S.C.C. FILE NO. _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

JULIA LAMB and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

APPLICANTS
(APPELLANTS)

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT
(RESPONDENT)

APPLICANTS' MEMORANDUM OF ARGUMENT

(Pursuant to Rule 25 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This Court, in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [***Carter #1***], declared the criminal prohibition against physician-assisted dying ("**PAD**") to be unconstitutional in its application to decisionally capable individuals with medical conditions causing them unbearable suffering. In 2016, after an extended period of suspended invalidity, Canada enacted a replacement law. This case is a challenge to the replacement law on the basis that it perpetuates the same constitutional flaw identified in *Carter* in that some individuals within the scope of the decision and declaration in *Carter #1* remain flatly prohibited without an individual assessment.

2. The courts below held it would be unfair to Canada to treat any of the factual findings from *Carter* as binding in this case "because the respective claims challenge two different pieces of legislation with arguably different objectives, purposes and effects" and holding Canada to facts determined in a "different context" would prejudice its defence of its replacement law.[1]

3. As a law enacted following a declaration of unconstitutionality ("**replacement law**") by definition involves a different law, and thus a challenge to it necessarily involves a new cause of action (and hence at least some new questions of law), the courts below effectively held that abuse of process and issue estoppel never apply to factual findings in constitutional litigation. However, not every factual finding is suffused with legislative context: sometimes a fact is just a fact. Moreover, some factual findings will have the same context under the replacement law. Under the approach adopted below, the contrary is presumed, creating a presumption in favour of relitigation notwithstanding its well-recognized and highly undesirable consequences.

4. Further, a declaration of invalidity is intended to be informed by the constituent factual findings leading up to it. Those factual findings give interpretative context to the bare words of the declaration. It is not possible to question the social and legislative facts underlying a determination of constitutionality without also questioning the ultimate constitutional conclusion.

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[1] *Lamb v. Canada (Attorney General)*, 2017 BCSC 1802 [***Lamb BCSC***], ¶70, Application for Leave to Appeal ("**ALA**") Tab 2A, p. 22; *Lamb v. Canada (Attorney General)*, 2018 BCCA 266 [***Lamb Appeal***], ¶¶13, 62 and 64 , ALA Tab 2C, pp. 38-39, 48-49

5. Courts commonly suspend declarations of constitutional invalidity. The purpose of such a suspension is to provide an opportunity to cure the identified constitutional defect. Law makers should not be permitted to use the period of suspension as a basis to claim prejudice from the passage of time necessitating relitigation. Such an outcome has significant deleterious impacts on the viability of this conventional constitutional remedy and will likely lead to its abuse.

6. The approach below not only permits unwarranted relitigation, it effectively encourages it. Under the approach below, an unsuccessful government is free, in interpreting a declaration and drafting a replacement law, to disregard any judicial factual finding it continues to disagree with, secure in the knowledge that a further challenge will simply entitle it to a *de novo* hearing. Plaintiffs, in turn, are discouraged from challenging laws at all – there is little point if an unsuccessful government can effectively grant itself a retrial on whatever points it chooses not to accept. Members of the public, for their part, are left to apprehend that their constitutional rights are determined by luck of the draw – different judge, different answer.

7. This proposed appeal raises a novel question of law in respect of the approach to factual determinations in constitutional challenges to replacement laws. The approach below is out of step with both the common law in general and the approach to changing legislative and social facts in respect of s. 1 *Charter* litigation and under the doctrine of *stare decisis*, in particular.

8. The common law generally abhors relitigation. In *Hill*, the Alberta Court of Appeal explained:

> 27 … Public policy dictates that, once the right of appeal has been exhausted, judicial decisions should be conclusive. The law requires that parties to litigation put forward their entire and best case once. Parties should not be called upon a second time to answer the same claim because legal ingenuity has revealed a new or revised version of the case.
>
> 28 Thus, the grounds for permitting relitigation must be narrow in scope and the discretion to allow it must be exercised only in the most compelling of circumstances, to prevent a substantial miscarriage of justice.…[2]

9. This Court, in *Bedford*[3] and *Carter #1*, addressed the binding effect of previous constitutional holdings on social and legislative facts in comparably strict terms: it is only where there has been

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[2] *Hill v. Hill*, 2016 ABCA 49 [***Hill***], ¶¶27-28 (emphasis added), leave to appeal dismissed, 2016 CanLII 60512 (SCC)

[3] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***], ¶42

"a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" that the conclusions in a prior decision of this Court may be revisited.

10. Further, in contrast to the decisions below, the Quebec Court of Appeal recently held that a party seeking to challenge a replacement law by undermining the social and legislative factual conclusions grounding an earlier *Charter* s. 1 analysis was required to establish, as a precondition, evidence demonstrating a fundamental change.[4] The *only* material difference between this case and the Quebec case was that in the original challenges[5] in the Quebec case, this Court gave *obiter* examples of what the government "could" do in compliance with s. 1, whereas in *Carter #1* the Court said only that any replacement law must comply with the constitutional parameters set out in its reasons. That ought to be a distinction without a difference for purposes of relitigation of facts under a *Charter* case, but under the approach below it is not – rather it is the line between full relitigation without limitation versus "fundamental change".

11. In light of the principles developed at common law in general and the approach to change of legislative and social facts that applies in respect of the doctrine of *stare decisis*, as discussed above, a proper analysis of the s. 241.2 of the *Criminal Code, R.S.C. 1985*, c. C-46[6] ("**2016 Law**"), the *Lamb* challenge, and the specific factual findings in issue here, should have resulted in an application of abuse of process and estoppel, a requirement to demonstrate fresh evidence as a precondition to relitigation and a proper allocation of burden. Such a result would harmonize and rationalize the doctrines of *res judicata*, abuse of process and *stare decisis* in the context of constitutional litigation.

12. The BCCA's blanket assumption that a replacement law necessarily involves a materially different context, and its failure to consider how the *Carter* factual findings relate to legal issues in *Lamb*, results in an extremely permissive approach to relitigation, an approach that is fundamentally inconsistent with the common law regarding abuse of process and *res judicata* and the need for stability in constitutional jurisprudence recognized by this Court. It is also an approach

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[4] *156158 Canada inc. c. Attorney General of Quebec*, 2017 QCCA 2055, ¶¶109-10

[5] That is, the challenges determined in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 and *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790

[6] As amended by Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, 1st Sess., 42nd Parl., 2016

that exacerbates chronic access to justice problems and, in this particular case, one that exacts its price, not only in money and time, but in the cost of continued unbearable suffering.

