter*, however, the BCCLA was granted public interest standing as a co-plaintiff, in support of plaintiffs who already had private standing.

6. In response to paragraph 43 of the Notice of Civil Claim, the Defendant denies the Plaintiffs' characterization of the parties in the *Carter* action. The only plaintiff in the *Carter* action who relied on his or her own medical condition was Gloria Taylor, who was terminally ill. The other plaintiffs were the adult daughter and son-in-law of Kay Carter (Lee Carter and Hollis Johnson), the BCCLA and a family physician who stated that he would be willing to assist patients to die should the prohibition be lifted (Dr. William Shoichet). The trial judge limited the declaration of invalidity to persons who were "in a state of advanced weakening capacities with no chance of improvement."

7. In response to paragraph 4 of the Notice of Civil Claim, the Supreme Court of Canada in *Carter v. Canada (A.G.),* 2015 SCC 5 did not define "grievous and irremediable medical condition". Paragraph 4 reflects the Plaintiffs' definition of "grievous and irremediable".

8. In response to the Plaintiffs' rendition of the facts in *Carter* as a whole from paragraphs 49 – 64 of the Notice of Civil Claim, the Defendant admits that the trial judge made these findings of fact. However, these findings are specific to the context in which they were made, which was a challenge to the absolute prohibition on physician-assisted dying. The Defendant does not admit that these findings remain true today or that they are applicable in the present case.

9. In further response to the Plaintiffs' rendition of the facts in *Carter* at paragraphs 49 – 64 of the Notice of Civil Claim, the Supreme Court of Canada restricted its declaration to the "factual circumstances of this case". The Court expressly stated that it made no pronouncement on other factual situations where physician-assisted dying may be sought.[1]

10. The Supreme Court of Canada's reasons in *Carter* primarily focused on the factual circumstances of Gloria Taylor, who was dying of amyotrophic lateral sclerosis (ALS). The Court found that the former law violated the s. 7 rights of "Ms. Taylor and of persons in her position" and "people like Ms. Taylor".[2]

11. The Court observed that s. 7 of the *Charter* is rooted in a profound respect for the value of human life, but also encompasses life, liberty, and security of the person during the passage to death. The Court further highlighted the role that autonomy and dignity play at the "end of life".[3]

12. The Court accepted the trial judge's finding that an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy, and that the

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[1] *Carter v. Canada (Attorney General)*, 2015 SCC 5, rev'g 2013 BCCA 435; 2012 BCSC 886 ("*Carter*") at para. 127.
[2] *Ibid.* at paras. 42, 56, 65-66, 70, 86 and 126.
[3] *Ibid.* at para. 63.

law allows "persons in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment".[4]

13. The Court found that an individual's choice about the end of her life is entitled to respect "in certain circumstances".[5]

Canada's Response to *Carter*

14. The Government of Canada's response to the *Carter* decision involved a comprehensive consultation process. This process began on July 17, 2015 when the Government appointed an External Panel on Options for a Legislative Response to *Carter v. Canada* (the "External Panel"). Throughout its mandate, the External Panel consulted extensively with Canadians, experts and stakeholders.

15. The consultation process continued with the establishment of a Special Joint Committee ("SJC") on Physician-Assisted Dying on December 11, 2015. The SJC's mandate included reviewing the report of the External Panel and other recent consultation activities, consulting with Canadians and stakeholders, and making recommendations on the framework of a federal response. The SJC's final report was tabled in Parliament on February 25, 2016.

16. Following this consultation process, the Government introduced Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, in the House of Commons on April 14, 2016.

17. Parliament's consideration of Bill C-14 was extensive both in terms of the debate it received in the House of Commons and the Senate, as well as in terms of the comprehensive study undertaken by the House Standing Committee on Justice and Human Rights and the Senate Committee on Legal and Constitutional Affairs.

18. Second Reading debate on Bill C-14 commenced in the House of Commons on April 22, 2016. At that time, the Minister of Justice tabled in the House of Commons an explanatory document entitled, "Legislative Background: Medical Assistance in Dying (Bill C-14)". An addendum to this document was tabled on June 16, 2016 that explained in more detail Bill C-14's requirement that natural death has become reasonably foreseeable. The Bill passed Second Reading and was referred to the House Standing Committee on Justice and Human Rights on May 4, 2016.

