S.C.C. FILE NO. 34788

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

BETWEEN:

THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF ONTARIO

APPELLANTS
(RESPONDENTS ON CROSS APPEAL)

- and -

TERRI JEAN BEDFORD, AMY LEBOVITCH AND VALERIE SCOTT

RESPONDENTS
(APPELLANTS ON CROSS APPEAL)

FACTUM OF THE INTERVENER DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Joseph J. Arvay, Q.C.
Arvay Finlay
1320 – 355 Burrard Street
Vancouver BC V6C 2G8
Telephone: 604.689.4421
Fax: 888.575.3281
Email: jarvay@arvayfinlay.com

Cheryl Milne
David Asper Centre for Constitutional Rights, University of Toronto
39 Queen's Park Cres. E.
Toronto, ON M5S 2C3
Telephone: 416.978.0092
Fax: 416.978.8894
Email: cheryl.milne@utoronto.ca

Counsel for the Intervener, David Asper Centre for Constitutional Rights

Martha Healey
Norton Rose Canada LLP
45 O'Connor Street
Suite 1500
Ottawa, ON K1P 1A4
Tel: 613.780.8638
Fax: 613.230.5459
Email: martha.healey@nortonrose.com

Agent for the Intervener, David Asper Centre for Constitutional Rights

Michael H. Morris
Gail Sinclair
Nancy Dennison
Attorney General of Canada
The Exchange Tower
130 King Street West, Suite 3400
Toronto, Ontario
M5X 1K6
Telephone: (416) 973-9704
FAX: (416) 952-4518

Counsel for the Appellant, Attorney General of Canada

Christopher M. Rupar
Attorney General of Canada
Bank of Canada Building - East Tower
234 Wellington Street, Room 1212
Ottawa, Ontario
K1A 0H8
Telephone: (613) 941-2351
FAX: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for the Appellant, Attorney General of Canada

Jamie C. Klukach
Christine E. Bartlett-Hughes
Megan Stephens
Attorney General of Ontario
720 Bay St, 10th Floor
Toronto, Ontario
M5G 2K1
Telephone: (416) 326-4600
FAX: (416) 326-4656
E-mail: jamie.klukach@ontario.ca

Counsel for the Appellant, Attorney General of Ontario

Robert E. Houston, QC
Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, Ontario
K2P 2H3
Telephone: (613) 236-9665
FAX: (613) 235-4430
E-mail: rhouston@burkerobertson.com

Agent for the Appellant, Attorney General of Ontario

Alan Young
Osgoode Hall Law School of York University
4700 Keele Street
North York, Ontario
M3J 1P3
Telephone: (416) 736-5595
FAX: (416) 736-5736
E-mail: AYoung@osgoode.yorku.ca

Counsel for the Respondent, Terri Jean Bedford

Fiona Campbell
Sack Goldblatt Mitchell LLP
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4
Telephone: (613) 235-5327 Ext: 2451
FAX: (613) 235-3041
E-mail: fionacampbell@sgmlaw.com

Agent for the Respondent, Terri Jean Bedford

Yaron Marzel
Stacey Nichols
Marzel Law
265 Rimrock Road, Suiite 200
Toronto, Ontario
M3J 3C6
Telephone: (416) 485-5800 Ext: 233
FAX: (416) 485-1610
E-mail: marzel@lernermarzel.com

Counsel for the Respondent, Amy Lebovitch

Fiona Campbell
Sack Goldblatt Mitchell LLP
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4
Telephone: (613) 235-5327 Ext: 2451
FAX: (613) 235-3041
E-mail: fionacampbell@sgmlaw.com

Agent for the Respondent, Amy Lebovitch

Marlys A. Edwardh
Daniel Sheppard
Sack Goldblatt Mitchell LLP
1100 - 20 Dundas St. W.
Toronto, Ontario
M5G 2G8
Telephone: (416) 979-4380
FAX: (416) 979-4430
E-mail: medwardh@sgmlaw.com

