S.C.C. FILE NO. 35591

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

BETWEEN:

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and GLORIA TAYLOR

APPELLANTS
(Respondents/Cross-Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant/Cross-Respondent)

- and -

ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENT
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA and ATTORNEY GENERAL OF QUEBEC

INTERVENERS

FACTUM OF THE APPELLANTS

LEE CARTER, HOLLIS JOHNSON, DR. WILLIAM SHOICHET, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and GLORIA TAYLOR

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

Counsel for the Appellants, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor

Joseph J. Arvay, Q.C. and
Alison M. Latimer
Farris, Vaughan, Wills & Murphy LLP
25th Floor, 700 West Georgia Street
Vancouver BC V7Y 1B3
Tel: 604.684.9151 / Fax: 604.661.9349
Email: jarvay@farris.com

Agent:

Jeffrey W. Beedell
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3
Tel: 613.233.1781 / Fax: 613.788.3587
Email: jeff.beedell@gowlings.com

-and -

Sheila M. Tucker
Davis LLP
2800 - 666 Burrard Street
Vancouver BC V6C 2Z7
Tel: 604.643.2980 / Fax: 604.605.3781
Email: stucker@davis.ca

Counsel for the Respondent, Attorney General of Canada:

Donnaree Nygard and Robert Frater
Department of Justice Canada
900 – 840 Howe Street
Vancouver BC V6Z 2S9
Tel: 604.666.3049 / Fax: 604.775.5942
Email: donnaree.nygard@justice.gc.ca

Agent:

Robert Frater
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa ON K1A 0H8
Tel: 613.670.6289 / Fax: 613.954.1920
Email: robert.frater@justice.gc.ca

Counsel for the Respondent, Attorney General of British Columbia:

Jean M. Walters
Ministry of Justice
Legal Services Branch
6th Floor – 1001 Douglas Street
PO Box 9280 Stn Prov Govt
Victoria BC V8W 9J7
Tel: 250.356.8894 / Fax: 250.356.9154
Email: jean.walters@gov.bc.ca

Agent:

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa ON K2P 2H3
Tel: 613.236.9665 / Fax: 613.235.4430
Email: rhouston@burkerobertson.com

Counsel for the Intervener, Attorney General of Ontario:

Zachary Green
Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto ON M5G 2K1
Tel: 416.326.4460 / Fax: 416.326.4015
Email: zachary.green@ontario.ca

Agent:

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa ON K2P 2H3
Tel: 613.236.9665 / Fax: 613.235.4430
Email: rhouston@burkerobertson.com

Counsel for the Intervener, Attorney General of British Columbia:

Jean M. Walters
Ministry of Justice
Legal Services Branch
6th Floor – 1001 Douglas Street
PO Box 9280 Stn Prov Govt
Victoria BC V8W 9J7
Tel: 250.356.8894 / Fax: 250.356.9154
Email: jean.walters@gov.bc.ca

Agent:

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street, Suite 200
Ottawa ON K2P 2H3
Tel: 613.236.9665 / Fax: 613.235.4430
Email: rhouston@burkerobertson.com

Counsel for the Intervener, Attorney General of Quebec:

Sylvain Leboeuf and Syltiane Goulet
Procureur général du Québec
1200, Route de l'Église, 2ème étage
Québec QC G1V 4M1
Tel: 418.643.1477 / Fax: 418.644.7030
Email: sylvain.leboeuf@justice.gouv.qc.ca

Agent:

Pierre Landry
Noël & Associés
111 Champlain Street
Gatineau QC J8X 3R1
Tel: 819.771.7393 / Fax: 819.771.5397
Email: p.landry@noelassocies.com

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PART I. OPENING STATEMENT AND STATEMENT OF FACTS

OPENING STATEMENT

1. This case is about those so unfortunate as to have grievous and irremediable conditions that cause intolerable suffering. It is about those who know there are states of being literally worse than death and wish to embrace the latter in the time and manner of their choosing. It is about those who are - because their disability prevents them from acting alone - denied the autonomy and respect accorded to able-bodied people and, instead, categorically labeled incapable of judging their own best interests, and either driven to end their lives pre-emptively while able or abandoned to their suffering. But it is also about a broader group who need and deserve the peace of mind and improved quality of life that comes with knowing that should their suffering become intolerable, a peaceful and dignified physician-assisted death ("PAD")[1] will be an available choice.

2. Currently, in Canada, able-bodied and disabled people alike, are entitled to make life-ending medical decisions for themselves - e.g., to direct withdrawal of a ventilator or undergo palliative sedation - under the informed consent standard used in medical decision-making. This autonomy is respected even where the intent and result will be hastened death. The ethics of these and other currently legal end-of-life practices are undisputed. As found below, there are leading ethicists and medical practitioners who regard PAD as ethical medical care on the same basis. Notwithstanding this, and the findings of the trial judge that it is possible to identify competent, independent, informed and resolved requests to die as such, the law completely prohibits PAD and AGC asserts that people in Canada cannot, under any conceivable

[1] "Physician-assisted suicide" means an assisted suicide where assistance to obtain or administer medication or other treatment that intentionally brings about the patient's own death is provided by a medical practitioner, as that term is defined in s. 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, or by a person acting under the general supervision of a medical practitioner, to a grievously and irremediably ill patient in the context of a patient-physician relationship. "Consensual physician-assisted death" means the administration of medication or other treatment that intentionally brings about a patient's death by the act of a medical practitioner, as that term is defined in s. 29 of the *Interpretation Act*, or by the act of a person acting under the general supervision of a medical practitioner, at the request of a grievously and irremediably ill patient in the context of a patient-physician relationship. The term "consensual physician-assisted death" was adopted in light of the language of the *Criminal Code* (in particular, s. 14) and the fact that, in the criminal law, "voluntary" generally pertains to *actus reus*. However, the term "voluntary euthanasia" is commonly used in the medical context to describe the conduct defined as "consensual physician-assisted death." Smith J. opted to use "voluntary euthanasia" rather than "consensual physician-assisted death" in her reasons (although she used the latter for her order). As Smith J.'s reasons are referenced at length in this factum, the appellants use the term "voluntary euthanasia" in this factum for consistency. "Physician-assisted

regime, be permitted to make this medical decision for themselves. The inconsistency, unfairness and arbitrariness of AGC's position is patent.

