

S.C.C. FILE NO. _____

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

APPLICANTS
(Respondents/Cross-Appellants)

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant/Cross-Respondent)

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Appellant)

**AFFIDAVIT OF GRACE PASTINE IN SUPPORT OF MOTION TO
EXPEDITE PROCESS**

I, **GRACE PASTINE**, lawyer, of 900 Helmcken Street, in the City of Vancouver, Province of British Columbia, AFFIRM THAT:

1. I am the litigation director of the B.C. Civil Liberties Association and as such have personal knowledge of the facts and matters hereinafter deposed to, save and except where same are stated to be made on information and belief, and where so stated, I verily believe them to be true.

2. The B.C. Civil Liberties Association (the "BCCLA") is a non-profit, non-partisan, unaffiliated advocacy group. The objects of the BCCLA include the promotion, defence,

sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. The BCCLA is involved as a co-Applicant in this proceeding. The BCCLA was a co-plaintiff at trial.

3. Lee Carter, Hollis Johnson, Dr. William Shoichet and the British Columbia Civil Liberties Association commenced this proceeding in April 2011.

4. 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.

5. At the trial of this action, Ms. Taylor adduced evidence to the Supreme Court of British Columbia in the form of an affidavit made August 25, 2011, a true copy of which is attached hereto and marked as **Exhibit A** to this my Affidavit. The Affidavit of Ms. Taylor was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Ms. Taylor was not cross-examined on the contents of her August 25, 2011 affidavit by any party or intervenor in the action. Ms. Taylor’s testimony in her August 25, 2011 affidavit was specifically quoted and referred to throughout Smith J.’s reasons for judgment on the merits (2012 BCSC 886) (the “reasons for judgment”) and, in particular, detailed at paragraphs 46–56.

6. In her August 25, 2011 affidavit, 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.

7. 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.

8. 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.

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

10. Ms. Taylor died on October 4, 2012. I was informed by her mother, Anne Fomenoff, that Ms. Taylor died suddenly and unexpectedly from a severe infection.

11. However, as the case progressed, a new urgency revealed itself.

12. The Applicants (plaintiffs at trial) had also adduced evidence to the Supreme Court of British Columbia at the trial of this action in the form of affidavits by other individuals who wished to have the option of an assisted death for themselves due to the consequences of serious illness. The Honourable Madam Justice Smith admitted into evidence nine affidavits deposed by witnesses suffering from serious illnesses including terminal cancer, Huntington's disease, locked-in syndrome, multiple sclerosis (MS) and ALS.

13. As the case progressed, four of these witnesses died. They died in circumstances which they sought to avoid by participating in this litigation; that is, without the measure of control over their circumstances at the end of life through a dignified and assisted death.

14. Two of these witnesses died due to the progression of their diseases. Two other of these witnesses chose to end their own lives, rather than continue to suffer in bodies that had failed them.

Peter Fenker

15. Peter Fenker suffered from ALS. I was informed by Grace Fenker, the widow of witness Peter Fenker, that Mr. Fenker died from his underlying condition on October 17, 2011. Ms. Fenker told me that Mr. Fenker died after a long, painful struggle with his illness.

16. Before he died, Mr. Fenker provided evidence to the Supreme Court of British Columbia at the trial of this action in the form of an affidavit made August 26, 2011, a true copy of which is attached hereto and marked as **Exhibit B** to this my Affidavit. The affidavit of Mr. Fenker was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Mr. Fenker was not cross-examined on the contents of his affidavit by any party

or intervenor in the action. Mr. Fenker's testimony in his affidavit was specifically referred to at paragraphs 1159, 1277 and 1278 of Smith J.'s reasons for judgment.

17. Before he died, Mr. Fenker told me that his mind felt trapped in a failing body. He told me he suffered from frequent pain and discomfort, severe boredom and an almost total loss of independence. He informed me that he had lost almost everything that made life worth living. Mr. Fenker informed me that he considered committing suicide by blowing his head off. He told me he decided not to because he did not want to traumatize his family. At the time he deposed his affidavit, he told me that suicide was no longer an option because he could no longer hold anything or have the physical strength to do anything himself. Mr. Fenker told me he wanted to have the option of a dignified, physician assisted death that would be peaceful and not painful for his family.

18. After Mr. Fenker died, Mr. Fenker's widow, Grace Fenker, provided evidence to the Supreme Court of British Columbia at the trial of this action in the form of an affidavit made November 4, 2011, a true copy of which is attached hereto and marked as **Exhibit C** to this my Affidavit. The affidavit of Ms. Fenker was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Ms. Fenker was not cross-examined on the contents of her affidavit by any party or intervenor in the action. Ms. Fenker's testimony in her affidavit was specifically quoted and referred to at paragraphs 1268 and 1278 of Smith J.'s reasons for judgment.