Counsel for the Respondent, Valerie Scott

Fiona Campbell
Sack Goldblatt Mitchell LLP
500 - 30 Metcalfe Street
Ottawa, Ontario
K1P 5L4
Telephone: (613) 235-5327 Ext: 2451
FAX: (613) 235-3041
E-mail: fionacampbell@sgmlaw.com

Agent for the Respondent, Valerie Scott

Brent B. Olthuis
Megan Vis-Dunbar
Hunter Litigation Chambers Law Corporation
1040 West Georgia Street
Suite 2100
Vancouver, British Columbia
V6E 4H1
Telephone: (604) 891-2400
FAX: (604) 647-4554
E-mail: bolthuis@litigationchambers.com

Counsel for the Intervener, British Columbia Civil Liberties Association

Michael J. Sobkin
90 blvd. de Lucerne
Unit #2
Gatineau, Quebec
J9H 7K8
Telephone: (819) 778-7794
FAX: (819) 778-1740
E-mail: msobkin@sympatico.ca

Agent for the Intervener, British Columbia Civil Liberties Association

Fay Faraday
Janine Benedet
860 Manning Ave.
Toronto, Ontario
M6G 2W8
Telephone: (416) 389-4399
FAX: (647) 776-3147
E-mail: fay.faraday@faradaylaw.com

Counsel for the Intervener, Canadian Association of Sexual Assault Centres

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1100
Ottawa, Ontario
K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Agent for the Intervener, Canadian Association of Sexual Assault Centres

Fay Faraday
860 Manning Ave.
Toronto, Ontario
M6G 2W8
Telephone: (416) 389-4399
FAX: (647) 776-3147
E-mail: fay.faraday@faradaylaw.com

Counsel for the Intervener, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1100
Ottawa, Ontario
K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Agent for the Intervener, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle

Fay Faraday
860 Manning Ave.
Toronto, Ontario
M6G 2W8
Telephone: (416) 389-4399
FAX: (647) 776-3147
E-mail: fay.faraday@faradaylaw.com

Counsel for the Intervener, Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel and Vancouver Rape Relief Society

Nadia Effendi
Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1100
Ottawa, Ontario
K1P 1J9
Telephone: (613) 237-5160
FAX: (613) 230-8842

Agent for the Intervener, Regroupement québécois des centres d'aide et de lutte contre les agressions à caractère sexuel and Vancouver Rape Relief Society

Robert W. Staley
Ranjan K. Agarwal
Bennett Jones LLP
Suite 3400, P.O. Box 130
One First Canadian Place
Toronto, Ontario
M5X 1A4
Telephone: (416) 777-4857
FAX: (416) 863-1716
E-mail: staleyr@bennettjones.ca

Counsel for the Intervener, Christian Legal Fellowship, Catholic Civil Rights Leagues and REAL Women of Canada

Sheridan Scott
Bennett Jones LLP
1900 - 45 O'Connor Street
World Exchange Plaza
Ottawa, Ontario
K1P 1A4
Telephone: (613) 683-2302
FAX: (613) 683-2323
E-mail: scotts@bennettjones.com

Agent for the Intervener, Christian Legal Fellowship, Catholic Civil Rights Leagues and REAL Women of Canada

Sylvain Leboeuf
Julie Dassylva
Procureur général du Québec
1200, Route de l'Église, 2ème étage
Québec, Quebec
G1V 4M1
Telephone: (418) 643-1477 Ext: 21010
FAX: (418) 644-7030
E-mail: sleboeuf@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec

Pierre Landry
Noël & Associés
111, rue Champlain
Gatineau, Quebec
J8X 3R1
Telephone: (819) 771-7393
FAX: (819) 771-5397
E-mail: p.landry@noelassocies.com

Agent for the Intervener, Attorney General of Quebec

Katrina Pacey
Pivot Legal LLP
121 Heatley Avenue
Vancouver, British Columbia
V6A 3E9
Telephone: (604) 255-9700 Ext: 103
FAX: (604) 255-1552
E-mail: katrina@pivotlegal.org