3. Sections 14, 21-22, 222, 241 of the *Code*[2] (the "impugned laws"), to the extent they relate to the province's ability to provide PAD as medical treatment to persons for whom there is no other meaningful alternative treatment, conflict with and severely impair the provinces' core legislative jurisdiction regarding health care, hospitals, and the physician-patient relationship. The doctrine of interjurisdictional immunity thus applies to the impugned laws to the extent required to protect the provinces' core power to allow PAD as a form of medical treatment. This division of powers issue was not addressed by the courts below nor in *Rodriguez*.[3]

4. The impugned laws also unjustly deny the suffering their rights of life, liberty and security of the person, and deny as well materially physically disabled people equality by criminalizing for them a decision and choice - to die to end suffering - legally allowed to others. These *Charter* violations are unjustifiable: the prohibition imposed is arbitrary and undermines the very objective of the law; the laws are overbroad and suffering is imposed unnecessarily; the bargain struck by the law is disproportionate in that even measured against the valid objective, the costs are concrete, extreme and borne by persons suffering intolerably;[4] and the criminal law's treatment of PAD is grossly disparate to its treatment of other morally and ethically equivalent end-of-life practices in a manner that undermines the ethical platform of the criminal law (and thus breaches what we refer to later as the fundamental principle of parity.)

5. At trial, Smith J. held that issues involving arbitrariness under s. 7 were foreclosed by the doctrine of *stare decisis* in light of *Rodriguez*,[5] but that the impugned laws breached s. 7 in other respects and also breached s. 15, and that neither breach was justified under s. 1. Smith J. did not determine whether a change in social and legislative facts could, in and of itself, displace *stare*

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suicide" and "consensual physician-assisted death" / "voluntary euthanasia" are collectively referred to as "physician-assisted dying" or "physician-assisted death" ("PAD").

[2] *Criminal Code*, R.S.C. 1985, c. C-46 [***Code***]

[3] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [***Rodriguez***], Appellants' Book of Authorities ("ABoA") v III, Tab 67

[4] To the extent that the benefits of the law are relevant at this stage of analysis, they are speculative and limited.

[5] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 [**TJ Reasons**], ¶¶1005, 1337, Joint Record ("JR") v II, A.R. 105, 174

decisis in constitutional matters. She did, however, compare the records and expressly conclude that the record before her differed significantly and materially from that in *Rodriguez*.[6]

6. The BCCA majority held that *stare decisis* foreclosed all of the issues determined by Smith J. at trial. Finch CJBC in dissent held that in light of *Rodriguez*, *stare decisis* applied to the issue of arbitrariness in relation to the liberty and security of person interests and also to the s. 1 analysis for a s. 15 breach, and that these particular issues could not be revisited.[7] Finch CJBC held the remaining issues under s. 7 were open for determination. He agreed with Smith J. that the impugned laws breached s. 7 as overbroad and grossly disproportionate, and were not saved under s. 1. He declined to address the issue of parity.

7. The BCCA majority applied *stare decisis* in a manner patently inconsistent with this Court's decision in *Bedford*.[8] Further, all three BCCA justices erred in rejecting the assertion - subsequently accepted by this Court in *Bedford* - that a material and significant change in social and legislative facts can itself displace *stare decisis*. The change in facts in this case meets and exceeds the threshold established in *Bedford*. Under the *Bedford* approach, <u>all</u> of the issues determined by Smith J. were legal issues she was entitled to determine.

8. Smith J. made comprehensive findings of adjudicative, social and legislative fact. Those findings attract deference at the palpable and overriding error standard of review.[9] Smith J.'s analyses of the applicable law to those findings in reaching her legal conclusions under ss. 7, 15 and 1, are correct and warrant affirmation by this Court. The legal conclusions she reached should be confirmed in their entirety, with her reasoning under s. 15 extended to also allow voluntary euthanasia.

FACTS

A. Ethics

9. Smith J. noted the competing opinions of ethicists tendered and preferred those of the appellants' experts: in particular, of Professors Battin and Sumner and of Dr. Angell.[10] It was

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[6] TJ Reasons, ¶998, JR v II, A.R. 82-83
[7] *Carter v. Canada (Attorney General)*, 2013 BCCA 435 [**CA Reasons**], ¶¶74-111, JR v III, A.R. 61-71
[8] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***], ¶¶48-56, ABoA v I, Tab 10
[9] *Bedford*, ¶56, ABoA v I, Tab 10
[10] TJ Reasons, ¶¶233, 335, 339, JR v I, A.R. 71, 105-06

uncontested that autonomy, compassion and non-abandonment play a central role in medical ethics, and that physicians are ethically required, within the law, to act in their patients' best interests.[11]

10. Ethicists and practitioners widely concur that current legal end-of-life practices are ethically acceptable.[12] Some of these are similar to PAD.[13]

11. Palliative sedation is a practice in which a patient is sedated in order to maintain her in a state of deep, continuous unconsciousness through to time of death, with or without providing artificial hydration ("palliative sedation").[14] Palliative sedation may hasten death and where artificial hydration is not provided, dehydration may be the actual cause of death under palliative sedation.[15] There are no legislated standards for palliative sedation in Canada.[16]

12. It is fairly widely accepted that when a patient is close to the end of life, and is experiencing symptoms that are severe and refractory, it is ethical care practice to use palliative sedation, with or without artificial hydration.[17]