13. This case is, at its narrowest, about how abuse of process and factual issue estoppel apply to a challenge to a replacement law. That is an important question as to the binding effect of constitutional determinations, and one this Court has yet to address. It is also a question of national import, being relevant to any constitutional challenge to a replacement law enacted by any government. At its broadest, it is also a case about fundamental constitutional accountability and access to justice for litigants seeking to demonstrate the government has failed in its duty to honour a declaration of invalidity.

B. Statement of Facts

14. Julia Lamb is an individual plaintiff who suffers from Spinal Muscular Atrophy. The British Columbia Civil Liberties Association ("**BCCLA**") had public interest standing as a party in *Carter v. Canada (Attorney General)*, 2012 BCSC 886 [***Trial Decision***], *Carter #1* and 2016 SCC 4 [***Carter #2***], (collectively, "***Carter***" or the "***Carter* proceeding**"). BCCLA's standing on the same basis is unopposed in these proceedings ("***Lamb***" or the "***Lamb* proceeding**").

15. The *Carter* plaintiffs challenged the then criminal law's [*Criminal Code*, R.S.C. 1985, c. C-46, ss. 14 and 241 ("**Carter Law**")] prohibition of PAD, asserting that there must be an exception for eligible medical patients, with decisional eligibility ("**decisional eligibility**") and medical eligibility ("**Carter medical eligibility**") being determined by application of the criteria identified in *Carter* ("**Carter Criteria**").[7] The core *Charter* s. 7 claimant group consisted of all requesting adults satisfying the Carter Criteria: (a) competent (to make a medical decision to die); (b) informed; (c) non-ambivalent; (d) acting voluntarily; and (e) suffering intolerably from a grievous and irremediable medical condition.

16. In response to the challenge, Canada asserted that: (1) no one could be reliably vetted using the Carter Criteria; (2) some groups (in particular, the disabled and the elderly) were especially incapable of being reliably vetted ("**purported vulnerable groups**"), and would be at particular risk under a permissive PAD law.

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[7] See, for example, *Trial Decision*, ¶¶872-82, 1233, 1243, 1361-71, 1383

17. The trial judge found that individuals could, in fact, be reliably assessed for decisional eligibility under the Carter Criteria. Persons meeting the Carter medical eligibility definition were, therefore, held to be constitutionally entitled to seek PAD if so assessed as decisionally eligible. The trial judge specifically found the purported vulnerable groups could be reliably vetted for decisional eligibility using the Carter Criteria (and were, in fact, already being so vetted for decision-making for other potentially life-shortening medical procedures). The factual findings from *Carter* were specifically upheld on appeal, notwithstanding that Canada was permitted to update the trial record before this Court.[8]

18. This Court's unanimous decision framed its declaration using the express terms of the Carter medical eligibility criteria:

> 127 The appropriate remedy is therefore a declaration 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 (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. "Irremediable," it should be added, does not require the patient to undertake treatments that are not acceptable to the individual....[9]

19. This Court further stated that the "individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada."[10]

20. The *Lamb* proceedings challenge the constitutionality of portions of the 2016 Law, the replacement law enacted following the declaration in *Carter #1*. The 2016 Law permits access to PAD by some of the individuals within the scope of the *Carter* declaration. Others are excluded, and remain prohibited without individual assessment. The 2016 Law's carve-out of excluded individuals ("**Excluded Group**") was achieved by creating a statutory definition of "medical eligibility" that is narrower than the Carter medical eligibility definition used by this Court in its declaration: s. 241.2(2).

21. The Excluded Group includes: (1) persons who are unbearably suffering from disabilities, illnesses or diseases that will either not end their lives or not end them for a long time, and whose

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[8] *Carter #1*, ¶¶108-13
[9] *Carter #1*, ¶127
[10] *Carter #1*, ¶116

death from some other cause (e.g., old age) is not reasonably foreseeable; (2) persons who are unbearably suffering but who cannot (or at least, cannot yet) be categorized as in "advanced state of irreversible decline in capability"; and, (3) persons who are unbearably suffering with medical conditions that are not "incurable", but for whom the means of cure is personally unacceptable.

22. The *Lamb* plaintiffs ("**Plaintiffs**") assert that, for the Excluded Group, the 2016 Law replicates the very constitutional flaw identified in *Carter* – that is, those in the Excluded Group remain subject to a complete prohibition against PAD.

23. In the *Lamb* Notice of Civil Claim, the Plaintiffs rely on findings on issues of fact (or of mixed law and fact) made in *Carter #1*, as well as findings on issues of fact (or of mixed law and fact) made in the *Trial Decision* (collectively, "**Carter Findings**").[11] The Carter Findings – including the key finding that all individuals, including those characterized by Canada as "vulnerable" in *Carter*, can be reliably assessed for decisional eligibility – were fully and forcefully litigated in *Carter*. In its Response,[12] Canada concedes that the Carter Findings were made in *Carter*, but denies them as facts in the context of the *Lamb* litigation.

24. The Plaintiffs applied to strike, under Rule 9-5(b) or (d), and/or the court's inherent jurisdiction, the paragraphs of the Response contesting the Carter Findings on the basis that Canada's denial constituted an abuse of process and/or was contrary to an issue estoppel. The Plaintiffs argued the Carter Findings are binding in *Lamb* and each must be accepted as plead unless and until Canada demonstrates the existence of, and satisfies the court of the import of, fresh evidence sufficient to warrant its relitigation.

25. Canada says, and the courts below agreed, that the facts and evidence in the *Lamb* proceeding are to be plead and entered as though the Carter Findings did not exist, including Canada being permitted to enter evidence going to the subject matter of the Carter Findings that existed at the time of *Carter*, but which Canada did not place before the courts in *Carter*.