Counsel for the Intervener, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence and PACE Society

Jeffrey W. Beedell
McMillan LLP
50 O'Connor Street, Suite 300
Ottawa, Ontario
K1P 6L2
Telephone: (613) 232-7171 Ext: 122
FAX: (613) 231-3191
E-mail: jeff.beedell@mcmillan.ca

Agent for the Intervener, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence and PACE Society

Michael A. Feder
McCarthy Tétrault LLP
Suite 1300, 777 Dunsmuir Street
Vancouver, British Columbia
V7Y 1K2
Telephone: (604) 643-5983
FAX: (604) 622-5614
E-mail: mfeder@mccarthy.ca

Counsel for the Intervener, Secretariat of the Joint United Nations Programme on HIV/AIDS

Patricia J. Wilson
Osler, Hoskin & Harcourt LLP
340 Albert Street
Suite 1900
Ottawa, Ontario
K1R 7Y6
Telephone: (613) 787-1009
FAX: (613) 235-2867
E-mail: pwilson@osler.com

Agent for the Intervener, Secretariat of the Joint United Nations Programme on HIV/AIDS

Georgialee A. Lang
Donald Hutchison
Evangelical Fellowship of Canada
130 Albert Street, Suite 1810
Ottawa, Ontario
K1P 5G4
Telephone: (613) 233-9868
FAX: (613) 233-0301
E-mail: glang@georgialeelang.com

Counsel for the Intervener, Evangelical Fellowship of Canada

Eugene Meehan, Q.C.
Supreme Advocacy LLP
397 Gladstone Avenue, Suite 100
Ottawa, Ontario
K2P 0Y9
Telephone: (613) 695-8855 Ext: 101
FAX: (613) 695-8580
E-mail: emeehan@supremeadvocacy.ca

Agent for the Intervener, Evangelical Fellowship of Canada

Jonathan A. Shime
Megan Schwartzentruber
Cooper & Sandler
1900-439 University Avenue
Toronto, Ontario
M5G 1Y8
Telephone: (416) 585-9191
FAX: (416) 408-2372
E-mail: jshime@criminal-lawyers.ca

Counsel for the Intervener, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS and HIV & AIDS Legal Clinic Ontario

Marie-France Major
Supreme Advocacy LLP
397 Gladstone Avenue, Suite 1
Ottawa, Ontario
K2P 0Y9
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS and HIV & AIDS Legal Clinic Ontario

Walid Hijazi
Desrosiers, Joncas, Massicotte
480, boul. St-Laurent, B-503
Montréal, Quebec
H2Y 3Y7
Telephone: (514) 397-9284
FAX: (514) 397-9922
E-mail: walidhijazi@hotmail.com

Counsel for the Intervener, Institut Simone de Beauvoir

Frédérick Langlois
Deveau, Bourgeois, Gagné, Hébert & associées, sencrl
867, boulevard Saint-René Ouest, Suite 8
Gatineau, Quebec
J8T 7X6
Telephone: (819) 243-2616
FAX: (819) 243-2641
E-mail: flanglois@deveau.qc.ca

Agent for the Intervener, Institut Simone de Beauvoir

Gwendoline Allison
Foy Allison Law Group
207 - 2438 Marine Drive
West Vancouver, British Columbia
V7V 1L2
Telephone: (604) 922-9282
FAX: (604) 922-9283
E-mail: gwendoline.allison@foyallison.com

Counsel for the Intervener, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution

D. Lynne Watt
Gowling Lafleur Henderson LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3
Telephone: (613) 786-8695
FAX: (613) 788-3509
E-mail: lynne.watt@gowlings.com

Agent for the Intervener, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution

Christa Big Canoe
Emily Hill
Aboriginal Legal Services of Toronto Inc.
415 Yonge Street, Suite 803
Toronto, Ontario
M5B 2E7
Telephone: (416) 408-4041 Ext: 225
FAX: (416) 408-4268

Counsel for the Intervener, Aboriginal Legal Services of Toronto Inc.