13. The administration of medication to control pain at levels that may hasten death is considered ethical.[18]

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[11] TJ Reasons, ¶¶310-11, JR v I, A.R. 96; Affidavit #1 of Margaret Pabst Battin, made 29 Aug 2011 ("**Battin #1**"), ¶¶43-48, JR v XI, 924-25; Affidavit #1 of Rodney Syme, made 19 Aug 2011 ("**Syme #1**"), ¶¶11-12, JR v X, 354-55; Affidavit #1 of Marcia Angell, made 30 Aug 2011 ("**Angell #1**"), ¶¶8, 10, 15, 19, Ex C, p 40, JR v XI, 749, 751, 753-54, 796; Affidavit #2 of Sharon Cohen, made 30 Aug 2011 ("**Cohen #2**"), ¶19, JR v XIII, 1764-65; Affidavit #1 of Gerrit Kimsma, made 01 Sep 2011 ("**Kimsma #1**"), Ex D, p 47, JR v XVIII, 3465; Affidavit #1 of Thomas A. Preston, made 21 Oct 2011, ¶¶14-16, 22, 19-22, Ex A, JR v XLVI, 12941, 12943, 12948-64; Affidavit #1 of Peter Rasmussen, made 28 Oct 2011 ("**Rasmussen #1**"), ¶¶27-30, 32-36, JR v XLVI, 13006-08; Affidavit #2 of Derryck Smith, made 31 Oct 2011, ¶19 ("**Smith #2**"), JR v XLVI, 13016-17; Affidavit #2 of Margaret Battin, made 03 Nov 2011 ("**Battin #2**"), ¶¶9, 18, JR v XLVII, 13268, 13271-72

[12] TJ Reasons, ¶¶312, 340, 357, JR v I, A.R. 96, 106, 110

[13] TJ Reasons, ¶5, JR v I, A.R. 8

[14] TJ Reasons, ¶¶200-01, JR v I, A.R. 62

[15] Affidavit #1 of Eugene Bereza, made 30 Sep 2011 ("**Bereza #1**"), ¶¶28-29, JR v XXXI, 7840; Cross Examination of Michael Downing held November 9, 2011 ("**Downing Cross**"), 21:4-20, JR v XLVIII, 13587; Cross Examination of Douglas McGregor held November 15, 2011 ("**McGregor Cross**"), pp 88-89, 96-98, JR v V, 88-89, 96-98; Cross Examination of José Pereira held November 22-23, 2011 ("**Pereira Cross**"), 416:40-417: 3, 424, 580-81, JR v VII, 416-17, 424, 580-81

[16] TJ Reasons, ¶¶200-01, JR v I, A.R. 62

[17] TJ Reasons, ¶¶200, 312, JR v I, A.R. 62, 96; Affidavit #1 of Anne Bruce, made 25 Aug 2011 ("**Bruce #1**"), ¶¶10-13, Ex C, pp 52-53, JR v XIII, 1432-33, 1485-86; Affidavit #1 of Gaétan Barrette, made 26 Aug 2011 ("**Barrette #1**"), Ex B, p 6, JR v XI, 906; Affidavit #1 of Deborah Cook, made 19 Sep 2011 ("**Cook #1**"), ¶17, JR v XIX, 3610

[18] TJ Reasons, ¶¶195-99, 315(g), JR v I, A.R. 60-62, 100

14. The withdrawal of life sustaining drugs, artificial food and/or hydration, or equipment (e.g., a ventilator) at a patient's request is considered ethical.[19]

15. The preponderance of evidence from ethicists is that there is no ethical distinction between PAD and other end-of-life practices whose outcome is highly likely to be death.[20]

16. Some physicians doubt the existence of a valid ethical distinction.[21] Some of the AGs' own witnesses doubted the existence of such a distinction.[22]

17. There are experienced, reputable and respected physicians in Canada who support legal change and state that providing PAD in defined cases, with safeguards, would be consistent with their ethical views.[23]

18. Since 1972 there has been no criminal prohibition against suicide or attempted suicide. Persons physically able to commit suicide may do so or attempt to do so; however, the amendments left the prohibition effected by the impugned laws in place.[24]

19. Where the requesting patient is rational, autonomous, informed and the act is in his or her best interests (i.e., undertaken to end intolerable suffering), there is no ethical distinction between suicide and assisted suicide.[25]

B. Safeguards in Other Jurisdictions

20. Smith J.'s findings regarding the safeguards in other jurisdictions are detailed below. The key point is that Smith J. ultimately found that the risks involved in permitting PAD can be

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[19] TJ Reasons, ¶¶200, 231(a), 315(g), JR v I, A.R. 62, 70, 99

[20] TJ Reasons, ¶¶234-41, 335, 1369, JR v I, A.R. 71-74, 105; v II, A.R. 181; Sumner #1, Ex C, pp 51-54, JR v XVIII, 3270-73; Angell #1, Ex C, p 40, JR v XI, 796

[21] TJ Reasons, ¶¶257-62, 336-37, 1369, JR v I, A.R. 79-82, 105; v II, A.R. 181; Affidavit #1 of Michael Klein, made 23 Jul 2011, ¶14, JR v IX, 55; Syme #1, ¶¶14, 18, JR v X, 355, 357; Affidavit #1 of Scott Meckling, made 25 Aug 2011, ¶33, JR v XVII, 2854-55; Affidavit #1 of David Bell, made 29 Aug 2011 ("**Bell #1**"), ¶6, JR v XII, 1071; Cohen #2, ¶23, JR v XIII, 1766

[22] TJ Reasons, ¶337, JR v I, A.R. 105. See e.g. Bereza #1, ¶¶28-36, JR v XXXI, 7840-43; Downing Cross, pp 34-43, JR v XLVIII, 13600-09; McGregor Cross, JR v V, 104-05

[23] TJ Reasons, ¶¶6, 309-12, 344, JR v I, A.R. 8-9, 96, 107; see e.g. Affidavit #1 of Lawrence Librach, made 15 Aug 2011 ("**Librach #1**"), ¶17, JR v IX, 163; Affidavit #1 of William Shoichet, made 22 Aug 2011 ("**Shoichet #1**"), ¶¶7-8, JR v IX, 342-43; Barrette #1, Ex B, pp 5-6, JR v XI, 905-06; Bell #1, ¶¶8-9, JR v XII, 1071-72

[24] TJ Reasons, ¶1011, JR v II, A.R. 85. The prohibition against voluntary euthanasia was also left in place under ss. 14 and 222 of the *Code*.