19. The Committee held nine meetings, each consisting of multiple panels of witnesses. The Committee received over 200 briefs and heard from over 70 witnesses reflecting a broad and diverse range of affected interests, such as legal experts (in criminal, constitutional, and health law); medical professional organizations (physicians, nurses, pharmacists, psychiatrists); specialists in mental health, pediatrics, and palliative care, as well as Indigenous physicians, rural physicians, and bioethicists; medical regulators; experts in foreign medical assistance in dying regimes; organizations supportive of and opposed to medical assistance in dying,

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[4] *Ibid.* at paras. 63, 64 and 66.
[5] *Ibid.* at para. 63.

including the BCCLA; national and other disability rights groups; religious groups; and interested individuals.

20. The House Standing Committee on Justice and Human Rights considered over 100 amendments during its clause by clause study of the Bill. It reported Bill C-14 back to the House of Commons on May 12, 2016, with a substantial number of amendments.

21. The Report Stage of Bill C-14 in the House of Commons commenced on May 17, 2016 and was completed on May 30, 2016. During the Report Stage, additional amendments were considered but none were adopted. Bill C-14 passed Third Reading on May 31, 2016 and was sent to the Senate that same day.

22. Bill C-14 received first reading in the Senate on May 31, 2016. On June 1, 2016, the Senate met as a Committee of the Whole and heard from the Ministers of Justice and of Health, who testified and answered Senators' questions regarding Bill C-14.

23. Second Reading Debate in the Senate commenced on June 2, 2016 and concluded on June 3, 2016. The Bill was then referred to the Senate Standing Committee on Legal and Constitutional Affairs.

24. The Senate Standing Committee on Legal and Constitutional Affairs had already conducted a pre-study of Bill C-14 between May 4, 2016 and May 17, 2016, while the Bill was being considered by the House of Commons. During its pre-study, the Committee held five days of meetings, each with multiple panels of witnesses reflecting the same diversity of views and interests as those heard by the House Justice and Human Rights Committee. After having heard from 66 witnesses, the Committee released its pre-study report on May 17, 2016, recommending ten amendments to the legislation supported either unanimously or by a majority of Committee members. The Senate Committee report also contained eight minority recommendations and two observations.

25. Once Bill C-14 was formally referred to the Senate Standing Committee on Legal and Constitutional Affairs, the Committee held further study on Bill C-14 on June 6 and 7, 2016, hearing from seven additional witnesses. It reported the Bill back to the Senate on June 7 without amendment, as it was agreed that amendments would be considered and debated and by the Senate Chamber as a whole, given the complex and personal nature of the subject matter.

26. Third Reading Debate on Bill C-14 in the Senate began on June 8, 2016 and took place over six days. The Bill was further amended by the Senate and passed on June 15, 2016. On that date, a message was sent to the House of Commons informing it of the Senate's amendments.

27. The following day, June 16, 2016, the House of Commons debated and passed a motion to send a message to the Senate to indicate agreement with some of the Senate's amendments, proposed changes to other amendments, and to express its disagreement with others.

28. In response to the Senate's amendments, the House of Commons voted specifically on the issue of removing the definition of "grievous and irremediable medical condition" from s. 241.2(2) and inserting, instead, the exact language of the Supreme Court of Canada's remedy in the

Carter decision (para. 127). The House overwhelmingly voted against this change by a vote of 240 - 54.

29. On June 17, 2016, the Senate debated and passed a motion to concur with the House of Commons, resulting in Parliament's adoption of Bill C-14.

30. Bill C-14 received Royal Assent that same day.

Purpose and Scope of Section 241.2 of the *Criminal Code*

31. In newly enacted s. 241.2 of the *Criminal Code*, Parliament has recognized the autonomy of individuals who are grievously and irremediably ill and suffering unbearably and who wish to seek and obtain medical assistance in dying. It facilitates their choice by creating a series of exemptions to otherwise applicable criminal offences, so that physicians and nurse practitioners can lawfully provide assistance to die to patients who are suffering and whose death has become reasonably foreseeable.

32. Among other criteria, individuals are eligible if they have a "grievous and irremediable medical condition", which is defined in subsection 241.2(2) of the *Criminal Code* as meaning that:

> (a) they have a serious and incurable illness, disease or disability;
> (b) they are in an advanced state of irreversible decline in capability;
> (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
> (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

33. The preamble to Bill C-14 describes a variety of legislative objectives affecting eligibility criteria, including: protecting vulnerable individuals from being induced to end their lives in moments of weakness; recognizing the significant and continuing public health issue of suicide, which affects individuals, families and communities; and affirming the equal and inherent value of every person's life while simultaneously avoiding encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled. The preamble also includes a recognition of the importance of access to palliative care.

34. Eligibility for medical assistance in dying is not limited to those who are dying from a fatal or "terminal" disease. No specific prognosis is necessary and death need not be imminent nor expected within a prescribed number of months. The legislation allows those who are suffering intolerably and whose natural death has become reasonably foreseeable the choice of a medically assisted death.