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PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. This appeal presents this Court with the opportunity to clarify two questions relating to the way in which the common law doctrine of "vertical" *stare decisis* applies to *Charter* adjudication: that lower courts may distinguish rulings of this Court (1) based on a s. 7 analysis of a different right or different principles of fundamental justice, and (2) based on a record that contains significant and material changes in the social and legislative facts that constitute the factual matrix of the case. Such change in the factual matrix may arise from the availability of new social science expertise and data and/or from rights claims that raise a different perspective. In these instances, the doctrine of *stare decisis* should not operate to undermine constitutional rights protection, access to justice and the rule of law.

2. The David Asper Centre for Constitutional Rights ("Asper Centre") accepts the facts as outlined in the Appellants' and Respondents' facta. It takes no position on contested facts other than to accept the Respondents'[1] submission that the factual context in this appeal is substantively and significantly different from that contained in the record filed in the *Prostitution Reference*.[2]

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

3. The Asper Centre's submissions address the following issues in support of the Respondents on the Appeal and Cross-Appeal:

(a) the *Prostitution Reference* was not binding on the lower courts because:

(i) the Respondents' claims are based on the s.7 guarantee of security of the person, not on liberty alone;

(ii) the Respondents relied on different principles of fundamental justice; and

(b) the analysis on s.1 justification in the *Prostitution Reference* was not binding on the lower courts because the Respondents had submitted a record of social and legislative facts that was significantly and materially different and represents a different perspective from that available to this Court in the narrow confines of the Reference.

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[1] Factum of the Appellants on Cross Appeal at paras 2, 4, 6-7, 39-42.
[2] *Reference re ss.193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 SCR 1123, 68 Man R (2d) 1 [*Prostitution Reference*].

PART III: STATEMENT OF ARGUMENT

A. No *Stare Decisis* Where Different Legal Considerations Raised

4. The Court of Appeal correctly stressed the need to differentiate between the binding and non-binding rulings in prior cases, stipulating that the threshold question for a trial court must be: what did the earlier Supreme Court of Canada case actually decide?[3]

5. In this case, the following issues fall outside the scope of the *Prostitution Reference*: (1) whether the security of the person interest is infringed and (2) whether any s. 7 deprivation accords with the principles of fundamental justice, as these principles have developed since the Prostitution Reference.[4]

Separate Section 7 Interest

6. The Attorney General of Canada errs when he submits that the Respondents' security of the person claim, based on the core right to physical and psychological integrity, is indistinguishable from the focus of the claim to "economic liberty", considered in the *Prostitution Reference.* It is not, we submit, a mere "distinction without a difference."[5]

7. The Court of Appeal correctly stated that s. 7 rights must be treated as distinct entitlements. A prior ruling dealing with s. 7 is only binding to the extent that the same s. 7 right was considered.[6] Silence on an independent interest cannot preclude future judicial s. 7 consideration of that interest, or the justice of its deprivation.

Different Principles of Fundamental Justice

8. The following principles of fundamental justice were not fully considered as separate, sequenced principles by this Court in the *Prostitution Reference* because they had yet to be fully developed : (a) that laws not be arbitrary; (b) that laws not be overbroad; and (c) that laws not be grossly disproportionate. Each of these principles provides the basis for differentiated legal

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[3] *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at paras 56-60, (2012) 109 OR (3d) 1, [*Bedford CA*]
[4] *Bedford CA* at paras 52, 75.
[5] Factum of the Appellant at para 94.
[6] *R. v Morgentaler*, [1988] 1 SCR 30 at 52, 63 OR (2d) 281, Beetz J, [*Morgentaler*] *Bedford CA* at paras 64-66.

argument and factual support in this case. The *Prostitution Reference* did not definitively preclude consideration of the Respondents' submissions addressing these principles.[7]