[25] TJ Reasons, ¶339, JR v I, A.R. 106; Sumner #1, Ex C, p 49, JR v XVIII, 3268

identified and very substantially minimized[26] and that such a system could, "with a very high degree of certainty" prevent vulnerable persons from being induced to commit suicide.[27]

C. Decisional Vulnerability[28]

21. Smith J.'s findings are more extensively discussed below. Essentially, she found that, even taking into account the possibility of cognitive impairment or depression in patients and the possibility that physicians may be influenced by inaccurate assumptions about their patients, it is feasible to assess decisional capacity with high reliability.[29] Coercion and undue influence can be detected in a capacity assessment.[30] Just as physicians routinely assess the requirements for informed consent in patients seeking or refusing medical treatment, it would be feasible to apply and use informed consent for purposes of PAD.[31]

22. Smith J. held that risks relating to patients' ability to make well-informed decisions and to be free from coercion or undue influence and to physicians' ability to assess patients' capacity and voluntariness can be very largely avoided through carefully-designed, well-monitored safeguards.[32]

23. Informed consent is considered an appropriate means for regulating the risks of decisional vulnerability arising in medical decision-making in the context of other end-of-life practices. Beyond general provincial laws pertaining to informed consent and the obligation of physicians to obtain it,[33] currently permitted end-of-life practices are not regulated or monitored under the law and decisions regarding them may be made by substitute decision-makers.[34]

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[26] TJ Reasons, ¶883, JR v II, A.R. 51
[27] TJ Reasons, ¶1367, JR v II, A.R. 180
[28] For purposes of this factum, issues of incompetence, non-voluntariness, inadequate information and ambivalence as these are relevant to informed consent for medical decision-making will be referred to as issues of "decisional vulnerability." See, *infra*, ¶61.
[29] TJ Reasons, ¶¶795, 798 see also 762-64, 775, 778-90, 793, JR v II, A.R. 17-18, 21-26
[30] TJ Reasons, ¶815, JR v II, A.R. 30
[31] TJ Reasons, ¶831, JR v II, A.R. 33
[32] TJ Reasons, ¶10, JR v I, A.R. 9
[33] Including provincial laws that statutorily enshrine the concept of informed consent: e.g., *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3-7; *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch A (as amended), ss. 1-11.
[34] TJ Reasons, ¶¶185, 201-02, 207-31, 831, JR v I, A.R. 58-59, 62-70; v II, A.R. 33

D. Conclusions on Facts

24. The appellants rely on the facts as set out by Smith J. in the trial reasons. Those findings are entitled to considerable deference.[35] No palpable and overriding error of fact was made (nor were any alleged before the BCCA). As the findings of fact are extensive, the appellants will more specifically list the critical findings they rely upon in the context of the issues they most directly pertain to and so address their import in context.

PART II. ISSUES ON APPEAL

25. The issues on this appeal are as follows:

a. How, if at all, does the doctrine of *stare decisis* apply to the constitutional legal questions raised in this case?

b. Are the impugned laws constitutionally inapplicable to PAD by reason of the doctrine of interjurisdictional immunity?

c. Do the impugned laws infringe s. 7 of the *Charter*?

d. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

e. Do the impugned laws infringe s. 15 of the *Charter*?

f. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

g. What remedy is appropriate?

h. What is the appropriate framework of analysis for costs in public interest litigation of this type?

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[35] *Bedford*, ¶¶48-56, ABoA v I, Tab 10

PART III. ARGUMENT

A. *Stare Decisis* and Constitutional Legal Issues

26. Vertical *stare decisis* has no application in this Court. To the limited extent that horizontal *stare decisis* has any role to play in this case, there are principled reasons for departing from *Rodriguez*.

Vertical Stare Decisis was Applied Incorrectly by BCCA Majority

27. The reasoning of the BCCA majority, whose decision rests entirely on the doctrine of vertical *stare decisis*, is patently inconsistent with the more recent decision of this Court in *Bedford*: [36]

a. even though the *Rodriguez* majority did not expressly address the right to life under s. 7, the BCCA majority found that *Rodriguez* was binding precedent on this point;[37]

b. even though the *Rodriguez* majority considered only the flaw[38] of arbitrariness when assessing consistency with the principles of fundamental justice, the BCCA majority held that *Rodriguez* was binding precedent with respect to all relevant flaws, including overbreadth, gross disproportionality, parity and equality;[39]

c. the BCCA majority erroneously concluded that the reasoning of the *Rodriguez* majority under s. 1 (which was under consideration only in relation to s. 15) was "exactly the same" as would apply to a consideration of the flaws of overbreadth and gross disproportionality under s. 7, and that the *Rodriguez* majority's decision in respect of s. 1 was therefore binding in respect of s. 7 in the present case;[40] and

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[36] Finch CJBC, in dissent, adopted an approach to *stare decisis* that is largely consistent with *Bedford*, but rejected the proposition that a significant and material change in legislative and social facts can itself displace the application of *stare decisis*: CA Reasons, ¶¶74-111, JR v III, A.R. 61-71; *Bedford*, ¶¶48-56, ABoA v I, Tab 10.
[37] CA Reasons, ¶281, JR v III, A.R. 121; see in contrast *Bedford*, ¶45, ABoA v I, Tab 10
[38] This factum will refer to the principles of fundamental justice as such (e.g., the principle requiring that laws not be arbitrary) and to the corresponding terms used to identify material breaches of those principles (e.g., arbitrariness) as "flaws."
[39] CA Reasons, ¶¶282-313, JR v III, A.R. 121-36; see in contrast *Bedford*, ¶¶45, 107-23, ABoA v I, Tab 10
[40] CA Reasons, ¶¶322-23, JR v III, A.R. 140; see in contrast *Bedford*, ¶¶124-29, ABoA v I, Tab 10

d. "despite the striking difference between the type and volume of evidence adduced in this case as compared with that adduced in *Rodriguez*,"[41] the BCCA majority refused to consider the constitutional issues in this case afresh.[42]

Horizontal Stare Decisis is of Limited, if any, Application Here

28. As leave has been granted and the BCCA majority decision is in error, the relevant *stare decisis* question is how - if at all - the doctrine applies to the legal issues now before this Court when assessed in accordance with *Bedford* and *Fraser*.[43]

29. The first step under *Bedford* is to determine which legal issues involve a potential revisitation of issues determined in *Rodriguez*. The *Rodriguez* majority determined two legal questions: (1) whether, for purposes of s. 7, infringement of the liberty and security of the person interests ran afoul of the principle of fundamental justice requiring the law not to be arbitrary; and (2) whether, on a presumed breach of s. 15, the s. 15 breach could be saved under s. 1 (collectively, the "*Rodriguez* Determinations").

