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APPLICANTS' MEMORANDUM OF ARGUMENT

PART I. OVERVIEW AND STATEMENT OF FACTS

1. In August 2011, the British Columbia Supreme Court was advised that all parties consented to Gloria Taylor being added as a plaintiff. Ms. Taylor had amyotrophic lateral sclerosis ("ALS"). The trial judge expedited the process and set a four week summary trial to commence November 14, 2011 given the urgency of Ms. Taylor's condition.[1]

2. Ms. Taylor attested that she wanted the right to die with dignity so she would not become trapped in an unbearable dying process as the suffering and indignity of her disease progressed. She deposed that she believed she should be able to make the choice about how much suffering to endure, based on her own beliefs and values.[2]

3. On June 15, 2012, the trial judge granted Ms. Taylor a constitutional exemption that would have allowed her to avail herself of a physician-assisted death.[3]

4. On August 10, 2012, Madam Justice Neilson, in the Court of Appeal Chambers, dismissed the Attorney General of Canada's application for a stay of Ms. Taylor's constitutional exemption.[4]

5. In the result, the urgency appeared to be allayed and the appeal proceeded on regular timelines according to the Court of Appeal Rules.[5]

6. Ms. Taylor died on October 4, 2012.[6]

7. However, as the case progressed, a new urgency revealed itself – that is four of the nine lay affiants who had bravely shared their stories about why they wished to have the option of a

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[1] Affidavit of Grace Pastine made October 24, 2013 ("Pastine Affidavit"), para. 4
[2] Pastine Affidavit, para. 6, Ex. A
[3] Pastine Affidavit, para. 7
[4] Pastine Affidavit, para. 8; *Carter v. Canada (Attorney General)*, 2012 BCCA 336
[5] Pastine Affidavit, para. 9
[6] Pastine Affidavit, para. 10

physician-assisted death died in circumstances which they sought to avoid by participating in this litigation or at their own instance in order to avoid such circumstances.[7]

8. Two of the remaining five witnesses have attested that they may be obliged to end their lives prior to final judgment of this Court should leave be granted and without the assistance of a physician, before they would otherwise wish to due to their declining condition and of the resulting psychological distress that this impending reality imposes on them.[8]

9. Witness Leslie Laforest has deposed:

> 12. As I testified in Affidavit #1, it is my resolved intent to die with dignity, regardless of whether the law aids or hinders me in my efforts to do so. I continue to plan a means to make that happen, which means I will need to act while I am still able to act alone as I will not put my husband and daughter at risk. In order to do what I must under the present law, I will have to end my life while still relatively able-bodied and capable, notwithstanding that the time will likely be well before I might otherwise have found my suffering intolerable. If physician-assisted dying was legal, my measure for my final breath would be my level of suffering; as it is not, the measure must be my ability to act.
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> 13. Further, as a result of the law as it stands, my quality of life is eroded, impacting my ability to enjoy the limited time I have left. The psychological impact this has is sometimes unbearable, made worse by having to plan a means of my death and having to contemplate the timing, my ability, the agony of how all of this will traumatize my family, and above all, ensuring they will not be held responsible. This means I will have to die alone, which no person should ever have to do.
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> 14. My life now is a constant state of agitation, worried about an unexpected change in the trajectory of my illness, that it may interfere with my plans to die as I wish. What little space that is not occupied by the fear of my illness, is filled with fear of my circumstances of death. That I will have to die without medical assistance and without my family in my presence is a horrifying spectre, leaving me vulnerable and terribly alone through such a frightening journey.[9]

10. Witness Elayne Shapray has deposed:

> 9. My MS now impacts my quality of life to the point where I no longer consider my life worth living unless I also possess the means to leave it at the time of my choosing.

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[7] Pastine Affidavit, paras. 11-32

[8] Affidavit of Elayne Shapray made October 23, 2013 ("Shapray Affidavit"); Affidavit of Leslie Laforest made October 24, 2013 ("Laforest Affidavit")

[9] Laforest Affidavit, paras. 12-14

...