B. No *Stare Decisis* Where Significant and Material Change in Social and Legislative Factual Matrix

9. Justice Himel's decision at first instance was correct in this case in the approach to proceedings related to legislation previously upheld under s.1. She determined that a material change in the legislative and social facts precipitates an obligation upon a first instance court to determine whether the state has demonstrably justified its breach of the rights as raised in the new proceedings. For reasons developed below, the Court of Appeal erred when it overturned Himel J. and held that the rule of law would be undermined if re-litigation followed material factual change.[8]

10. This Honourable Court recently addressed the issue of vertical *stare decisis* in *Canada v Craig*.[9] The Asper Centre submits that the decision is simply a restatement of the common law principle that lower courts are not entitled to "overrule" the decision of the Supreme Court. It is distinguishable on the basis that it was a statutory interpretation and not a constitutional case, as well as being an instance where the Court was purporting to correct a legal error in that interpretation.

11. With respect, the approach[10] taken by the Ontario Court of Appeal herein incorrectly disregards the legal significance of a change in social and legislative facts in light of s. 52 of the *Constitution Act, 1982* and of the essential factual matrix in a s. 1 analysis.

Constitutional Supremacy

12. S. 52 of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

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[7] *Bedford CA* at paras 52, 68.
[8] *Bedford CA* at paras 84-85.
[9] *Canada v Craig*, 2012 SCC 43 at para 21, [2012] 2 SCR 489.
[10] Which was adopted by the Federal Court of Appeal in *Air Canada Pilots Association v Kelly*, 2012 FCA 209 at paras 41-43, 2013 1 FRC 308.

13. S. 52 of the *Constitution Act, 1982* expresses the principle of constitutional supremacy which has at least two important aspects. First, courts and tribunals with the authority to decide questions of law have the authority *and obligation* to decide questions of the highest law, the Constitution.[11] Second, courts and all government actors must exercise their authority within the boundaries set by the principles of the *Charter*.

14. Any law that is inconsistent with the *Constitution* is, to the extent of the inconsistency, of no force and effect. In *Conway* this Court made this point about constitutional supremacy: "administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority - and duty - to consider and apply the Constitution, including the *Charter*, when answering those legal questions."[12] This applies *a fortiori* to the superior courts since the legislature cannot remove that jurisdiction.

15. The fact that the Constitution is the highest law has important implications for the common law doctrine of *stare decisis* – it cannot be permitted to operate to empower or require any court (here lower courts) to uphold a law which, in light of evolving jurisprudence or legislative and social facts, is unconstitutional. And it is no answer to say that this Honourable Court is the safe-guard to any unconstitutional law as this Court simply does not hear every case for which leave is sought even when error is alleged.

16. This Court has acknowledged that common law rules must give way to the Constitution.[13] Thus, the common law doctrine of *stare decisis* must give way (or be subordinate) to the requirement that courts apply the highest law (the Constitution) to the specific rights claim before them.

17. This does not mean that the doctrine of *stare decisis* must be jettisoned in *Charter* cases. Rather the point is that *stare decisis* should operate differently, in constitutional cases, particularly for *Charter* cases involving a challenge to legislation, especially those decided under s. 1. This difference is based on these factors: they are rarely, if ever, determined on adjudicative facts alone and their impact extends beyond the immediate parties.

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[11] *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765, [*Conway*].
[12] *Conway* at paras 49-77 (emphasis added).
[13] *Kingstreet Investments Ltd v 501638 NB Ltd*, 2007 SCC 1 at paras 13-39, [2007] 1 SCR 3.

Significance of Factual Matrix

18. *Stare decisis* is founded on the *ratio decidendi* of a case, i.e., "the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision".[14] This reasoning is "rooted in the facts". [15] S*tare decisis* does not apply, therefore, where facts are materially different from earlier cases.