26. The chambers judge held that at least some of the Carter Findings seemed to meet the test for

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[11] Amended Notice of Civil Claim filed 21 Jun 2017, ¶¶78-95, ALA Tab 4C, pp. 120-122; Notice of Application dated 23 May 2017 ("**Application to Strike**"), Part 1, ¶2, ALA Tab 4B, pp. 99-101

[12] Part 1, Division 2, ¶¶8-13 of Attorney General of Canada's ("**AGC**" or "**Canada**") Amended Response to Civil Claim filed 19 Jul 2017 ("**Response**"), ALA Tab 4D, pp. 129-130

issue estoppel:

> 73 Some of the findings in *Trial Reasons* that the plaintiffs wish to fix as binding upon the AGC may satisfy the *Danyluk* test. They include (with reference to the *Trial* Reasons) the following:
>
> a) findings relating to general ethical responsibilities of physicians to act in the best interest of their patients and not break the law (para. 311);
>
> b) cultural and historical differences between jurisdictions in Europe, the U.S., and Canada and how that relates to the ability to transpose the experiences of one system on to another (para. 683); and
>
> c) the feasibility of properly-qualified and experienced physicians to assess patient competence to give informed consent (e.g. paras. 795, 798, 831).[13]

27. The chambers judge's inclusively listed examples correspond to three broader Carter Findings set out at Part 1, paragraph 2 of the Plaintiffs' application[14] as the findings addressing:

> e. … whether [Canadian] physicians are ethically required to act in the best interests of their patients and in accordance with the law, as found at Trial Reasons [¶¶310-1];
>
> [the *Carter* answer was: yes]
>
> i. what inferences can be drawn [from evidence regarding foreign PAD regimes] with respect to the likely effectiveness of comparable safeguards in Canada, as found at Trial Reasons [¶¶683-85, 847, 853, 883, 1239-40, 1284, 1367 and *Carter #1*, ¶¶110-13]; and
>
> [the *Carter* answer was: inferences were "particularly problematic" for Belgium and the Netherlands, and even only "a weak inference" could be drawn regarding Oregon, given the significant medico-legal and cultural differences (see esp., *Lamb BCSC*, ¶¶680-85 and *Carter #1*, ¶¶112-13)]
>
> l. whether it is feasible for a physician to reliably assess patient competence, informed consent and ambivalence in medical decision-making, including for physician-assisted death, as found at Trial Reasons; [¶¶795, 798, 815, 831, 843, 853, 1368]
>
> [the *Carter* answer was: yes (including voluntariness (see *Lamb BCSC*, ¶¶815 and 853))].

28. Subparagraphs (e) and (i) together relate to the central *Carter* factual issues of whether Canadian physicians would comply with the terms of a permissive Canadian PAD law and whether there would be a "slippery slope" movement away from their adherence to statutory conditions. Subparagraph (l) addresses *Carter*'s central factual dispute as to whether patients' true wishes about PAD could be reliably determined by physicians based on individual patient assessments.

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[13] *Lamb BCSC*, ¶73, ALA Tab 2A, p. 23

[14] *Lamb BCSC*, ¶6, ALA Tab 2A, pp. 7-9; Application to Strike, ALA Tab 4B, pp. 99-101

These points were squarely raised in the litigation and fundamental to the *Carter* decision (collectively, the "**Key Findings**").

29. The chambers judge declined to apply either estoppel or abuse of process to the Key Findings (or even a subset thereof) on the basis that to do so would prejudice Canada:

> 74 I find, however, that the AGC would suffer prejudice if the plaintiffs were allowed to rely on findings that were collateral to the earlier proceeding, and are unconnected to the matters in issue in these proceedings, or which are out of date. For example, I agree that expert evidence about the regimes in foreign jurisdictions should be updated, as well as the impacts of the eligibility criteria on individuals seeking assistance and on society in general. To deny such updates could cause prejudice to the AGC.
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> …
>
> 76 I am persuaded by the AGC that in light of the different set of questions to be answered in these proceedings, the plaintiffs' argument that this Court should be bound by findings of fact made in a previous case involving a different legal regime and a different set of issues should be rejected. I conclude that to strike the impugned paragraphs of the AGC's response to civil claim at this early stage in the proceedings would be highly prejudicial because it would preclude the AGC from mounting a full defense of the new regime.
>
> …
>
> 98 In my view, the plaintiffs have failed to demonstrate that it is an abuse of process for the AGC to fully defend the newly enacted legislation or that not permitting them to rely on the findings of fact in *Carter* would amount to an abuse of process. The plaintiffs seek declaratory relief in relation to the constitutionality of the new regulatory regime, a regime that differs from the one that was considered in *Carter*. While the old legislation imposed an absolute prohibition on medical assistance in dying, the new legislation allows for access to medical assistance in dying subject to certain conditions, and is grounded in potentially different objectives. Therefore, the new legislation should be examined on as full a factual matrix as reasonably possible.[15]

30. In *Toronto*, this Court confirmed the residual discretion that exists to decline to apply estoppel also exists regarding abuse of process.[16] In *Danyluk*, this Court confirmed the discretion is very limited, and the touchstone for its exercise is avoiding the imposition of "real injustice" on the party seeking to relitigate:

> 62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J. noted, at p. 101, that in the context of court proceedings "such a discretion must be very limited in application"….

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[15] *Lamb BCSC*, ¶¶74, 76, 98, ALA Tab 2A, pp. 23, 24, 29-30 (emphasis added)
[16] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [***Toronto***], ¶53

> …
>
> 67 The list of factors is open.... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case….[17]

31. On appeal, the Plaintiffs asserted that the chambers judge had erred by reason of his conclusion that the 2016 Law, necessarily and *per se*, constituted a "different context" for the Key Findings. First, that error caused the chambers judge to apprehend prejudice to Canada where there was none. Absent the "different context" assumption, the described prejudicial effects (e.g., having to demonstrate fresh evidence) are nothing more than the logical consequence and legal effect of prior findings being binding. Second, because of it, the chambers judge failed to properly consider the very real hardship relitigation would impose on the Plaintiffs (as opposed to mere concerns about efficiency) or the serious negative implications for the administration of justice that would result from relitigation of the Key Findings. Third, if a factual finding has to be in the same legal context to be binding, then factual issue estoppel has no existence independent of legal issue estoppel and cause of action estoppel; it will always be subsumed.