35. In response to paragraph 66 of the Notice of Civil Claim, no medical condition is excluded from the legislation. Every person's medical circumstances are unique. The criterion of "natural death has become reasonably foreseeable" provides flexibility to physicians and nurse practitioners when assessing the overall medical circumstances of a patient. The legislation

permits physicians and nurse practitioners to take into account the entirety of a person's medical circumstances – including factors such as overall frailty, advanced age, the combined effect of multiple conditions none of which alone is fatal, or the impact of a weakened immune system on the risk of death – in determining whether death has become reasonably foreseeable.

36. To have become "reasonably foreseeable," a natural death must be reasonably anticipated to occur by one of a range of predictable ways, and within a period of time that is not too remote.

37. The eligibility criteria are intended to be applied in a manner consistent with established medical practices and other laws that protect a patient's right to refuse treatment or demand that it be withdrawn, including the *Criminal Code*, which prohibits assault.

Assisted Dying Laws in Other Jurisdictions

38. In response to paragraph 65 of the Notice of Civil Claim, the Defendant denies that "a significant number of countries now authorize medical assistance in dying" to the extent this is meant to suggest the practice is common. Legislation governing the practice remains exceptional. At present, only eight foreign jurisdictions have legal rules authorizing the provision of some form of medical assistance in dying: the states of Oregon, Washington, Vermont and California in the United States of America, and the countries of Colombia, Belgium, the Netherlands, and Luxembourg. Other jurisdictions have recently considered assisted dying laws and have rejected them.

39. Five of these jurisdictions (Oregon, Washington, Vermont, California and Colombia) limit eligibility to "terminal patients" (or patients with "terminal illnesses") who are dying either in the short term or who are expected to die within six months.

40. Three of these jurisdictions (Belgium, the Netherlands and Luxembourg) permit access to patients who are suffering "intolerably" or "unbearably", whether physically or psychologically, from a serious and incurable medical condition, where there is no prospect of improvement. Proximity to death is not a legislative requirement for access to medical assistance in dying in these countries.

41. In Switzerland, it is not a crime to assist someone to die by suicide for unselfish motives. Private organizations provide assisted suicide services to individuals according to their own policies. There is no specific law regulating how and to whom the assistance can be provided or what types of safeguards are required. Individuals have been helped to die by suicide in Switzerland under circumstances where their deaths were not reasonably foreseeable.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The Defendant opposes the granting of any of the relief sought in Part 2 of the Notice of Civil Claim.

2. The Defendant seeks an order dismissing this proceeding, with costs to the Defendant.

3. In the alternative, in the event that any part of s. 241.2 of the *Criminal Code* is found to be inconsistent with the *Charter*, the Defendant says that a suspension of effect of a declaration of constitutional invalidity or inapplicability should be granted to permit Parliament sufficient time and flexibility to amend the legislation as appropriate.

Part 3: LEGAL BASIS

1. Canada relies on:

    a. The *Constitution Act*, 1867;
    b. The *Constitution Act*, 1982;
    c. The *Canadian Charter of Rights and Freedoms*, particularly ss. 1, 7, 15, 24;
    d. The *Criminal Code*, particularly ss. 14, 227, 241, 241.1. 241.2, 241.3, 241.4;
    e. Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*; and
    f. The *Crown Liability and Proceedings Act*, R.S. C. 1985, c. C-50, particularly s. 24 and the *Regulations* to that *Act*.

The BCCLA's Standing

2. While Canada does not challenge the BCCLA's standing in this matter, the BCCLA's standing should be, as it was in *Carter*, limited to supporting the individual Plaintiff and people like her.

3. This approach serves the objectives of public interest standing by preserving the possibility of advancing the litigation should the Plaintiff become too ill to participate while ensuring that the litigation remains grounded in the concrete factual circumstances of individuals who are most directly affected by the legislation.

Section 241.2 Does Not Infringe s. 7 of the *Charter*

4. The rights to life, liberty and security of the person under s. 7 of the *Charter* are not absolute. Section 7 protects only against deprivations of those interests that are not in accordance with the principles of fundamental justice. Any deprivation of life, liberty or security of the person that may be occasioned by s. 241.2 respects the applicable principles of fundamental justice.

5. Section 241.2 is not overbroad. An overbroad law is one that impairs rights in a way that generally supports the object of the law but goes too far by denying the rights of some individuals in a way that bears no relation to the object. The question is not whether Parliament has chosen the least restrictive means but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature.