30. Under the *Bedford* analysis, the s. 7 / s. 1 issues raised in this case regarding the life interest (in relation to *any* flaw, including arbitrariness), and regarding the interests of liberty and security of the person in relation to the flaws of overbreadth and gross disproportionality and the proposed flaw of gross disparity, are all new legal issues. The courts below were, and this Court is, entitled to adjudicate these s. 7 issues, including the question of whether any s. 7 breach can be saved under s. 1, as matters arising for the first time in this litigation.[44]

31. The *Rodriguez* Determinations are the only legal issues that potentially engage the application of *stare decisis* in this Court. However, the appellants submit that *stare decisis* does not apply with respect to the *Rodriguez* Determinations.

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[41] CA Reasons, ¶262, JR v III, A.R. 112
[42] See in contrast *Bedford*, ¶¶43-44, ABoA v I, Tab 10
[43] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [***Fraser***], ABoA v II, Tab 32
[44] *Bedford*, ¶¶39-47, ABoA v I, Tab 10

32. For the reasons set out by Smith J.,[45] *Hutterian*[46] represents legal development sufficient to displace the application of *stare decisis* with regard to a s. 15 / s. 1 analysis. Thus, the s. 15 breach found by Smith J. warrants a fresh s. 1 analysis.

33. Further, and in any event, the *Rodriguez* Determinations are not foreclosed by *stare decisis* because the record in this case demonstrates that in the intervening years, the facts and/or circumstances relevant to the constitutional analysis have changed so as to "fundamentally shift the parameters of the debate."[47]

34. With respect to the material social and legislative facts, the two most significant factors identified in upholding the assisted suicide prohibition under s. 1 were the *Rodriguez* majority's findings that, on the record before it: (1) there was a moral (or ethical) distinction between what it characterized as passive and active euthanasia;[48] and, (2) there was adequate fit and proportionality between an assumed breach of s. 15 and the law's effect because there was no "halfway measure" capable of protecting the vulnerable.[49] Smith J. came to different conclusions on these factual points on the basis of a thorough and encompassing record that markedly differs from that in *Rodriguez*.[50]

35. With respect to the ethical debate, Smith J. explained its relevance[51] and then made the following findings based on the record before her:

a. "there are experienced and reputable Canadian physicians who, in some circumstances, would find it consistent with their ethical principles to assist patients with hastening death if it were legal to do so;"[52]

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[45] TJ Reasons, ¶¶989-91, 993-95, JR v II, A.R. 79-82
[46] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [***Hutterian***], ABoA v I, Tab 3
[47] *Bedford*, ¶¶42, 44, 46, ABoA v I, Tab 10. Smith J. did not have the benefit of this Court's articulation of required factual threshold in *Bedford*. However, her reasons contain an equivalent finding, reached after careful comparative consideration of the *Rodriguez* record (which is at JR v XXXVIII-XLIII), that the record before her demonstrated "significantly and materially different legislative facts:" TJ Reasons, ¶¶896, 941-47, 998, 1003, JR v II, A.R. 54-55, 67-69, 82-84
[48] *Rodriguez*, at 605-08, ABoA v III, Tab 67
[49] *Rodriguez*, at 614, see also 613-15, ABoA v III, Tab 67
[50] TJ Reasons, ¶¶942-45, JR v II, A.R. 67-68
[51] TJ Reasons, ¶¶317-18, JR v I, A.R. 102
[52] TJ Reasons, ¶319, JR v I, A.R. 102

b. "[t]he preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death;"[53] a number of practitioners doubt the existence of a valid ethical distinction;[54] in an individual case, a bright-line ethical distinction is elusive;[55] and that there is no ethical distinction between suicide and assisted suicide in circumstances where the patient's decision to die is entirely rational and autonomous, is in the patient's best interest, and the patient has made an informed request for assistance;[56]

c. there is a relatively strong societal consensus that current legal end-of-life practices are ethical;[57] and

d. there is no clear societal consensus either in favour of or against PAD, but there is a strong societal consensus that if it is ethical, it is only so where it is clearly consistent with the patient's wishes and best interests, and done to relieve suffering.[58]

36. With respect to whether there is any "halfway measure" capable of protecting the vulnerable, Smith J.'s s. 7 and s. 1 analyses were informed by evidence regarding PAD in the seven permissive jurisdictions that came into existence post-*Rodriguez*, including detailed studies and expert evidence from primary researchers regarding structure, operation and experience under those with regulatory structures.[59] She also relied on evidence demonstrating that the psychological health establishment now firmly accepts the concept of a rational wish to die and considers it distinguishable from the reasoning process that informs traditional suicide.[60] The record in this case also includes detailed evidence regarding current legal end-of-life

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[53] TJ Reasons, ¶335, JR v I, A.R. 105
[54] TJ Reasons, ¶¶336-38, JR v I, A.R. 105-06
[55] TJ Reasons, ¶338, JR v I, A.R. 106
[56] TJ Reasons, ¶339, JR v I, A.R. 106
[57] TJ Reasons, ¶340, JR v I, A.R. 106
[58] TJ Reasons, ¶342, JR v I, A.R. 106-07
[59] TJ Reasons, ¶¶359-747, JR v I, A.R. 359 to v II, A.R. 15]
[60] TJ Reasons, ¶¶813-14, JR v II, A.R. 29-30; Affidavit #1 of Michael Ashby ("**Ashby #1**"), Ex E, p 75, JR v XI, 880; Battin #1, ¶¶28, 38, JR v XI, 918, 921-22; Battin #2, ¶¶11-14, 20, 28-29, Ex B, JR v XLVII, 13269-70, 13272, 13274, 13287-96; Affidavit #1 of Derryck Smith, made 31 Aug 2011 ("**Smith #1**"), ¶25, JR v XVII, 2950; Kimsma #1, ¶41(b), JR v XVIII, 3416-17; Affidavit #2 of Helene Starks, made 31 Oct 2011 ("**Starks #2**"), ¶¶5-6, 9-11, JR v XLVI, 13032-35; Affidavit #1 of James Werth, made 01 Nov 2011 ("**Werth #**1"), ¶¶20-33, 38-39, 40(d), 41, 47-49, 59-60, Ex B, C, JR v XLVI, 13095-104, 13107, 13134-72; Affidavit #2 of Linda Ganzini, made 02 Nov 2011 ("**Ganzini #2**"), ¶20, JR v XLVII, 13321

practices[61] and medical decision-making practices including extensive expert evidence regarding competence, independence, information obligations, patient resolve and the ability to assess these through informed consent for medical decision-making,[62] the risks in these practices, how these practices and risks are (and are not) regulated, and the ethics of same.[63] The record also contains extensive evidence about the actual impact of the current law. The *Rodriguez* record contained nothing comparable.