32. The Court of Appeal affirmed the decision below. It endorsed the chambers judge's view that "[t]he evidence, argument and factual disputes that were before the Court in *Carter* were adduced, made and resolved in the context of specific statutory wording, provisions, and objectives."[18] It agreed with the chambers judges' description of the prejudicial effects.[19] It concluded the chambers judge had considered the Plaintiffs' arguments, and it was not prepared to reweigh the factors.[20] The Court of Appeal further held that, after the evidence and argument was in at trial, it would be open to the trial judge to then find relitigation abusive or oppressive.[21]

PART II. STATEMENT OF QUESTION IN ISSUE

33. It is submitted this case raises the following question of public and national importance:

> Whether the doctrines of abuse of process and/or issue estoppel can apply, in the context

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[17] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶¶62, 67 (emphasis added)
[18] *Lamb Appeal*, ¶64, ALA Tab 2C, pp. 48-49 (quoting ¶63 of *Lamb BCSC*, ALA Tab 2A, p. 21)
[19] *Lamb Appeal*, ¶¶68-69, 72, ALA Tab 2C, pp. 49-50
[20] *Lamb Appeal*, ¶¶83-84, ALA Tab 2C, pp. 52
[21] *Lamb Appeal*, ¶73 and, per Hunter JA concurring, ¶106, ALA Tab 2C, pp. 50, 56-57

of a constitutional challenge to a replacement law, to any factual findings made in the challenge to the original law or whether, as held below, the bare fact that a replacement law is at issue dictates that fairness to the Crown requires all factual issues to be litigated *de novo*.

PART III. STATEMENT OF ARGUMENT

A. Nature of the Appeal

34. There is no issue but that *Lamb* gives rise to new and different legal questions. There is no question but that the 2016 Law expressly introduced two new objectives and a definition of a "grievous and irremediable" medical condition. However, nothing in those propositions dictates the conclusion that either the Key Findings or the evidence addressing them would be framed any differently under the 2016 Law.

35. The words of Shore J. are apposite:

> … The pre-condition for the creation of issue estoppel is not whether the legislative provisions on which the disposition is based are identical. Rather, the test is whether the same question in essence has been decided. This is a broader test and the overriding criterion is one of substance rather than form.…[22]

36. The Carter Law had a single objective – the protection of those vulnerable to being induced to end their lives, against their true wishes, at times of weakness ("**true wishes objective**"). As explained in the Legislative Background – Addendum,[23] seen in the Preamble to the 2016 Law, and stated in Canada's Response,[24] the 2016 Law continues to have that objective.

37. The Key Findings regarding the feasibility of reliably assessing decisional capability and physician compliance go, respectively, to the ascertaining and honouring of patients' true wishes regarding PAD, and are thus equally and identically relevant to both Laws. Neither finding is affected by whether the law allows PAD access to none (Carter Law), some (2016 Law), or all.

38. The Carter plaintiffs demonstrated that the Carter Law prohibited persons unnecessarily in

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[22] *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1442, ¶18 (expressly adopting the remarks of the Immigration Appeal Division) (emphasis added)
[23] Affidavit #1 of Nicoleta Badea made 5 Apr 2017, Ex. B ("**Legislative Background – Addendum**"), ALA Tab 4A, pp. 93-98
[24] Response, Part 1, ¶¶18 and 33, ALA Tab 4D, pp. 130-31, 132

regard to the true wishes objective. The Plaintiffs assert that the 2016 Law continues to prohibit some of those persons unnecessarily vis-à-vis that same objective. The Key Findings relate to what is necessary in order to ascertain and honour patients' true wishes, not to what access is permitted by the law. Thus, the context for the Key Findings is exactly the same in both proceedings: i.e., *what is necessary* in order to achieve the true wishes objective.

39. By way of illustration, the feasibility of assessing decisional eligibility was determined based on voluminous evidence about medical practices and physician capabilities.[25] Situational vulnerability was squarely considered,[26] including in relation to voluntariness.[27] Assessment of decisional eligibility in the disabled and the elderly was extensively dealt with.[28] The means and ability to distinguish "suicidal desires" born of depression or irrational thought from a rational and considered decision to cease suffering from a medical condition was addressed.[29] Individual assessments were still found reliable.[30] This Court specifically agreed:

> … Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making.… We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.[31]

40. The Key Finding that medico-legal and cultural differences (between Canada and the permissive European countries, and between Canada and the U.S.) are significant – so significant as to render it "problematic" to draw any inferences about how a permissive Canadian PAD regime would operate from European regimes – is based on historical developments, practices and attitudes in other countries. As such, these are not facts that can be impacted by the terms or

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[25] *Trial Decision*: ¶¶761-98 (competence, including cognitive dysfunction, depression and suicidal desires); ¶¶799-815 (voluntariness, including subtle influence and the disabled); ¶¶816-31 (informed consent); ¶¶832-43 (ambivalence); ¶¶844-53 ("vulnerable" people, including the elderly and disabled).
[26] *Trial Decision*, ¶¶668-72
[27] *Trial Decision*, ¶¶799-814
[28] *Trial Decision*, ¶¶848-53, 1118-20, 1126-27, 1129
[29] *Trial Decision*, ¶¶785-98 and 813-14
[30] *Trial Decision*, ¶¶ 799, 815, 825, 831, 843 and 853
[31] *Carter #1*, ¶¶115-16

objectives of either the Carter Law or the 2016 Law. Sometimes a fact is just a fact.

41. Two new, additional objectives are also asserted for the 2016 Law: to "guard against death being seen as a solution to all suffering" (in recognition of the problem of "traditional" suicide) and "to counter negative perceptions about the quality of life of the elderly, ill or disabled" ("**New Objectives**").[32] The New Objectives are expressly directed to perceptions that Canada contends would arise if members of the Excluded Group were permitted access to PAD. They have nothing to do with the feasibility of providing the Excluded Group with access that would accord with their true wishes, but rather are both explicitly concerned with the *side effects* of providing the Excluded Group with access. The Key Findings relate to feasibility and true wishes; they have nothing to do with the perception-based New Objectives.

42. Finally, the Key Findings were not "collateral" to the *Carter* litigation. To the contrary, they were its central factual disputes. Accordingly, there is no basis for concluding that because the 2016 Law is a replacement law, Canada will suffer "real injustice" unless permitted to relitigate the Key Findings *de novo*.

43. As observed in *Mancuso*, whether issues have already been litigated is effectively dealt with at the outset of litigation:

> 43 Whether a particular issue has previously been judicially determined is a fact of which a judge is entitled to take notice at the early stage of a motion to strike. The fact of the other decision can form the foundation for the exercise of the judge's discretion. Allowing the abuse of process doctrine to be raised at the pleadings stage is consistent with the objective of maintaining respect for the administration of justice and the court's desire for comity and mutual respect between jurisdictions. More practically, a defendant has the right to have an abusive claim struck before being subjected to an intrusive and costly discovery process. While plaintiffs are not required to build into their pleadings a response to every conceivable defence, it is not unduly burdensome to expect plaintiffs who know they are relitigating a previously-determined issue to include in their pleadings the material facts they will rely upon to explain why the discretion to find the claim abusive should not be exercised.[33]

44. With regard to "updating" the *Carter* record, as noted above in *Mancuso*, if Canada has fresh evidence on the Key Findings, it is reasonable and fair to require Canada to identify that evidence.

