MEMORANDUM OF ARGUMENT OF THE INTERVENER
CHRISTIAN LEGAL FELLOWSHIP

PARTS I AND II – OVERVIEW AND POSITION

1. Christian Legal Fellowship ("CLF"), also known by its French name Alliance des Chrétiens en Droit, seeks leave to present oral argument at the January 11, 2016 hearing ("Hearing") on the motion filed by the Attorney General of Canada for an extension ("Extension") of the suspension of the declaration of invalidity ("Suspension") issued in *Carter v Canada (Attorney General)*[1] with respect to ss. 14 and 241(b) of the *Criminal Code* ("Impugned Provisions") for a further six months, pursuant to the Order of this Honourable Court made December 17, 2015.

2. CLF's submissions will address the following question: Should Quebec be exempted ("Exemption") from the Extension of the Suspension, if granted?

3. For the following reasons, it would be appropriate for CLF to present oral argument at the Hearing:

a. CLF has intervened at every level of court in *Carter*;

b. CLF has intervened in both levels of court in Quebec in the challenge to the Quebec's *An Act Respecting End-of-Life Care*[2] ("Quebec Statute");

c. The argument of CLF set forth herein will be of assistance to this Honourable Court, in that the argument sets forth reasons why the Court should not exempt Quebec from an Extension of the Suspension;

d. Neither the Appellants nor the Respondent have presented argument opposing an Exemption.

4. CLF supports Canada's application for the Extension. The Extension is consistent with and will uphold the Rule of Law found within the Constitution. CLF notes that on December 11, 2015, both the House of Commons and the Senate passed resolutions appointing a Special Joint Committee

[1] 2015 SCC 5 [*Carter*].
[2] RSQ c S-32.0001, ss 26-32 [Quebec Statute].

of the House of Commons and Senate to "make recommendations on the framework of a federal response on physician-assisted dying that respect the Constitution, the *Charter of Rights and Freedoms*, and the priorities of Canadians."[3] This is consistent with the Rule of Law and should be encouraged.

5. The Exemption, however, would not uphold the Rule of Law. An Exemption would allow the partial invalidation of the Impugned Provisions to take effect in one province before it takes effect in the rest of Canada. It would undermine the Rule of Law and be inconsistent with the constitutional division of powers. The declaration in *Carter* was made in relation to the Impugned Provisions alone. Extending the Suspension in all provinces but one would create an unprecedented differentiation in the application of specific criminal law provisions by province, undermining the reason for which criminal law is assigned exclusively to Parliament by section 91(27) of the *Constitution Act, 1867*. It would also frustrate the original purpose for which the Suspension was granted.

PART III - ARGUMENT

A) Exempting Quebec would create uncertainty and undermine the Rule of Law

i. Criminal law questions raised by *Carter* remain unanswered

6. Important criminal law questions raised by *Carter* remain unanswered. Parliament must answer these questions before assistance in suicide or euthanasia is provided by anyone, including physicians. Provinces lack jurisdiction to answer these questions. If the declaration in *Carter* were sufficiently clear to delineate when assisted suicide or euthanasia attracts criminal liability and when it does not, and to safeguard the vulnerable from risks of abuse, the Suspension would have been unnecessary. However, the Suspension was advisable then and is still advisable today.

7. This was the view of Justice Pinsonnault of the Quebec Superior Court:

> À la lumière de ce qui precede [excerpts from paragraphs 127-129 and 147 of *Carter*], il ne fait aucun doute que la Cour suprême a voulu suspendre la Déclaration d'invalidité prononcée dans cet arrêt jusqu'au 6 février 2016 ou à toute date antérieure si le parlement fédéral légifère avant cette échéance en matière criminelle relativement à l'euthanasie d'un être humain et de suicide assisté dans le contexte de l'Aide médicale à mourir.[4]

The crucial reason for suspending the declaration was that the "criminal aspects" should be legislated by Parliament, not by the Court and not by the provincial legislatures.

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[3] *Senate Debates*, 42nd Parl, 1st Sess, Volume 150, Issue 6 (11 Dec 2015), at 110 (Hon. the Speaker), at Tab 2 a.
[4] *D'Amico c. Québec (Procureure générale)*, 2015 QCCS 5556, at para 80 [*D'Amico*], at Tab 2 b.