19. Often only adjudicative facts are material to the *lis* between parties. However, *Charter* cases and especially those involving s. 1 are not determined on adjudicative facts alone. Importantly, social and legislative facts play a substantive role in the determination of whether other sections of the *Charter* have been breached. For example, social facts play a significant role in determining whether there has been discrimination under s. 15 or in respect of the determination of gross disproportionality under s. 7.

20. This Court has emphasized the importance of a full factual matrix and appropriate context in *Charter* litigation. This Court has characterized this contextual approach as the "indispensable handmaiden" to a proper application of s. 1.[16] The factual matrix presented within the s. 1 analysis (and in many cases, within the analysis of the claimed breach) is founded on legislative and social facts that are often firmly rooted in the social context and the distinctive delineation of the claimants' perspective. Accordingly, *Charter* cases bind later litigation only to the extent of a common factual matrix.[17]

21. Protection of *Charter* rights therefore requires that the judiciary be attentive to the possibility that prior s. 1 analysis has lost its authority. There is no reason to presume that the factual matrix underlying s.1 justification is fixed in its content or perspective. Indeed it is reasonable to suggest that any s. 1 analysis has a built in potential for obsolescence.

22. Accordingly, it is submitted that the approach taken by Himel J. in this case was correct. In circumstances where a breach of the *Charter* has been previously found, but upheld as

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[14] *Bedford CA* at para 57, citing *Halsbury's Laws of Canada, Civil Procedure I*, 1st ed. (Markham: LexisNexis Canada, 2008), at 282.

[15] *R v Henry*, 2005 SCC 76 at para 57, [2005] 3 SCR 609.

[16] *Thomson Newspapers v Canada (Attorney General),* [1998] 1 SCR 877, (1998) 159 DLR (4th) 385.

[17] See e.g. *MacKay v. Manitoba*, [1989] 2 SCR 357, at pages 361-363, (1989) 61 D.L.R. (4th) 385; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, at para 28, [2007] 1 SCR 873; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, at paras 193-194, [2009] 1 SCR 222; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at paras 17-19, 47, [2002] 4 SCR 429..

justified under s. 1, a trial court must be attentive to the legislative and social facts underpinning the present case to determine if they are materially and significantly different. This does not involve a rejection of the doctrine of *stare decisis*. It reflects the fact that the state must justify *Charter* infringements with regard to the most relevant factual matrix.

23. The Ontario Court of Appeal rejected the notion that a sea change in social and legislative facts could also justify reconsidering a *Charter* issue at the trial level. Instead, it proposed that in such cases, the court of first instance ought simply to assemble the factual record but refrain from ruling on the relevant *Charter* provisions.[18] The Asper Centre submits that this latter approach is misguided.

24. As Smith J. noted in *Carter*:

> [997] I note as well that, while in principle a trial judge could find facts without conducting a legal analysis in order to create a record for appellate courts to decide section 1 issues, *it would be an unusual exercise*. Facts are not normally found in a legal vacuum – they are found in a context, for a reason and with a purpose. Indeed, without a legal framework, how is the primordial task of determining the relevance of evidence possible? *Charter* analysis is always to be contextual. Assessing justification under s. 1 is a particularly fact-intensive process. Similarly, it might be said that finding facts for a s. 1 inquiry is law-intensive, making reference to the governing legal principles essential.[19]

25. The Asper Centre respectfully goes further: a common law doctrine that prevents a trial court from applying the *"Oakes"* test to the facts before her is an *unconstitutional exercise.* It is also one inconsistent with the fundamental role of the trial judge who after all is not a mere scribe.

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[18] *Bedford CA* at para 76: "This is not to say that a court of first instance has no role to play in a case where one party seeks to argue that a prior decision of the Supreme Court should be reconsidered and overruled based on significant changes in the evidentiary landscape. The court of first instance does have a role in such a case, albeit a limited one. It may allow the parties to gather and present the appropriate evidence and, where necessary, make credibility findings and findings of fact. In doing so, the court of first instance creates the necessary record should the Supreme Court decide that it will reconsider its prior decision."