19. Ms. Fenker told me, and attested in her affidavit, that Mr. Fenker suffered horribly in the final stage of ALS before he finally succumbed to death. Ms. Fenker attested that in his final months, Mr. Fenker initiated many conversations with her and his doctors about ending his life. He asked one of his doctors how long it would take to die if he stopped eating and drinking. Ms. Fenker further attested that based on her conversations with her husband, she believed that in his final months he would have chosen to have a physician-assisted death if the option had been available.

20. Ms. Fenker told me that in the week before he died, Mr. Fenker's suffering became acute. She told me that Mr. Fenker's pain became unbearable and he begged her to shoot him or strangle him with a rope. She told me he was taken to the hospital, where his slow, laboured

march to death lasted four and a half days. She told me Mr. Fenker would never have wanted his life to end that way, and she believed she would be haunted by his painful death for the remainder of her life.

Nagui Morcos

21. Nagui Morcos suffered from the late stages of Huntington's disease, a genetic neurodegenerative disorder. I was informed by Janet Crowley, the widow of witness Nagui Morcos, that Mr. Morcos died on April 22, 2013 after having taken his own life. Ms. Crowley provided evidence to the Supreme Court of British Columbia at the trial of this action in the form of an affidavit made July 11, 2011, a true copy of which is attached hereto and marked as **Exhibit D** to this my Affidavit. The affidavit of Ms. Crowley was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Ms. Crowley was not cross-examined on the contents of her affidavit by any party or intervenor in the action. Ms. Crowley attested that she loved her husband and supported his right to decide the manner and timing of his death.

22. Before his death, Mr. Morcos had severe difficulty making his speech intelligible, controlling involuntary movements, walking, swallowing and breathing on account of his illness. Mr. Morcos provided evidence to the Supreme Court of British Columbia at the trial of this action. His evidence was in the form of video testimony taken under affirmation on June 22, 2011, before a court reporter. A true copy of the transcript of Mr. Morcos' testimony is attached hereto and marked as **Exhibit E** to this my Affidavit. The transcript of the testimony of Mr. Morcos was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Mr. Morcos was not cross-examined on the contents of his testimony by any party or intervenor in the action. Mr. Morcos' testimony was specifically referred to at paragraph 1159 of Smith J.'s reasons for judgment.

23. Huntington's disease is hereditary. Mr. Morcos told me that having witnessed his father suffer cruelly from the disease, he decided that he wanted to determine the circumstances of his own death. Mr. Morcos told me he had a plan for ending his life before his disease destroyed his body and mind.

24. On October 24, 2013, I accessed the following website: http://www.thestar.com/news/gta/2012/09/07/toronto_man_ends_his_life_to_avert_horrors_of_huntingtons_disease.html#. On that website there is an article that discusses Mr. Morcos' death and his decision to take his own life while he was still physically capable of doing so rather than continuing to suffer with his disease. Attached hereto and marked as **Exhibit F** to this my Affidavit is a true copy of the *Toronto Star* article entitled "Toronto man ends his life to avert horrors of Huntington's disease" dated September 7, 2012. In that article I learned that Mr. Morcos' symptoms progressed significantly in the last year of his life and that he decided to commit suicide on the date he did while he still had the legal ability to do so. I learned that Meg Westley, the president of Dying with Dignity, a Canadian right-to-die advocacy group that supports and provides information to those considering suicide, attended at Mr. Morcos' suicide at his home. Ms. Crowley was present in the home but held vigil in another room. I learned that immediately after his death, the police interviewed his widow, Ms. Crowley, and Ms. Westley, and began a four-month homicide investigation into his suicide.

25. On October 24, 2013, I accessed the following website: http://www.thestar.com/news/gta/2012/09/07/huntingtons_disease_sufferer_nagui_morcos_explains_his_suicide.html. On that website there is an article that reproduces a letter that Mr. Morcos wrote to his family which was read at his memorial. In that letter, he explained his suicide to his family and friends. Attached hereto and marked as **Exhibit G** to this my Affidavit is a true copy of the *Toronto Star* article entitled "Huntington's disease sufferer Nagui Morcos explains his suicide" dated September 7, 2012. In that article I learned that Mr. Morcos struggled with finding the right balance between committing suicide too early and missing out on a rich life, and waiting until later when he might become incapable of doing so.