8. Homicide - causing another person's death - includes euthanasia. Euthanasia is *culpable* homicide; more specifically, euthanasia is murder under section 229 of the *Criminal Code*. Euthanasia will remain murder even when the *Carter* declaration comes into effect, except in circumstances falling within the declaration in *Carter* - circumstances which this Honourable Court did not delineate because doing so is Parliament's responsibility.[5] The same is true with respect to assisted suicide, which will remain an offence even when *Carter* comes into effect, except for physicians in circumstances that have not yet been clearly defined.

9. The basic criteria governing who may be euthanized or whose suicide may be assisted involve serious questions of public morality and core societal values.[6] Questions such as whether Canadian society should permit assisted suicide or euthanasia for the mentally ill, minors, non-terminally ill persons, persons with non-debilitating, non-degenerative, or minor illnesses, or anyone at all, are criminal law questions.

10. Furthermore, the Quebec Statute purports to address activities not addressed in *Carter* and in violation of the *Criminal Code* prohibitions relating to euthanasia and assistance in suicide outside of the Impugned Provisions. These prohibitions were identified in a 1995 report from the Special Senate Committee on Euthanasia and Assisted Suicide ("Senate Identified Provisions") and include the following sections of the Criminal Code: 216 (Duty of Persons Undertaking Acts Dangerous to Life, 217 (Duty of Persons Undertaking Acts), 219 (Criminal Negligence), 220 (Causing Death by Criminal Negligence), 229 (Murder), 241(a) (Counselling Suicide), 245 (Administering Noxious Thing), 264 (Assault), 265 (Assault Causing Bodily Harm), 268 (Aggravated Assault), and 269 (Unlawfully Causing Bodily Harm).[7] Health care providers in Quebec would remain at risk of criminal charges under the Senate Identified Provisions, even if this Honourable Court granted the Exemption.

11. Assisted suicide or euthanasia should not be permitted to occur in Quebec or anywhere in Canada until addressed by Parliament during the period of the Extension.

ii. Quebec's law does not and cannot answer these questions

12. The reason Quebec proposes an Exemption is that Quebec now has legislation in place purportedly governing the conditions under which assisted suicide and euthanasia are legal and

[5] *Supra* note 1, at para 125.
[6] *Carter*, *supra* note 1, at paras 76, 98.
[7] The Special Senate Committee on Euthanasia and Assisted Suicide, "Of Life and Death – Final Report" (June 1995), at Tab 2 c.

illegal. Quebec argues it is different from rest of Canada and there is no need for the criminal prohibitions to remain in force in Quebec.

13. However, it is irrelevant that Quebec has legislation and guidelines in place addressing what might be considered the provincial or "health services" aspects of assisted dying.[8] So do other provinces. As this Honourable Court noted in *Carter*, physicians apply certain procedures in their assessment of informed consent and capacity in the context of end-of-life decision making.[9] Such procedures are governed by provincial law. In Ontario, for example, the *Health Care Consent Act, 1996*[10] governs and, not surprisingly, the College of Physicians and Surgeons of Ontario's draft document entitled "Interim Guidance on Physician-Assisted Death" incorporates the rules set forth in that Act.[11] Similarly, the College of Physicians and Surgeons of Manitoba and the College of Physicians and Surgeons of Saskatchewan have passed policies on "physician-assisted dying" that are based on their respective provincial laws, which policies are set to come into force on February 6, 2016.[12] Each provincial legislature and provincial medical regulatory authority may address those aspects of assisted suicide and euthanasia that fall within their proper jurisdiction. They may all do so differently, perhaps with less specificity than Quebec, perhaps more.

14. As each province addresses questions within its jurisdiction, it must remember that no province can determine the legal criteria to distinguish culpable from non-culpable assisted suicide or what might appropriately be termed "consensual homicide". This is fundamentally a question of the dividing line between criminal and non-criminal participation by anyone, including health care professionals, in another person's death. It is the central question remaining unanswered in the wake of *Carter* and the reason the Extension is needed. It can only be answered by Parliament.