[19] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 [emphasis added] at para 997, (2012) 287 C.C.C. (3d) 1, Smith J, (*Carter*). Ultimately Smith J. found it unnecessary to decide whether a change in legislative and social facts "on its own" could justify a fresh s. 1 inquiry because she found that "significantly and materially different legislative facts, *along with a change in the legal principles to be applied*, can.": *Carter*, at para 998 (emphasis added) . In *Carter* at para 994 Smith J. held that an important change in the legal principles arose, *inter alia*, from this Court's re-statement in *Hutterian Brethren* of the last branch of the Oakes test (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, at paras 47-79, [2009] 2 SCR 567. This point was not brought to the attention of the Ontario Court of Appeal in the case presently under appeal.

26. The approach of Ontario Court of Appeal is, with respect, not persuasive:

> **83** In our view… Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.
>
> **84** If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. It would be particularly problematic in the criminal law, where citizens and law enforcement have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court. Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.[20]

Threshold for Appropriate Reconsideration

27. It is clear that a lower court should not be entitled to ignore "authoritative holdings from the Supreme Court on the very points in issue". The question is when and in what circumstances a decision from this Court has binding authority. Where this Court's *Charter* analysis is based on a factual matrix and a trial court is in a position to make a *finding* that the relevant factual matrix is now significantly and materially different, the constitutional status of *Charter* rights requires the trial court to adjudicate in the light of the altered factual matrix and the most developed constitutional methodologies.[21]

28. We also agree that a lower court cannot refuse to follow a Supreme Court precedent "every time a litigant came upon new evidence or a fresh perspective from which to view the problem…" We are not proposing that this Court should consider such a step. However, if a plaintiff has raised rights claims based on an evidentiary record that demonstrably establishes, to a trial court's satisfaction, that the material social and legislative matrix from the earlier decision is no longer relevant or apposite, the constitutional status of *Charter* rights requires the trial court

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[20] *Bedford CA* at paras 83-84.

[21] This was in essence the approach of Madam Justice Himel in the Court below: "In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today." *Bedford, CA* at para 83.

to adjudicate, and not push the matter up to appeal without making a decision based on the facts before it.

29. We appreciate that constitutional litigation should not "yield a garden of annuals to be regularly uprooted and replaced." This Court's decisions should not be distinguished lightly or frequently. But it has been more than **20 years** since the *Prostitution Reference* decision. Furthermore, the judiciary must prune and nurture the living tree that is the *Constitution*. Trial courts should not be expected to ignore dead branches. Individuals invoking their fundamental rights should not be asked to live under rules that circumscribe their rights without regard to the most relevant factual matrix and legal principles relevant to their breach and the justification of their breach. Nor should a trier of fact be required to close her mind to relevant factual considerations or fundamental changes in the social, political or economic underpinnings of previous decisions and the legal implications of such factual considerations or changes in favour of simply creating a future legal record for an appellate court as the Ontario Court of Appeal has suggested.[22]

30. The Court of Appeal's concern about the impact such an approach would have on the rule of law is addressed by the imposition of a requirement for a *significant and material* change. Whether the social and legislative facts are material, and the level of change that makes them sufficiently different to displace *stare decisis*, will be guided by the nature of the inquiry under s. 1 or other relevant provisions of the *Charter*. This is not an easy threshold to reach. Revisiting the few cases that meet it will not throw the system into disorder or disrepute, will not threaten the rule of law and indeed will invigorate it by ensuring that citizens of ordinary means can hold government to the highest law at the earliest opportunity. It also better accords with the principles underlying the doctrine of *stare decisis* which include not only consistency, certainty, and predictability in the law but also sound judicial administration consistent with the fundamental principles of the *Charter*.

31. As McLachlin J (as she then was) noted:

> Decisions under the *Charter* must conform to the fundamental reality of our society. They must be generally in accord with the expectations and needs of our society as it changes and develops. Different people may hold different perceptions of the precise nature of that reality. This is to be expected and is

[22] *Bedford CA* at para 76.