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[32] Legislative Background – Addendum, ALA Tab 4A, pp. 93-98; Preamble to the 2016 Law; AGC Response

[33] *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227 [***Mancuso***], ¶43, per Rennie J.A., for the Court (emphasis added)

If Canada wants to relitigate, it should be prepared to satisfy the trial court that it has evidence that meets the standard for overcoming abuse of process or estoppel (i.e. "when fresh, new evidence, previously unavailable, conclusively impeaches the original results").[34]

45. Equally important, striking the denials and leaving Canada to bring fresh evidence applications places the burden on the correct party – the party seeking to relitigate. As stated by the Alberta Court of Appeal in *Hill*, the burden to establish the very exceptional right to engage in relitigation properly lies on the party seeking to do that:

> 37 The majority emphasized the principle that "the Court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined": *Kaliel* at 470. Accordingly, when a defendant applies to have a claim struck on the basis of *res judicata*, the burden is reversed; it is on the plaintiff to establish that one of the exceptions to *res judicata* applies and that the statement of claim should be permitted to proceed.…[35]

46. It also results in a fair process whereby the question of materiality can be determined in the context of the *Carter* proceeding and decisions, as the question is whether the proffered evidence would have caused the earlier court (i.e., Smith J., as affirmed by this Court) to reach a different conclusion:

> 45 In practical terms, the process of considering the materiality requirement demands a careful examination of the new evidence, the trial decision, and any appeal therefrom. The court must first determine whether the new evidence itself is incontrovertible, whether it is capable of being denied or disputed, and whether it is unassailable both in terms of what it is and what it is adduced for. The court must review the foundation of the trial decision, the key findings of the trial judge, the analysis of the evidence and the basis upon which evidence was accepted or rejected. Only then should the court turn to the new evidence and place it in context to determine whether, had it been before the trial judge, that evidence would have led to a different result.[36]

47. Here, as Canada is the defendant[37] and there is no claim that Canada's entire response should be struck, striking the denials of the Key Findings from the pleadings and requiring Canada to establish the existence of fresh evidence before entering into any relitigation of any of the Key Findings is the only way to meaningfully relieve the Plaintiffs of vexation and oppression and the most effective way to safeguard finality and consistency. It is not asserted that *Lamb* should

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[34] *Toronto*, ¶52 (emphasis added); *Hill*, ¶¶26-46
[35] *Hill*, ¶37 [referencing *Kaliel v. Aherne*, [1946] 2 D.L.R. 388 (ABCA)]
[36] *Hill*, ¶45
[37] A fact that in itself confers no right to relitigate: *Toronto*, ¶¶45-50.

proceed on anything less than a full factual matrix, but rather only that (absent fresh evidence) the Key Findings comprise part of that factual matrix.

B. Importance: Overview

48. The questions raised herein are of national importance. All laws can be constitutionally challenged and all governments – federal, provincial or territorial – may respond to a successful challenge with a replacement law. The courts frequently issue decisions in complex, controversial constitutional cases – cases like *Bedford* and *Carter* – in which challenges to replacement laws are likely. The question raised by this appeal is of importance for all such challenges. Whether and, if so, how, the doctrines of abuse of process and issue estoppel apply is of great import in – and perhaps even determinative of – those challenges.

49. The determination of the question also has important policy implications: for the ability of the courts in a first proceeding to fulfil their mandates, for the viability of conventional constitutional remedies, and for the manner in which replacement laws are drafted.

50. Finally, the underlying *Lamb* case is itself of national and public importance. The Plaintiffs' expressed concerns about vexation, oppression and inefficiency do not, in this context, toll only in money and time. Here, those ills also toll in continued unbearable suffering.

C. Relitigation To "Update": Enabling Courts In First Proceeding To Fulfil Their Mandates

51. Canada asserts that the *Carter* trial was in 2011-2012 and thus its evidence on the Key Findings needs to be "updated" and, further, that there should be no threshold (e.g., the temporal and qualitative aspects of the test for "fresh evidence") or other limitation on its right to enter evidence relating to those findings. The courts below accepted this assertion.

52. Parties are obliged to put their best evidentiary case forward in litigation. As a corollary to that, parties are able to enter, in the first proceeding, fresh evidence that becomes available post-trial, enabling the courts to consider it in that same proceeding. By doing so, the parties enable the courts on the first proceeding to fulfil their mandates and issue meaningful decisions.

53. If Canada had evidence that warranted revisiting the Key Findings after trial, it never asked Smith J. to re-open to hear it. It never applied to enter it before the BC Court of Appeal. It

successfully entered evidence to update the trial record before this Court in *Carter #1*. It then successfully asked to re-open the *Carter* proceeding for *Carter #2*, but never sought to put in any evidence (nor even raised the subject of new evidence) as part of the re-opening before this Court in 2016, or at any ensuing time before enacting the 2016 Law.

54. That a party failed to enter further evidence as and when it became available during the ongoing first proceeding is not a valid reason to allow the party to relitigate the factual findings in a second proceeding.[38] If that were the case, a party could, by sitting on its hands during the first proceeding, effectively manufacture its own "prejudice" to justify subsequent relitigation. There is no reason that practice should be condoned in constitutional litigation, any more than it is in other areas of law. Rightly, it should be less so, given the importance of the subject matter and the fact that the government is a party of limitless resource.

D. "Updating" to Account for the Passage of a Period of Suspension: Consequences for Conventional Constitutional Remedies

55. Courts routinely suspend declarations in constitutional cases. The purpose of suspending a declaration of constitutional invalidity is to provide an opportunity to "fix the problem"[39] – that is, to cure the constitutionally fatal flaw that has been found to exist. The intention, clearly, is that lawmakers will avail themselves of the period of suspension to bring their laws into conformance, as closely as possible, with the reasons for judgment of the court.

56. In *Carter*, the government sought and received (over plaintiffs' repeated objections) a 16 month period of suspension. Essentially, the period of time between the issuance of *Carter #1* (for which Canada *did* update the trial record) and the enactment of 2016 Law consists of the period of suspension requested by Canada.