15. The Rule of Law requires that these criminal law questions receive clear answers from Parliament. These are not questions that this Honourable Court answered or intended to answer in *Carter*. Rather, as this Honourable Court stated in *Carter*, "Parliament must be given the opportunity to craft an appropriate remedy."[13]

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[8] There are serious questions about the jurisdictional legitimacy of certain provisions of the Quebec Statute insofar as they set the basic conditions for who may be euthanized or whose suicide may be assisted.
[9] *Supra* note 1, at para 115.
[10] SO 1996, c 2, Sched A.
[11] "CPSO Interim Guidance on Physician-Assisted Death", released December 7, 2015, at Tab 2 d.
[12] College of Physicians and Surgeons of Manitoba, *Schedule M attached to and Forming part of By-Law 11 of the College*, approved November 2015; College of Physicians and Surgeons of Saskatchewan, *Physician-Assisted Dying*, approved November 2015, at Tab 2 e.
[13] *Supra* note 1, at para 125.

B) Exempting Quebec would dishonour the division of powers

i. Criminal law provisions must apply uniformly across Canada

16. It is desirable, for public policy reasons, to have uniform answers across Canada to the legal questions noted above. Furthermore, the constitutional division of powers requires it. Parliament has jurisdiction to make laws for the peace, order, and good government of Canada under section 91 of the *Constitution Act, 1867*. For greater certainty, section 91(27) specifically assigns to Parliament exclusive authority to enact criminal law. Granting Quebec's Exemption request would undermine the very purpose for which this power was granted to Parliament by the Constitution. The dividing line between criminal and non-criminal participation in causing another person's death cannot differ under the Constitution from province to province.

ii. Provinces cannot fill "gaps" in the criminal law

17. Exempting Quebec from the continued application of sections 14 and 241(b) of the *Criminal Code* would also undermine the division of powers by allowing Quebec to provide assisted suicide and euthanasia through its health care system before Parliament delineates the circumstances in which doing so is permissible under criminal law. Parliament needs the Extension of the Suspension to address criminal law issues raised by *Carter*. Quebec and other provinces have laws that relate to other aspects of physician-assisted dying, but Quebec is essentially saying that its law fills the gaps in the criminal law in the wake of *Carter*, which, if true, means the Quebec Statute impedes on Parliament's jurisdiction.

18. This Honourable Court stated in *Morgentaler* (1993) that "[t]he guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law or to fill perceived defects or gaps therein."[14]

iii. *Carter* does not alter the constitutional division of powers

19. Portions of the Quebec Statute may be *ultra vires* insofar as they set the basic conditions for who may be euthanized or whose suicide may be assisted - matters that do not fall within provincial jurisdiction to regulating services under 92(13), but rather are in pith and substance questions of public morality under section 91(17). While the jurisdictional validity of certain provisions of the Quebec Statute are questionable, at this stage it is unnecessary for this Honourable Court to decide this issue. What is clear from *Carter* is that Parliament has the constitutional jurisdiction to determine

[14] *Morgentaler* (1993), [1993] 3 SCR 463, at 498.

whether or not and the circumstances under which euthanasia and assisted suicide are permissible.[15] This Honourable Court affirmed Parliament's authority to regulate "controversial medical procedures" in *Morgentaler* (1975), [16] *Morgentaler* (1993), [17] *PHS*[18] and *Carter*.[19]

20. Of course, the *Carter* judgment also contemplates a role for provincial legislatures and regulatory bodies,[20] but provincial legislative and regulatory authority must be exercised pursuant to a provincial head of power. No province has authority to delineate between criminal and non-criminal assisted suicide and euthanasia. That *Carter* requires such a delineation to be made based on this Honourable Court's application of section 7 of the *Charter* does not turn assisted suicide and euthanasia into exclusively provincial law matters.

21. Justice Pinsonnault put it this way:

> Qui plus est, la Cour suprême n'a pas indiqué que l'aide au suicide constituait dans certains cas un soin médical et que, conséquemment, les parlements provinciaux avaient compétence exclusive pour légiférer sur cette matière particulière. ... Le débat reste ouvert jusqu'à ce que le parlement fédéral redéfinisse l'Aide médicale à mourir dans le contexte du Code criminel et de l'arrêt Carter.[21]

Further, Justice Pinsonnault said, "Le Tribunal est d'opinion que la Cour suprême a reconnu qu'il revenait au parlement fédéral de déterminer ce qui constitue un acte criminel ou non en matière d'aide au suicide."[22]

22. Assisted suicide and euthanasia have never before been part of provincial health services. The claimants in *Carter* preferred the term "physician-assisted suicide", but this Honourable Court did not, by using the term preferred by the claimants in *Carter*, narrow Parliament's jurisdiction over this matter or expand the provinces' jurisdiction.