> 11. I know that the actual manner in which I take my life will be wrenching to both those that I care for and those that care for me. My choices for bringing about my death unassisted are severely limited - self-starvation, over-medication or some violent self-inflicted injury. I continue to suffer from the agonizing reality that if I wait too long, I will, by virtue of the increasing impact of MS, forfeit the ability to take my own life. The current state of the law deprives me of any other option; I will have to act while I can.
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> 12. Although I am a wife, mother of two children and grandmother of four children, and would, for obvious reasons, prefer a dignified death surrounded by my loved ones and many friends, my disease has now progressed to the point where I have resolved, given the absence of a legal right to seek a physician-assisted death, that I must take my own life without assistance while I remain able. This means that I will die unassisted at an earlier point in time than I would die if physician-assisted dying was available to me.
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> 13. This litigation will determine whether I have a constitutional right to legally seek a physician's assistance in dying. For obvious reasons, the answer to that question is of critical importance to me and, equally obviously, the answer will only be of value to me if determined in a timely manner.[10]

11. There are many other individuals who seek support to end their lives from Dying with Dignity in comparable circumstances. In the absence of lawful physician-assisted dying, these individuals are forced to resort to macabre methods involving "exit bags" and helium or dubious drugs.[11]

PART II. STATEMENT OF QUESTION IN ISSUE

12. Whether the requested orders should be made and directions given expediting remaining steps in the Application for Leave to Appeal as well as the Appeal if leave to appeal is granted.

PART III. STATEMENT OF ARGUMENT

Extreme Urgency

13. This is a matter of extreme urgency in which the fate of a number of suffering, grievously and irremediably ill individuals hangs in the balance. If the relief requested is not granted and Orders are not made expediting all proceedings before this Court, lives will be jeopardized

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[10] Shapray Affidavit, paras. 9, 11-13
[11] Affidavit #1 of Wanda Morris made August 29, 2011, paras. 33, 35-42, 46

simply as a result of the passage of time and the expected progression of the diseases that affect this population. Fairness for all parties and for all people in Canada favour, if not dictate, the granting of the requested relief.

14. In these circumstances, justice delayed will be justice denied for many.

15. All parties to these proceedings are represented by experienced counsel who are intimately familiar with all issues of fact and law that the proceedings give rise to and are fully capable of dealing with this "real time" litigation on an urgent basis.

The Effectual Execution and Working of the *Supreme Court Act*

16. Section 56 of the *Supreme Court Act* and Rules 3, 4 and 6 of the *Rules of the Supreme Court of Canada* empower the Chief Justice or the senior puisne judge present to grant the relief sought in this motion.

17. A judge of this Court also has the implied and inherent power to grant the requested orders and directions flowing from this Court's power to control its own processes in furtherance of the proper administration of justice.

18. In exercising this Court's inherent powers and in interpreting its enabling statute and Rules, this Court has followed a broad and flexible approach in order to ensure that the substantive rights of parties are not lost or prejudiced as a result of delays associated with the disposition of proceedings that will be brought before the Court.[12]

19. In *RJR-MacDonald*,[13] this Court specifically held that the Rules of this Court and the provision of the *Supreme Court Act* that authorizes them, should be interpreted broadly to "facilitate the bringing of cases" before the Court "for the effectual execution and working of this Act."

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[12] *Re Olympic Towers Ltd.*, [1979] 1 S.C.R. 883, p. 885
[13] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

Judicial Discretion

20. While time periods for the various steps in the leave to appeal and appeal processes are governed by the Rules and the *Supreme Court Act*, Rules 3, 4 and 6 authorize the abridgement of time periods. Those Rules provide as follows:

> **3.** (1) Whenever these Rules contain no provision for exercising a right or procedure, the Court, a judge or the Registrar may adopt any procedure that is not inconsistent with these Rules or the Act.
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> (2) A party may, on motion to a judge or the Registrar, request directions as to the procedure referred to in subrule (1).
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> **4.** Whenever these Rules provide that the Court, a judge or the Registrar may make an order or direction, the Court, the judge or the Registrar, as the case may be, may impose any terms and conditions in the order or direction that the Court, the judge or the Registrar considers appropriate.
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> ...
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> **6.** (1) The Court, a judge or unless these Rules provide otherwise, the Registrar may, on motion or on their own initiative, extend or abridge a period provided for by these Rules.
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> (2) The affidavit in support of a motion for an extension or abridgement of time shall set out the reason for the delay or urgency, as the case may be.

21. The decisions of this Court have interpreted these Rules broadly and applied them flexibly so as to facilitate this Court's supervisory role and ensure that the Court is able to abridge time periods, where necessary, to safeguard substantive rights.