57. A government ought not to be permitted to claim prejudice arising from the passage of a period of time granted to it at its request. Further, if the period of suspension that passes between a declaration and the enactment of replacement legislation warrants (or even significantly contributes to) a finding that a government will be "prejudiced" unless *de novo* determinations of fact on an updated record are made, that result has significant consequences for the fairness and

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[38] *R. v. Hillier et al.*, 2017 MBQB 4, ¶¶35-36
[39] *Canada (Attorney General) v. Hislop*, 2007 SCC 10, ¶91

viability of the courts' conventional approach to constitutional remedies.

58. Further, permitting lawmakers to defend the constitutionality of their re-enacted laws on the basis of a challenge to the constitutional findings that led to a finding of invalidity in the first place can only lead to abuse of the suspended declaration remedy. That remedy was not intended to permit law makers time to decide whether to accept or reject the court's determinations, but rather to facilitate the implementation of those determinations.

E. Implications for Government Response to Court Declaration

59. A government has a *duty* to comply with a court declaration.

60. The ultimate legal declarations made in complex constitutional cases are commonly stated in general terms on the understanding that their meaning is informed by the constituent factual and legal conclusions set out in the court's reasons. This is reflected by this Court's express statement in *Carter* that the government was being given a period of suspension to enact legislation "consistent with the constitutional parameters *set out in these reasons*."[40] It is not possible to question the findings of social and legislative fact underlying a determination of constitutionality without calling into question the ultimate constitutional conclusion.

61. A court, in making a declaration of unconstitutionality, assumes that honouring the declaration includes accepting and having regard for the court's substantiating findings, including its factual findings. That is consistent with our constitutional structure. Should a government genuinely disagree with the factual findings in a case like *Carter*, it is entitled to invoke s. 33 of the *Charter*, but not to simply disregard those findings.

62. The effect of the decisions below is to allow governments to use their legislative authority to unilaterally create a right of retrial – a right unavailable to any other participant in the legal system. Provided a government enacts some form of replacement law (even the most obviously non-compliant), there will necessarily be a "different context" within which the government will be entitled to insist on a full rehearing. Notably, such an approach may be especially attractive in *Charter* cases, where a government may well have incentive to continue to content the majority at

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[40] *Carter #1*, ¶126 (emphasis added)

the expense of hard won minority rights.

63. A determination of the question posed herein will bear directly on whether a prudent government will regard itself as obliged to accept the courts' factual findings when fashioning a replacement law. If estoppel and/or abuse of process prevent a government from relitigating any or some factual findings, then a responding government will be motivated to accept those findings when formulating its response. If, on the other hand, a responding government can rest confident that the enactment of any form of replacement law will open the door for the *de novo* relitigation of factual findings it refuses to accept, there is little reason for government not to carry forward with its original (albeit initially unsuccessful) position on the facts.

F. Absence of Jurisprudence on Point

64. Replacement legislation might be challenged on the basis that in enacting a replacement law, the government made a "new" constitutional error. That new error might be such that the factual findings of the first proceeding are largely irrelevant to the second proceeding. This was the case, for example, with the replacement medical marijuana laws. They addressed the earlier declaration of invalidity by creating a means for legal access,[41] but introduced a new and different constitutional flaw in that access under the regulations was unworkable in practical terms and thwarted, procedurally, the substantive access granted.[42] Thus, the challenge to the replacement law was grounded in new evidence about how the procedures under the regulations worked (or did not work) in practice.

65. However, a challenge might instead be, in whole or in part, founded on the failure of the replacement law to comply with the parameters established in the first decision. The *Lamb* challenge is such.[43] It asserts that vis-à-vis that Excluded Group, the 2016 Law re-enacts and perpetuates the very constitutional flaw identified in *Carter*. (To make the medical marijuana cases comparable to *Carter/Lamb*, Canada would have had to respond to *Parker* by carving-out from

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[41] *R. v. Parker (2000)*, 149 OR (3d) 481 (ONCA) [***Parker***]
[42] *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104 (ONCA), see esp. ¶¶93-105 re the nature of the violation at issue.
[43] Notably, no issue is taken in *Lamb* with regard to the procedures the permitted subclass must follow to gain access to PAD.

the broader right there declared: e.g., by legalizing medical marijuana only for people with epilepsy or only for people nearing death.)

66. The most similar case to *Carter/Lamb* is the *BCTF* litigation,[44] where the BC government effectively re-enacted the same legislation that had been struck down, but with one additional term. In the second proceeding, it was alleged that the additional term did not cure the constitutional deficiency that had been declared. There, the parties to the second proceeding *agreed* that the relevant factual findings from the first constitutional challenge (i.e., *BCTF 2011 BCSC*) were binding for purposes of the second.[45]

67. Notably, *BCTF 2014 BCSC*, in addition to dealing with the challenge to the replacement law, dealt for the first time with the issue of remedies for the earlier violation found in *BCTF 2011 BCSC*. The paragraph of the *BCTF 2014 BCSC* decision reproduced and relied on by both Hinkson C.J. and the Court of Appeal in the *Lamb* proceeding[46] did not relate to the second challenge, but rather specifically to the issues of remedies for the earlier violation.

> 78 And, at para. 97, Hinkson C.J.S.C. noted that in BCTF, the trial judge expressed her reluctance to limit the evidence she could receive in the following terms:
>
> > [644] The government urged the Court to limit the scope of the evidence that may be called in the Bill 28 Remedies Application. I did not consider this appropriate, given the wide ambit of the arguments being advanced by both sides. A premature ruling limiting the scope of evidence and arguments could dictate the substantive result.
>
> [Emphasis added by Hinkson C.J.S.C.]

68. Thus, to the extent that factual findings from the first *BCTF* constitutional challenge were relevant to the second proceeding, these were treated as binding (albeit by agreement of the parties).[47]

69. There have also been replacement law challenge cases that involved challenges to new and different laws found in broader legislation that also contained challenged replacement law

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[44] *British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469 [***BCTF 2011 BCSC***]; *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121 [***BCTF 2014 BCSC***]; *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184; *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49 (collectively "***BCTF***")
[45] *BCTF 2014 BCSC*, ¶111
[46] *Lamb Appeal*, ¶78 (reproducing ¶644 of the *BCTF 2014 BCSC* decision), ALA Tab 2C, p. 51
[47] See *BCTF 2014 BCSC*, ¶¶111, 149, 216, 399, 439, 441-42, 458, 462

provisions. This was the case in the tobacco advertising cases. Canada's post-*RJR*[48] replacement law not only revised the advertising bans found too broad in *RJR*, it introduced a brand new comprehensive anti-smoking strategy that included corporate sponsorship bans. Swathes of the anti-smoking strategy provisions were challenged, such that the *JTI*[49] litigation involved numerous allegations of unconstitutionality that did not involve replacement provisions.[50] What is of particular note, however, is that, even in that very complicated context, the findings from the *RJR* proceedings that were relevant to the second proceeding were regarded as at least *prima facie* binding by the Quebec Superior Court.[51]

70. Other than the *Lamb* decisions below, there are no decisions that squarely address abuse of process and/or estoppel in the context of a challenge to a replacement law. Elucidation is required not only on whether and how the doctrines apply, but also on what constitutes "fresh" evidence in the circumstances, both temporarily and qualitatively.