6. The objectives of s. 241.2 include supporting suicide prevention and discouraging suicide to the extent feasible under the criminal law. They also include affirming the inherent and equal value of every person's life without regard to age, illness or disability and protecting those who may be vulnerable to persuasion or influence to take their lives in a moment of weakness or

suffering. It cannot be said that prohibiting assisted death for those whose natural death has not become reasonably foreseeable has "no connection" to those objectives.

7. Section 241.2 is not grossly disproportionate. Gross disproportionality involves assessing the effects of a law on rights against the object of the law, taken at face value. The standard is high. A grossly disproportionate law is one whose impact on life, liberty or security is completely out of sync with the object of the law.

8. The ineligibility of some individuals who wish to die but who do not come within the exceptions created by this legislation must be weighed against the objectives of the legislation. The effects of s. 241.2 cannot reasonably be said to be "totally out of sync" with these objectives, which include protecting persons from involuntary or transitory wishes to die, including those who may be induced to seek a medically assisted death while experiencing vulnerability.

Section 241.2 Does Not Infringe s. 15 of the *Charter*

9. To the extent that s. 241.2 gives rise to distinctions on the ground of disability or age, such distinctions are not discriminatory because they respond to the needs and capacities of younger persons and persons with disabilities. The purpose of the legislation is to allow those who are in decline and whose natural death has become reasonably foreseeable the choice of a medically assisted death. It does not provide a general right to medically assisted death as a response to suffering in life. Nor does anything in the *Carter* decision provide for such a right.

10. The legislation is intended to support rather than weaken suicide prevention initiatives to the extent feasible under the criminal law. It does so by maintaining strict limits in relation to those who would participate in the death of another person while recognizing that for individuals who wish to die but whose natural death is not reasonably foreseeable, suicide prevention is better achieved through the offer of help and treatment rather than the threat of criminal sanction.

11. Section 241.2 corresponds with the needs and capacities of persons with disabilities and younger persons in the same way that it corresponds with the needs and capacities of the able-bodied and older persons. It recognizes that every person who contemplates suicide is potentially vulnerable, and by protecting vulnerable members of each of those respective groups who might be induced in moments of weakness to end their lives.

12. Further, the legislation also responds to the needs and capacities of individuals with disabilities by affirming the equal and inherent value of their lives and countering negative perceptions of the quality of their lives.

13. Finally, s. 241.2 responds to the needs and capacities of younger persons by providing an individualized and flexible eligibility criterion that any competent adult may satisfy, depending on their medical circumstances.

Section 241.2 is a Reasonable Limit Under s. 1 of the *Charter*

14. In the alternative, s. 241.2 is a reasonable limit under s. 1 of the *Charter*. Each of the objectives of s. 241.2 is pressing and substantial, and restricting medical assistance in dying to those whose natural death has become reasonably foreseeable is rationally connected to those objectives.

15. The eligibility criteria in s. 241.2 are minimally impairing and reasonably tailored to the particular objectives of the legislation. In cases such as this one that involve questions about complex human behaviour, scientific proof of the potential harms that the government seeks to avoid is not required. Rather, the government must show that it had a reasonable basis for concluding that the perceived harms exist (i.e. a reasoned apprehension of harm) and that the means it has chosen to address those harm are minimally impairing and proportionate in terms of their impact on *Charter* rights.

16. Parliament gave extensive consideration to this legislation, consulting with a wide variety of experts and individuals, including the plaintiffs. The experience in foreign jurisdictions was also considered. There was comprehensive review of the policy objectives in light of the interests of those who are suffering and wish to obtain medical assistance in dying. Alternative wordings of the various clauses of the legislation were considered and both the House of Commons and the Senate extensively debated the terms of the legislation.

17. Recognizing the different and greater risks of permitting assistance in dying for those whose natural death is not reasonably foreseeable, and based on the experience in jurisdictions with broad eligibility, Parliament had a reasonable basis for concluding that a broader approach would frustrate its objectives of affirming the equal value and dignity of all human lives regardless of age, state of health or disability, supporting rather than undermining suicide-prevention, and protecting vulnerable individuals who might be induced in a moment of weakness – by another person or by circumstance – to end their lives. The resulting legislation represents a constitutionally compliant way of attaining a variety of important objectives.

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Dated: July 27, 2016

Signature of
☐ defendant ☒ lawyer for defendant(s)
Jasvinder S. Basran,
Regional Director General
Per: Jan Brongers and BJ Wray
Department of Justice
British Columbia Regional Office

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

THIS RESPONSE TO CIVIL CLAIM is prepared and served by Jasvinder S. Basran, Regional Director General, British Columbia Regional Office, Department of Justice (Canada), whose place of business and address for service is the Department of Justice, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: 604-666-0110; 604-666-4304, Facsimile: 604-666-1585, Attention: Jan Brongers and BJ Wray.