37. Concepts that were empty abstractions at the time of *Rodriguez* are now populated with facts, including evidence of foreign regimes, detailed research studies, and the testimony of actual participants. A debate once framed by stark philosophical opposition can now be assessed against experience. Speculative concern about the ability to distinguish between rational medical decision-making and traditional suicidal behaviour can now be gauged in the context of broad study-based expert consensus. In light of the evidence, some of the assumptions made by the *Rodriguez* majority now demonstrably lack factual grounding.

38. In short, the parameters of the debate *have* fundamentally shifted. The new evidence is not merely significant and material but, in fact critical, to a determination of whether the impugned laws are constitutionally valid today. Smith J. was entitled to decide all of the relevant legal issues, including those addressed in the *Rodriguez* Determinations, on the current record and as new legal issues.

39. Further, and in any event, there is no question as to this Court's authority to revisit the *Rodriguez* Determinations and reach different conclusions.[64] In *Fraser*, Rothstein J. summarized a number of criteria which had been identified by the majority of this Court and the Supreme Court of the United States in previous cases as potentially relevant in deciding whether a departure from precedent is appropriate in a given case.[65] These criteria favour revisitation of the *Rodriguez* Determinations: (a) the significant and material change in social and legislative facts

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[61] Including the practice of palliative sedation which was not considered by this Court in *Rodriguez*, ABoA v III, Tab 67.
[62] TJ Reasons, ¶¶748-884, JR v II, A.R. 15-51
[63] TJ Reasons, ¶¶185-231, JR v I, A.R. 58-70
[64] *Bedford*, ¶¶46-47, ABoA v I, Tab 10; *Canada v. Craig*, 2012 SCC 43 at ¶27, ABoA v I, Tab 11; *Fraser*, ABoA v II, Tab 32
[65] *Fraser*, ¶¶130-39, ABoA v II, Tab 32

has robbed the precedent of its justification;[66] (b) a contemporary application of the relevant legal principles demands a different conclusion, undermining the validity of *Rodriguez* as precedent;[67] and (c) the evidence in this case demonstrates that the absolute ban upheld in *Rodriguez* fails to reflect *Charter* values,[68] creates unfairness,[69] and defies workability.[70] Fundamentally, the rationales of certainty, consistency, predictability and institutional legitimacy do not outweigh the need to provide a correct answer.[71] The need for a correct answer is particularly strong when the effect of reversing *Rodriguez* would be to enhance, not diminish, *Charter* protection.[72] Finally, the life interest itself is in play here[73] and, in the sage words of Lord Atkin: "Finality is a good thing, but justice is a better."[74]

B. Interjurisdictional Immunity

40. Apart from their application to PAD, the impugned laws are accepted as a valid exercise of Parliament's criminal law power under s. 91(27). The issue raised is whether these laws are constitutionally inapplicable to PAD by reason of the doctrine of interjurisdictional immunity on the basis of ss. 92(7), (13) and (16), or any combination thereof, of the *Constitution Act, 1867*.[75]

41. This Court should find that the impugned laws are inapplicable to PAD on the basis of interjurisdictional immunity, if it answers the following questions in the affirmative: First, do the federal laws encroach on the protected core of a provincial competence? Second, is the effect of the encroachment sufficiently serious to invoke interjurisdictional immunity?[76]

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[66] *Fraser*, ¶¶136-37, ABoA v II, Tab 32
[67] *Fraser*, ¶¶134, 137, ABoA v II, Tab 32
[68] *Fraser*, ¶134, ABoA v II, Tab 32
[69] *Fraser*, ¶135, ABoA v II, Tab 32
[70] *Fraser*, ¶136, ABoA v II, Tab 32
[71] *Fraser*, ¶139, ABoA v II, Tab 32
[72] *Fraser*, ¶58, ABoA v II, Tab 32
[73] Both as an engaged s. 7 interest and as the nature of the interest affected under the s. 15 analysis.
[74] *Ras Behari Lal v. King Emperor*, [1933] All E.R. Rep. 723 at 726, ABoA v III, Tab 60
[75] *Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [***Constitution Act, 1867***]
[76] For this formulation of the test, albeit applied solely in relation to federal heads of power, see *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [***COPA***], ¶27, ABoA v II, Tab 38.

The Proposed Core of Provincial Power

42. Provincial power over health care includes the power to determine the medical treatments to be delivered at hospitals and other health care facilities.[77] In *PHS_SCC,* the Court declined to accept "the delivery of health care services" as a defined core of provincial power.[78] The holding in *PHS_SCC* does not, however, preclude this Court from recognizing a different - more narrowly and less amorphously defined - core of provincial power in relation to health care.[79]

43. In *PHS_SCC,* the Court remarked that "[o]verlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread."[80] However, this case involves a provincial sphere of authority, narrow and exceptional by nature, around which a bright line is both necessary and feasible: i.e., a provincial power to deliver medically-indicated medical treatments for which there is no alternative treatment capable of meeting the patient's medical need ("Proposed Core"). This Proposed Core is a matter of exclusive provincial jurisdiction under ss. 92(7), (13) and (16), or any combination thereof, of the *Constitution Act, 1867*.

44. The power to authorize the delivery of treatments falling within the Proposed Core undoubtedly falls within the "basic minimum and unassailable" core of provincial jurisdiction over health care; to paraphrase *Bell*,[81] the ability to make such decisions, and in particular with regard to the fact that the decision relates to a situation of necessity where there are no other alternative treatments, is what makes health care of specifically provincial jurisdiction.