Ian Petrie

26. Ian Petrie suffered from ALS. I was informed by Marilyn Sanford, the widow of witness Ian Petrie, that Mr. Petrie died from his underlying condition on May 15, 2012. Ms. Sanford told me that Mr. Petrie's death was protracted and painful.

27. Before he died, Mr. Petrie provided evidence to the Supreme Court of British Columbia at the trial of this action in the form of an affidavit made August 28, 2011, a true copy of which

is attached hereto and marked as **Exhibit H** to this my Affidavit. The affidavit of Mr. Petrie was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Mr. Petrie was not cross-examined on the contents of his affidavit by any party or intervenor in the action. Mr. Petrie's testimony in his affidavit was specifically quoted and referred to at paragraph 1047 of Smith J.'s reasons for judgment. In his affidavit, Mr. Petrie attested that he wanted the choice to have a compassionate, legal, painless and dignified death.

28. Ms. Sanford told me that Mr. Petrie's ALS progressed rapidly in 2011. Ms. Sanford told me she cared for Mr. Petrie at home during his final days. She told me that at the advice of Mr. Petrie's doctors, she ceased hydration and nutrition for Mr. Petrie and administered morphine for his pain. She told me he was very uncomfortable, unable to cough the thick mucus that his lungs produced. She told me he gasped for air trying to breathe. She told me he was unable to communicate because his voice had failed from weakness and because he had painful thrush in his esophagus, a byproduct of a medical treatment for mucus buildup. She told me that the morphine she fearfully administered gave brief interludes of relief, but when he roused from unconsciousness, he struggled with pain.

29. Ms. Sanford told me that after years of dealing with his dreadful disease, he saw his last days end in pain and suffering, unable to communicate except for gasps, tears and intermittent outbursts of sheer terror. She told me that Mr. Petrie would have never wanted to end his life in that way. She told me she believed it was useless and cruel that Mr. Petrie was forced to suffer in the manner he did at the end of life. She told me it was horrifying to not be able to help him, and that she was traumatized by his death.

Anthony Nicklinson

30. Anthony Nicklinson, a citizen of the United Kingdom, had a stroke in 2005 and contracted locked-in syndrome. Mr. Nicklinson provided evidence to the Supreme Court of British Columbia at the trial of this action in the form of an affidavit made August 22, 2011, a true copy of which is attached hereto and marked as **Exhibit I** to this my Affidavit. The affidavit of Mr. Nicklinson was filed on behalf of the Applicants and admitted into evidence by the Honourable Madam Justice Smith. Mr. Nicklinson was not cross-examined on the contents of his affidavit by any party or intervenor in the action. Mr. Nicklinson attested that he commenced

Judicial Review proceedings in the High Court in England against the Secretary of State for Justice seeking the right to choose a physician assisted death. Mr. Nicklinson's affidavit attached multiple exhibits, including a Witness Statement, attached as Exhibit F, that he deposed and which was admitted into evidence by the High Court in England.

31. Mr. Nicklinson attested in the Witness Statement attached as Exhibit F to his affidavit that he was paralyzed from the neck down and was unable to speak. He attested that he needed assistance in every aspect of his life. He further attested that he lived a life totally devoid of quality and wanted to have the right to have a physician assist him to die.

32. On October 24, 2013 I accessed the following website: <http://www.telegraph.co.uk/health/healthnews/9492991/Tony-Nicklinson-dies-saying-Goodbye-world-the-time-has-come.-Ive-had-some-fun.html>. On that website there is an article detailing the legal case and death of Mr. Nicklinson. I learned that Mr. Nicklinson died of pneumonia after refusing food and medication for the illness. The article informed me that Mr. Nicklinson decided to end his life shortly after the High Court rejected his case where he sought the right to die with dignity. Attached hereto and marked as **Exhibit J** to this my Affidavit is a true copy of the *Telegraph's* article entitled "Tony Nicklinson dies saying: 'Goodbye world, the time has come. I had some fun'" dated on August 12, 2012.

Remaining Witnesses

33. I have reviewed the affidavits of Elayne Shapray and Leslie Laforest filed in support of this motion to expedite the processes in this Court. While these individuals are not parties in these proceedings, the BC Civil Liberties Association has standing to represent their interests. Like Ms. Taylor before them, the circumstances of these individuals brings an urgency to this appeal. I therefore make this affidavit in support of an application by the Applicants for an

expedited process, including an expedited consideration of the application for leave to appeal, and if leave is granted, then as well an expedited hearing of any appeal.

AFFIRMED BEFORE ME at the City of)
Vancouver, Province of British Columbia,)
on October 24, 2013)

_____)
A Commissioner for taking Affidavits for)
British Columbia.)

GRACE PASTINE