iv. Increased likelihood of federal-provincial conflict

23. Even if assisted suicide and euthanasia have a "double aspect", the aspect that might be considered to fall under a provincial head of power is limited. The provincial government cannot be given responsibility to establish the basic restrictions as to who may and may not receive assisted

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[15] *Carter*, at paras 49-53.
[16] *Morgentaler v The Queen* (1975), [1976] 1 SCR 616, at 626-627 (Laskin C.J. dissenting, but not on this point).
[17] *Supra* note 14, at 488-489.
[18] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, at para 69 [*PHS*].
[19] *Supra* note 1, at para 53.
[20] *Ibid*, at para 132.
[21] *D'Amico*, *supra* note 4, at para 129.
[22] *Ibid*, at para 137.

suicide or be euthanized. An Exemption for Quebec would do just that, and as a result would effectively alter the division of powers.

24. Justice Pinsonnault explained it this way:

> Dans un tel contexte, le Tribunal retient également que les provinces ont et continueront de jouer un rôle important en matière de santé, mais ce rôle, si important puisse-t-il être, sera néanmoins complémentaire comme il l'a toujours été à la compétence exercée par le parlement fédéral en matière criminelle, compétence qui peut parfois toucher la santé. Les provinces pourront donc légiférer sur la méthode appropriée de dispenser l'*Aide médicale à mourir* dans les cas qu'aura permis le parlement fédéral dans l'exercice de sa compétence en matière criminelle.[23]

25. It may be that Parliament will enact stricter restrictions on assisted suicide and euthanasia than found in the Quebec Statute. If that occurs, and Quebec is exempted in the interim, it will mean that people may be euthanized in Quebec whom Parliament would not have permitted to be euthanized. The fact that Quebec purports to legalize assisted suicide and euthanasia only when done by doctors is irrelevant when it comes to setting out the criteria that make the act itself permissible or impermissible.[24]

26. Even if this Honourable Court were to find the Quebec Statute aligns with the declaration in *Carter*, limited as it was to the factual circumstances of that case and not to other circumstances in which assisted suicide or euthanasia may be sought,[25] and an Exemption is granted, there is nothing stopping Quebec from then amending the Quebec Statute to be broader than *Carter*, which would create a conflict with the *Criminal Code* even when read through *Carter*. The refusal of an Exemption for Quebec precludes any potential conflict and confusion between the Quebec Statute and the Criminal Code during the period of any Extension. Thereafter, once Parliament has enacted new criminal provisions, the parameters under which assisted suicide and euthanasia are permissible will be more clear.

27. The conflict that will exist in the event of an Exemption is easy to see. If Parliament's law is stricter than Quebec's, the former must be complied with. If Quebec's law is stricter than Parliament's, the former would likely be found to be illegitimately supplementing or "filling gaps" in the criminal law.[26] Those issues can be settled once Parliament has enacted a law. Granting Quebec the Exemption in the interim, however, creates uncertainty as to whether persons in Quebec who

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[23] *D'Amico*, supra note 4, at para 138.
[24] See *Carter*, paras 49-53.
[25] *Supra* note 1, at para 127.
[26] *Morgentaler*, [1993], *supra* note 14, at 498.

participate in assisting suicide or euthanasia in accordance with Quebec law also do so within the boundaries of the *Criminal Code*.

28. If the court were to exempt Quebec simply because Quebec has legislation in place, it would send a message to people in Quebec that they will not violate criminal law provided they comply with the Quebec Statute. But that is not at all certain, since no province can delineate criminal law boundaries. A province cannot be exempted from the criminal law as it applies in the rest of Canada because it has legislation in place on the provincial aspect of a matter in question.