Serious Effect of the Impugned Laws on the Proposed Core Provincial Power

45. The effect of the impugned federal laws is sufficiently serious to justify invoking the doctrine of interjurisdictional immunity. The application of the impugned laws to PAD in particular not only impairs, but effectively prevents the delivery of health care in some

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[77] *Mazzei v. British Columbia (Director of Adult Forensic Services Psychiatric Services)*, 2006 SCC 7, ¶¶31 and 34, ABoA v II, Tab 30
[78] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [***PHS_SCC***], ¶66, ABoA v I, Tab 13
[79] *PHS_SCC*, ¶68, ABoA v I, Tab 13
[80] *PHS_SCC*, ¶68, ABoA v I, Tab 13

circumstances. The impugned laws, as they apply to PAD where no other treatment will meet the patient's medical needs,[82] essentially stop the provinces from providing *any* medically appropriate health care to the patient in question.[83] The same is, by definition, true of all medical treatments falling within the Proposed Core.

46. Binnie and LeBel JJ. in *CWB* counselled that interjurisdictional immunity is reserved for, *inter alia*, "what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction."[84] The application of interjurisdictional immunity to the Proposed Core falls squarely within this category. Indeed, the Proposed Core is formulated in terms of "necessity."

47. Recognition of the Proposed Core would not implicate the three concerns that animate the cautious approach taken to date in respect of interjurisdictional immunity.[85] First, modern federalism recognizes significant concurrent federal and provincial jurisdiction.[86] Recognition of the Proposed Core would have no bearing on Parliament's ability to generally enact valid criminal legislation that touches upon health matters.[87] As defined, the Proposed Core impacts the applicability of federal law only where the effect of the law is to deprive a province of the ability to provide any meaningful medical treatment. The Proposed Core will only mandate "exceptions" to the application of federal legislation where it actually precludes provincial

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[81] *Bell Canada v. Québec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, ABoA v I, Tab 7; see also *Canadian Western Bank v. Alberta*, 2007 SCC 22 [***CWB***], ¶51, ABoA v I, Tab 15

[82] The appellants refer to their Amended Response to Demand for Particulars the content of which is set out at TJ Reasons ¶24, JR v I, A.R. 13, and note that the patient's medical condition must be diagnosed as such by a medical practitioner who will also provide a range of medically indicated treatment options. Whether the condition is without remedy is to be assessed by reference to treatment options acceptable to the patient. AGC's four palliative care experts all testified that assessment of suffering is subjective and that in medicine and, in particular, in the context of palliative care, physicians look to patients and their families to know what the experience of suffering is: Downing Cross, 2:13-19, JR v XLVIII, 13568; McGregor Cross, 86:17-20, JR v V, 86; Pereira Cross, 564:37-42, JR v VII, 564; Cross Examination of Harvey Chochinov held November 25, 2011, 719:36-46, JR v VIII, 719. The law has already established the informed consent standard as the appropriate standard for medical decision-making. Under this standard, the decision lies with the patient and the physician's onus is to ensure that a patient is provided with sufficient information about diagnosis, prognosis and treatment options to make an informed decision: Affidavit #2 of Martha Donnelly made 31 Oct 2011 ("**Donnelly #2**"), ¶40, JR v XLVI, 13028; Smith #2, ¶6, JR v XLVI, 13013; Battin #2, ¶18, JR v XLVII, 13271-72.

[83] It matters not that in this case British Columbia is not currently exercising its legislative authority to specifically regulate PAD: *PHS_SCC*, ¶59, ABoA v I, Tab 13.

[84] *CWB*, ¶77, ABoA v I, Tab 15

[85] *PHS_SCC*, ¶¶62-64, ABoA v I, Tab 13

[86] *PHS_SCC*, ¶62, ABoA v I, Tab 13

[87] *PHS_SCC*, ¶69, ABoA v I, Tab 13

exercise of jurisdiction. Recognizing a provincial core so structured operates to *maximize* concurrency, not to restrict it.

48. Recognition of the Proposed Core would enable both governments to legislate to advance their respective valid purposes. Parliament could legislate in respect of dangerous and/or "socially undesirable" behaviour.[88] That legislation would be inapplicable only to the extent it prohibits a prescribed medical treatment which is the only treatment capable of meeting the patient's medical need.

49. Second, recognizing the Proposed Core is consonant with the emergent practice of cooperative federalism.[89] Where a core *provincial* power is impaired by a *federal* law, rather than proceeding directly to paramountcy, the court should consider whether interjurisdictional immunity should protect the provincial core. The doctrine of paramountcy applied in combination with a blanket federal prohibition like that under the impugned laws eliminates the possibility of interlocking federal and provincial legislative schemes with respect to a double aspect matter, whereas recognition of the Proposed Core would foster such a development.

50. This Court has repeatedly recognised that the criminal law power, though broad, "is not unlimited."[90] Valid criminal law may have incidental effects upon areas of provincial competence,[91] but the jurisprudence has never suggested that the criminal law can encroach upon areas of exclusive provincial concern so as to impair core provincial powers. Rather, the converse is true: the criminal law "cannot be used to eviscerate the provincial power to regulate health."[92] As such, the tendency in the cases has been to recognise that the criminal law power must be subject to some limits in order to afford the provinces "adequate breathing room" in the exercise of their jurisdiction, and to safeguard the balance of Canadian federalism.[93]

51. Third, a legal vacuum would not result. By virtue of its structure, the Proposed Core would only operate to confer immunity where it actually precludes all exercise of provincial

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[88] *PHS_SCC*, ¶68, ABoA v I, Tab 13
[89] *PHS_SCC*, ¶63, ABoA v I, Tab 13
[90] *Reference re Firearms Act (Can.),* 2000 SCC 31 [***Firearms Reference***], ¶30, ABoA v III, Tab 63
[91] *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [***Hydro- Québec***], ¶129, ABoA v II, Tab 44; *Firearms Reference*, ¶¶48-49, ABoA v III, Tab 63
[92] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, ¶77 per McLachlin C.J., ABoA v III, Tab 62
[93] *Hydro- Québec*, ¶153, ABoA v II, Tab 44

jurisdiction. Even if the province chose not to legislate in the area of medically indicated PAD specifically, this would simply put the practice on the same footing as other medically indicated treatment such as palliative sedation which remains in provincial jurisdiction.[94]

52. In *CWB*, Binnie and LeBel JJ. identified several further concerns about interjurisdictional immunity. These include a history of the doctrine's having "an unintentional centralising tendency,"[95] leading to "somewhat asymmetrical results"[96] in application; the ability of the doctrine, as traditionally applied, to undermine the principles of subsidiarity;[97] the risk of its creating "serious uncertainty" by defining, in the abstract, indeterminate core areas of jurisdiction;[98] and the apparently superfluous nature of the doctrine,[99] at least insofar as its application to federal powers is concerned.