G. Access to Justice

71. *Carter* was a 24 day hybrid summary trial before the court, plus two weeks of out of court cross-examination. There were 57 expert witnesses. The plaintiffs were represented *pro bono* and most plaintiff experts, from all over the world, gave freely of their time and expertise in order to ensure the best record possible was produced for a case of first instance and of profound public and international interest. Fundraising campaigns were run to help defray the BCCLA's disbursements and other hard costs. Other complex *Charter* cases have been similarly manned and funded in the public interest.[52]

72. To suppose that public interest plaintiffs are *able* to litigate the same issues over and over again (let alone against a government of limitless resource) is unrealistic. This is not a concern about "efficiency", but rather about whether such litigation can be undertaken at all. It is reckless disregard of access to justice to endorse an approach to these doctrines that *presumes*, as the BCCA does, that replacement laws *per se* and necessarily have a materially "different context".

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[48] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [***RJR***]
[49] *JTI Macdonald Corp. v. Canada (Attorney General)* (2002), 102 CRR (2d) 189 (SCQ) [***JTI***]
[50] *JTI*, ¶¶171-76, 250
[51] *JTI*, ¶¶83, 105
[52] Affidavit #1 of Grace Pastine made 8 Aug 2018, ALA Tab 4E, pp. 139-41

73. Similarly, it is untenable to hold that the second challenge should just proceed on a *de novo* evidentiary and factual basis and, at the end of the trial process, the Plaintiffs might then seek a ruling on whether the relitigation has, in fact, been abusive, vexatious and/or oppressive.

74. Few litigants have the will and resources to enter into a war of attrition with a government. The analysis of abuse of process and estoppel in the context of replacement law should be rigorous and undertaken early, and one in which the party seeking to relitigate factual findings shoulders the heavy burden of establishing such a right.

PART IV. SUBMISSIONS ON COSTS

75. Special costs should be available on the same basis and at the same scale as in *Carter #1*.

PART V. NATURE OF ORDER SOUGHT

76. An order is sought that:

a. leave to appeal be granted; and

b. costs, including special costs, be awarded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia, this 22nd day of August, 2018.

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

PART VI. TABLE OF AUTHORITIES

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PART VII. STATUTES RELIED ON

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Canadian Charter of Rights and Freedoms, ss. 1, 7 and 33, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11

Rights and Freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

…

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

…

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés.

Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

...

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

...

Dérogation par déclaration expresse

33. (1) Le Parlement ou la législature d'une province peut adopter une loi où il est expressément déclaré que celle-ci ou une de ses dispositions a effet indépendamment d'une disposition donnée de l'article 2 ou des articles 7 à 15 de la présente charte.

Effet de la dérogation

(2) La loi ou la disposition qui fait l'objet d'une déclaration conforme au présent article et en vigueur a l'effet qu'elle aurait sauf la disposition en cause de la charte.

Durée de validité

(3) La déclaration visée au paragraphe (1) cesse d'avoir effet à la date qui y est précisée ou, au plus tard, cinq ans après son entrée en vigueur.

Nouvelle adoption

(4) Le Parlement ou une législature peut adopter de nouveau une déclaration visée au paragraphe(1).

Durée de validité

(5) Le paragraphe (3) s'applique à toute déclaration adoptée sous le régime du paragraphe (4).

***Criminal Code*, R.S.C. 1985, c. C-46,** ss. 14 and 241 **(Carter Law)**

Consent to death

14 No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

...

Counselling or aiding suicide

241 Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Consentement à la mort

14 Nul n'a le droit de consentir à ce que la mort lui soit infligée, et un tel consentement n'atteint pas la responsabilité pénale d'une personne par qui la mort peut être infligée à celui qui a donné ce consentement.

...

Fait de conseiller le suicide ou d'y aider

241 Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, selon le cas :

a) conseille à une personne de se donner la mort;

b) aide ou encourage quelqu'un à se donner la mort,

que le suicide s'ensuive ou non.

Criminal Code, R.S.C. 1985, c. C-46, s. 241.2 **(2016 Law)**

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

(a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;

(b) they are at least 18 years of age and capable of making decisions with respect to their health;

(c) they have a grievous and irremediable medical condition;

(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(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.

Safeguards

(3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

(a) be of the opinion that the person meets all of the criteria set out in subsection (1);

(b) ensure that the person's request for medical assistance in dying was

(i) made in writing and signed and dated by the person or by another person under

subsection (4), and

(ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;

(c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before two independent witnesses who then also signed and dated the request;

(d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

(e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);

(f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or — if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and

(i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

Unable to sign

(4) If the person requesting medical assistance in dying is unable to sign and date the request, another person — who is at least 18 years of age, who understands the nature of the request for medical assistance in dying and who does not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death — may do so in the person's presence, on the person's behalf and under the person's express direction.

Independent witness

(5) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an independent witness, except if they

(a) know or believe that they are a beneficiary under the will of the person making the

request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;

(b) are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;

(c) are directly involved in providing health care services to the person making the request; or

(d) directly provide personal care to the person making the request.

Independence — medical practitioners and nurse practitioners

(6) The medical practitioner or nurse practitioner providing medical assistance in dying and the medical practitioner or nurse practitioner who provides the opinion referred to in paragraph (3)(e) are independent if they

(a) are not a mentor to the other practitioner or responsible for supervising their work;

(b) do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; or

(c) do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Reasonable knowledge, care and skill

(7) Medical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards.

Informing pharmacist

(8) The medical practitioner or nurse practitioner who, in providing medical assistance in dying, prescribes or obtains a substance for that purpose must, before any pharmacist dispenses the substance, inform the pharmacist that the substance is intended for that purpose.

Clarification

(9) For greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying.