C) Respecting the separation of powers

29. As stated above, the Rule of Law requires that criminal law questions raised by *Carter* receive clear, legislated answers from Parliament. These are not questions that this Honourable Court answered or intended to answer in *Carter*, so as not to usurp Parliament's role.[27]

30. Quebec asks this Honourable Court to do what Parliament may or may not do, but has not done - to make assisted suicide and euthanasia an offence, except when performed in accordance with provincial law. This is an approach Parliament has taken with respect to lotteries, for example.[28]

31. Parliament cannot, by legislating, alter the constitutional division of powers. However, Parliament may authorize the provinces to create regulations pursuant to provincial constitutional powers. Parliament may, for criminal law purposes, enact laws that create legitimate restrictions on what it is practically possible for the provinces to do. A recent example of this is found in *PHS*.[29] This Honourable Court found in that case that, although provinces may have jurisdiction to establish safe injection clinics, Parliament had jurisdiction to effectively make the operation of such a clinic impossible by prohibiting drug possession. "Controversial medical procedures," a phrase this Honourable Court used in *PHS*,[30] cannot be provided by a province where criminal law prohibits it.

32. In response to *Carter*, Parliament may or may not decide to enact something along the lines of its 1969 abortion law, which made abortion an offence except where approved by a therapeutic abortion committee in a provincially approved hospital. But that remains to be seen. It may also try to enact something far more comprehensive. In the interim, this Honourable Court should not

[27] *Carter*, *supra* note 1, at para 125.
[28] *Criminal Code*, RSC 1985, c C-46, at s. 207.
[29] *Supra* note 18.
[30] *Ibid*, at para 69.

effectively determine that the criminal law will integrate elements of provincial law the way the criminal law used to with respect to abortion or still does with respect to gambling.[31]

33. An Exemption granted at this time by this Honourable Court would essentially amount to an endorsement of the Quebec Statute as an adequate answer to the criminal law questions in issue. Or at least the Court would need to find that Quebec, or any province that may seek an Exemption, has only regulated "physician-assisted dying" pursuant to provincial heads of power and that its law would only authorize physician-assisted dying within the scope permitted by criminal law.

34. This Honourable Court recognized in *Carter* that there were serious ethical issues involved in legalizing assisted suicide, as well as significant public safety risks, and recognized that *Parliament* has the difficult responsibility "to balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying."[32] Quebec's request for an Exemption raises the question of whether this Honourable Court should, on a motion, be asked to assess not only the jurisdictional validity of the Quebec Statute, but also its adequacy in achieving the required Charter section 7 balance between protecting the vulnerable and respecting the constitutional autonomy of those who seek assistance in dying.

35. The Quebec Statute may have fairly stringent conditions on who may receive aid in dying. But what if it is amended during the period of the Extension? Will the Exemption be revoked? Or what if another province with far more or far less stringent or detailed legislation, regulations, or policies requested an Exemption? This Honourable Court should not grant an Exemption simply because a province has assisted suicide and euthanasia-related legislation, nor should an Exemption be granted based on the supposed quality or adequacy thereof. The adequacy of Quebec's legislation in addressing the risks of permitting physician-assisted dying noted in *Carter*[33] cannot be fully determined by this Honourable Court on a motion, nor can its jurisdictional legitimacy. Nor should this Honourable Court be asked to find that Quebec's legislation draws a clear enough line between criminal and non-criminal assisted suicide or homicide.

36. Canada's request for an Extension of the Suspension is in line with the Constitution because Canada asks the Court to grant Parliament more time to tackle its responsibility of clarifying the criminal law of assisted suicide and "consensual homicide" in a way that honours the *Charter*, as it was interpreted and applied to the facts in *Carter*.

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[31] See *Criminal Code* section 286 (procuring a miscarriage, now invalid) and section 207 (permitted lotteries).
[32] *Carter*, *supra* note 1, at para 98.
[33] *Ibid*, at paras 27, 105, and 117.

37. The spirit of Quebec's request for an Exemption, conversely, does not respect the separation of powers in the Constitution. It essentially asks this Honourable Court to find that the reasons for the Suspension of the declaration in *Carter* no longer apply in Quebec because Quebec's law adequately protects the vulnerable and provides sufficiently clear answers to the legal questions that the *Carter* ruling raised. It asks the Court, on the hearing of a motion, to analyze Quebec's policy choices for clarity and adequacy. That is beyond the Court's role in a motion.

38. As this Honourable Court stated in *Doucet-Boudreau v Nova Scotia (Minister of Education)*, "[I]n the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited."[34]

PARTS IV and V – COSTS AND ORDER SOUGHT

39. CLF requests that it be granted leave to present oral argument at the hearing of this motion. CLF does not seek costs in this motion and requests that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUMBITTED this 21st day of December, 2015.

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[34] 2003 SCC 62, at para 34.