22. For example, in *Reekie v. Messervey*,[14] this Court held that the predecessor to Rule 3 (formerly Rule 7) authorized this Court to reconsider a decision made on an application for leave to appeal notwithstanding the proscription in Rule 51(12) that "[t]here shall be no re-hearing on an application for leave or a motion" and despite the absence of a provision in the Rules (or the Act) contemplating reversal of a decision that, on reconsideration, was found to be wrong. In granting the rehearing, Sopinka J. observed, in part, that:

> In my opinion, it would be extraordinary if the Court were powerless to remedy the injustice that is conceded as present in this case... As a general principle, the

[14] *Reekie v. Messervey*, [1990] 1 S.C.R. 219

> rules of procedure should be the servant of substantive rights and not the master. I believe that this is the underlying rationale of Rule 7. (emphasis added)

23. Under Rule 6, this Court has been extremely flexible in accommodating litigants by abridging the time periods prescribed by the Rules in urgent circumstances or matters of extreme importance.

24. In *Tremblay v. Daigle*,[15] for example, the time periods associated with leave to appeal and appeal proceedings before this Court were abridged. In that case, the Quebec Court of Appeal delivered its majority judgment on July 26, 1989 upholding an injunction issued in the Court below. Mr. Daigle applied for leave to appeal to this Court the following day, on July 27. The application was granted by a panel of five judges of the Court less than a week later, on August 1. Despite the short notice, intervener status was granted to several interested parties. The appeal was heard one week later before the full Court, on August 8 and the Court delivered a unanimous judgment at the end of the hearing allowing the appeal and stating that the Court's reasons for decision would be rendered at a later date. Those reasons were delivered several months later on November 16, 1989.

25. The caselaw is replete with cases where time periods have also been shortened for instance:

a. *Gould v. the Queen*,[16] a case involving prisoners' right to vote, in which the Court granted leave, heard and dismissed the appeal all within five days of the Court of Appeal's decision;

b. in *R. v. A*,[17] a witness resisted a subpoena to give evidence in a criminal trial out of fear for his security and that of his parents. His request for additional protection was refused by the Court of Appeal. Leave to appeal was sought on January 10, 1990 and granted by this Court one day later. The appeal was heard on February 2, 1990 and judgment delivered on February 15, 1990;

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[15] *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, pp. 535-536, 537-539
[16] *Gould v. A.G. (Canada)*, [1984] 2 S.C.R. 124
[17] *R. v. A*, [1990] 1 S.C.R. 992

c. in *Sauvé v. Canada (Chief Electoral Officer)*,[18] this Court considered and dismissed a leave application within three days; and

d. in *Harper v. Canada (Attorney General)*,[19] an election case, an application for leave to appeal together with a motion for a stay of execution and motion to expedite the leave application, were filed on October 30, 2000. On November 10, leave to appeal was granted and this Court stayed the injunction order that had declared the impugned federal legislation invalid.

26. Where reasons have been granted refusing such relief, this Court has found that the requisite urgency was not made out or has expressed a serious concern that justice could not be adequately dispensed within the requested abridged time frames.[20]

27. These proceedings were expedited at the trial level because of the recognition of the urgent circumstances facing Ms. Taylor. While Ms. Taylor is now deceased, the urgent circumstances of all those other individuals represented by the BC Civil Liberties Association in these proceedings should not be ignored, and the circumstances outlined by the lay witnesses who have so bravely participated in this case cannot be ignored.

28. The question of whether the requested orders and directions should be granted involves the fair and reasonable exercise of judicial discretion. Simply put, a Justice of this Court has the power to grant the requested relief and, in the circumstances of this case which include suffering worse than death and life itself, fairness and justice mandate that the relief sought be granted.

PARTS IV AND V. COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

29. The Applicants seek costs including special costs and request that this motion be granted and that an Order be made in the form set out in the Notice of Motion.

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[18] *Sauvé v. Canada (Chief Electoral Officer)*, [1997] S.C.C.A. No. 264
[19] *Harper v. Canada (A.G.)*, [2000] 2 S.C.R. 764
[20] *Haig v. Canada (Chief Electoral Officer)*, [1992] S.C.C.A. No. 438; *National Party of Canada v. Canadian Broadcasting Corp.*, [1993] 3 S.C.R. 651, para. 1; *Thomson Newspapers Co (c.o.b. Globe and Mail) v. Canada (Attorney General)* (1996) 146 D.L.R. (4th) 191 (SCC); *R. v. Pilarinos*, [2001] S.C.C.A. No. 497

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, the 25th day of October, 2013.

as agent for

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