Critères d'admissibilité relatifs à l'aide médicale à mourir

241.2 (1) Seule la personne qui remplit tous les critères ci-après peut recevoir l'aide médicale à mourir:

a) elle est admissible — ou serait admissible, n'était le délai minimal de résidence ou de carence applicable — à des soins de santé financés par l'État au Canada;

b) elle est âgée d'au moins dix-huit ans et est capable de prendre des décisions en ce qui concerne sa santé;

c) elle est affectée de problèmes de santé graves et irrémédiables;

d) elle a fait une demande d'aide médicale à mourir de manière volontaire, notamment sans pressions extérieures;

e) elle consent de manière éclairée à recevoir l'aide médicale à mourir après avoir été informée des moyens disponibles pour soulager ses souffrances, notamment les soins palliatifs.

Problèmes de santé graves et irrémédiables

(2) Une personne est affectée de problèmes de santé graves et irrémédiables seulement si elle remplit tous les critères suivants :

a) elle est atteinte d'une maladie, d'une affection ou d'un handicap graves et incurables;

b) sa situation médicale se caractérise par un déclin avancé et irréversible de ses capacités;

c) sa maladie, son affection, son handicap ou le déclin avancé et irréversible de ses capacités lui cause des souffrances physiques ou psychologiques persistantes qui lui sont intolérables et qui ne peuvent être apaisées dans des conditions qu'elle juge acceptables;

d) sa mort naturelle est devenue raisonnablement prévisible compte tenu de l'ensemble de sa situation médicale, sans pour autant qu'un pronostic ait été établi quant à son espérance de vie.

Mesures de sauvegarde

(3) Avant de fournir l'aide médicale à mourir, le médecin ou l'infirmier praticien doit, à la fois :

a) être d'avis que la personne qui a fait la demande d'aide médicale à mourir remplit tous les critères prévus au paragraphe (1);

b) s'assurer que la demande :

(i) a été faite par écrit et que celle-ci a été datée et signée par la personne ou le tiers visé au paragraphe (4),

(ii) a été datée et signée après que la personne a été avisée par un médecin ou un infirmier praticien qu'elle est affectée de problèmes de santé graves et irrémédiables;

c) être convaincu que la demande a été datée et signée par la personne ou par le tiers visé au paragraphe (4) devant deux témoins indépendants, qui l'ont datée et signée à leur tour;

d) s’assurer que la personne a été informée qu’elle pouvait, en tout temps et par tout moyen, retirer sa demande;

e) s’assurer qu’un avis écrit d’un autre médecin ou infirmier praticien confirmant le respect de tous les critères prévus au paragraphe (1) a été obtenu;

f) être convaincu que lui et l’autre médecin ou infirmier praticien visé à l’alinéa e) sont indépendants;

g) s’assurer qu’au moins dix jours francs se sont écoulés entre le jour où la demande a été signée par la personne ou en son nom et celui où l'aide médicale à mourir est fournie ou, si lui et le médecin ou l’infirmier praticien visé à l’alinéa e) jugent que la mort de la personne ou la perte de sa capacité à fournir un consentement éclairé est imminente, une période plus courte qu’il juge indiquée dans les circonstances;

h) immédiatement avant de fournir l’aide médicale à mourir, donner à la personne la possibilité de retirer sa demande et s’assurer qu’elle consent expressément à recevoir l’aide médicale à mourir;

i) si la personne éprouve de la difficulté à communiquer, prendre les mesures nécessaires pour lui fournir un moyen de communication fiable afin qu’elle puisse comprendre les renseignements qui lui sont fournis et faire connaître sa décision.

Incapacité de signer

(4) Lorsque la personne qui demande l’aide médicale à mourir est incapable de dater et de signer la demande, un tiers qui est âgé d’au moins dix-huit ans, qui comprend la nature de la demande d’aide médicale à mourir et qui ne sait pas ou ne croit pas qu’il est bénéficiaire de la succession testamentaire de la personne qui fait la demande ou qu’il recevra autrement un avantage matériel, notamment pécuniaire, de la mort de celle-ci peut le faire expressément à sa place, en sa présence et selon ses directives.

Témoins indépendants

(5) Toute personne qui est âgée d’au moins dix-huit ans et qui comprend la nature de la demande d’aide médicale à mourir peut agir en qualité de témoin indépendant, sauf si :

a) elle sait ou croit qu’elle est bénéficiaire de la succession testamentaire de la personne qui fait la demande ou qu’elle recevra autrement un avantage matériel, notamment pécuniaire, de la mort de celle-ci;

b) elle est propriétaire ou exploitant de l’établissement de soins de santé où la personne qui fait la demande reçoit des soins ou de l’établissement où celle-ci réside;

c) elle participe directement à la prestation de services de soins de santé à la personne qui fait la demande;

d) elle fournit directement des soins personnels à la personne qui fait la demande.

Indépendance des médecins et infirmiers praticiens

(6) Pour être indépendant, ni le médecin ou l’infirmier praticien qui fournit l’aide médicale à mourir ni celui qui donne l’avis visé à l’alinéa (3)e) ne peut :

a) conseiller l’autre dans le cadre d’une relation de mentorat ou être chargé de superviser son travail;

b) savoir ou croire qu’il est bénéficiaire de la succession testamentaire de la personne qui fait la demande ou qu’il recevra autrement un avantage matériel, notamment pécuniaire, de la mort de celle-ci, autre que la compensation normale pour les services liés à la demande;

c) savoir ou croire qu’il est lié à l’autre ou à la personne qui fait la demande de toute autre façon qui porterait atteinte à son objectivité.

Connaissance, soins et habileté raisonnables

(7) L’aide médicale à mourir est fournie avec la connaissance, les soins et l’habileté raisonnables et en conformité avec les lois, règles ou normes provinciales applicables.

Avis au pharmacien

(8) Le médecin ou l’infirmier praticien qui, dans le cadre de la prestation de l’aide médicale à mourir, prescrit ou obtient une substance à cette fin doit, avant que la substance ne soit délivrée, informer le pharmacien qui la délivre qu’elle est destinée à cette fin.

Précision

(9) Il est entendu que le présent article n'a pas pour effet d'obliger quiconque à fournir ou à aider à fournir l'aide médicale à mourir.

***Supreme Court Civil Rules*, Rule 9-5**

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

(a) the registrar may, despite any other provision of these Supreme Court Civil Rules,

(i) retain the document and all filed copies of it, and

(ii) refer the document to the court, and

(b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

(a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,

(b) the person who filed the document may, within 7 days after being notified, apply to the court, and

(c) the court may confirm, vary or rescind the order