> defensible. The complexity of modern society cannot be reduced to a series of simple absolutes.[23]

32. Professor Parkes notes that rigid adherence to precedent, particularly in the face of changing values and social realities, does little to foster confidence in the judicial process.[24] A more flexible approach to precedent in the face of changing social conditions, where there is clear evidence of this changed factual context, arguably better fulfills the aims of the doctrine of *stare decisis.*

33. And this leads us to a consideration of the second relevant way in which constitutional cases differ from ordinary litigation – that is that constitutional litigation affects the people of Canada, not merely the parties to the litigation. It does so in a *fundamental* manner. One of the main and most injurious problems of adhering to precedent in the face of materially different legislative and social facts is that it results in a long delay in accessing justice for the affected litigants and many others whom they often represent. Often in *Charter* cases justice delayed, is justice denied. This case presents stark illustrations of this point in the well-publicized example of the missing and murdered women of Vancouver's notorious "downtown eastside".[25]

Relevant Factors to be Considered

34. In the Asper Centre's submission, the following is a non-exhaustive list of factors that may be of assistance in determining whether a lower court can depart from a decision of the Supreme Court of Canada on the basis of a significant and material change in legislative and social facts:[26]

a) The length of intervening years between the Supreme Court of Canada decision and the present case;

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[23] Hon. Madam Justice Beverley McLachlin, "The Charter of Rights and Freedoms: A Judicial Perspective" (1988-1989) 23 UBC L Rev 579 at 589-590.

[24] Parkes, Debra, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man LJ 135 at 137.

[25] This is described persuasively in paragraph 9 of the Factum of the Respondents on Appeal.

[26] Many of these factors are drawn from para 83 of the trial decision in this case (*Bedford v Canada*, 2010 ONSC 4264, 102 OR (3d) 321 as well as *David Polowin Real Estate Ltd v Dominion of Canada General Insurance Co* (2006), 76 OR 3(d) 161 at paras 127-127, (2006) 255 DLR (4th) 633 (referencing *R v Bernard,* [1988] 2 SCR 833).

b) The breadth of "new evidence" or "fresh evidence" available to the lower court and not available to the Supreme Court of Canada in the initial case;[27]

c) Evidence that the social, political and economic assumptions underlying the first case are no longer valid;

d) International evidence of a shift in approach to the problem;

e) The difference, if any, in the adjudicative facts of the two cases;

f) The different perspective of the claimants in the two cases.

Horizontal Stare Decisis

35. While the Asper Centre's submissions herein focus on the issue of vertical *stare decisis* and advocate for the approach taken by Himel J., the submissions apply equally to support this Honourable Court reconsidering its own decision in the *Prostitution Reference* and taking an approach to horizontal *stare decisis* based upon the same factors. The Asper Centre submits that for the reasons set out herein and in accordance with the reasoning in *Bernard, Henry, Craig* and *Fraser*[28] this Honourable Court should not be bound by that previous decision.

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

35. The Asper Centre seeks no costs and respectfully requests that none be awarded against it. The Asper Centre requests that it be allowed 10 minutes to provide oral representations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 27, 2013

per Joseph J. Arvay, Q.C. and Cheryl Milne
Counsel for the Intervener, David Asper Centre for Constitutional Rights

[27] See *Jens v. Jens*, 2008 BCCA 392 at paras 27-29, (2008) 300 DLR (4th) 136 as to the distinction between fresh evidence and new evidence.
[28] *Supra*, notes 9, 15, 25; and *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3, at paras 58 and 129-139]

PART VI: TABLE OF AUTHORITIES

OTHER	**Paragraphs**
Debra Parkes, “Precedent Unbound? Contemporary Approaches to Precedent in Canada” (2007) 32 Man LJ 135.	32
Hon. Madam Justice Beverley McLachlin, “The Charter of Rights and Freedoms: A Judicial Perspective” (1988-1989) 23 UBC L Rev 579.	31

PART VII: STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, 1982, section 52

(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.