53. Applying interjurisdictional immunity to protect the Proposed Core does not raise any of these concerns. When applied to protect a provincial power, the doctrine operates to *offset* the combined centralizing influence of paramountcy and historic asymmetry of interjurisdictional immunity. Nor is it superfluous, as paramountcy cannot be invoked by the provinces. It does not create serious uncertainty, as it incorporates a test of defined application which, in the event of dispute as to whether the Proposed Core was engaged, would reduce to a readily justiciable factual issue. It also supports subsidiarity.

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[94] The province has jurisdiction over health care. In BC, the Province has exercised this jurisdiction, in part, by enacting the *Health Professions Act*, R.S.B.C. 1996, c 183, which establishes the College of Physicians which ensures that physicians are a self-regulating profession and allows physicians to make their own treatment choices (in accordance with other provincial laws relating to health care). Even if this Court is not prepared to accept that existing provincial laws address the delivery of PAD as health care, the failure of the Province to legislate specifically with respect to PAD does not create a legal vacuum or gap within the meaning of the caselaw. See for e.g. *COPA* where the province had argued (in favour of the applicability of its laws), that Parliament had not in fact regulated the location of aerodromes, and, if it did so, any contrary provincial law would then have to yield to the federal regulation by virtue of federal paramountcy. In the absence of a conflicting federal law, the province argued its law should apply. The Chief Justice rejected this argument at ¶53 noting "acceptance of this argument would narrow Parliament's legislative options and impeded the exercise of its core jurisdiction." Therefore she held that the doctrine of interjurisdictional immunity exempted the aerodrome from the provincial law prohibiting non-agriculture uses even in the absence of federal regulation. The same observations apply here, *mutatis mutandis*.

[95] *CWB*, ¶45, ABoA v I, Tab 15

[96] *CWB*, ¶35, ABoA v I, Tab 15

[97] *CWB*, ¶45, ABoA v I, Tab 15

[98] *CWB*, ¶43, ABoA v I, Tab 15

[99] *CWB*, ¶46, ABoA v I, Tab 15

C. Section 7

Impugned Laws Engage the Life, Liberty and Security of the Person Interests

54. Smith J. found that the impugned laws engaged the s. 7 liberty interest (including the right to non-interference with fundamentally important, personal medical decision-making as an aspect of liberty) and security of the person interest.[100]

55. Smith J. also correctly found the s. 7 life interest to be engaged because the impugned laws force an earlier decision and possible earlier death on persons like Ms. Taylor.[101] This finding was supported by unchallenged evidence.[102]

56. Finch CJBC, in dissent, upheld Smith J.'s finding regarding the life interest, but correctly concluded that the life interest was engaged in a broader aspect as well:[103]

> Surely this human rights guarantee should protect "life" beyond one's mere physical existence. "Everyone" lives in different circumstances, experiences life in different ways, and lives within the ambit of his or her own personal abilities, characteristics and aptitudes. The meaning of the term "life" in the context of s. 7 includes a full range of potential human experiences. The value a person ascribes to his or her life may include physical, intellectual, emotional, cultural and spiritual experiences, the engagement of one's senses, intellect and feelings, meeting challenges, enjoying successes, and accepting or overcoming defeats, forming friendships and other relationships, cooperating, helping others, being part of a team, enjoying a moment, and anticipating the future and remembering the past. Life's meaning, and by extension the life interest in s. 7, is intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, when suffering overwhelms all else, is an intensely personal decision which "everyone" has the right to make for him or herself.[104]

57. Smith J. also made factual findings regarding the extent or severity of the deprivations at issue given the interests engaged under s. 7, noting with regard to Gloria Taylor and persons like

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[100] TJ Reasons, ¶¶1291-305, 1320-21, JR v II, A.R. 163-67, 170. AGC properly did not challenge those findings before the BCCA.
[101] TJ Reasons, ¶1322, JR v II, A.R. 170
[102] Affidavit #1 of Rosana Pellizzari, made 20 Jul 2011 ("**Pellizzari #1**"), ¶7, JR v IX, 329; Affidavit #1 of Elayne Shapray, made 03 Aug 2011 ("**Shapray #1**"), ¶¶16-18, JR v IX, 338; Affidavit #1 of Leslie LaForest, made 22 Aug 2011 ("**LaForest #1**"), ¶¶39-45, JR v IX, 146-47; Affidavit #1 of Susan Bracken, made 25 Aug 2011 ("**Bracken #1**"), ¶18, JR v XIII, 1427; Affidavit #1 of Peter Fenker, made 26 Aug 2011 ("**P. Fenker #1**"), ¶20, JR v XIV, 2101
[103] CA Reasons, ¶¶84-89, JR v III, A.R. 64
[104] CA Reasons, ¶86, JR v III, A.R. 64-65

her that:[105] (1) their lives may be shortened if they take steps to end their lives sooner than they would feel it necessary to do if they were able to receive assistance; (2) they are denied the opportunity to make a choice of fundamental importance to them; (3) they are denied self-worth in being denied autonomy; (4) that palliative care, including palliative sedation, may be unavailable and/or unacceptable as relief for their suffering, and for some palliative care short of palliative sedation may not be able to alleviate their suffering and "[t]hus, they may be required to continue to undergo physical pain or psychological suffering or both, possibly exacerbated by terrible fear about what is yet to come;"[106] (5) they are made to undergo stress and deprived of peace of mind. Those who assist their loved ones are forced to risk serious criminal prosecution.

Principles of Fundamental Justice

58. This Court recently clarified the qualitative approach to the principles of fundamental justice:

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[105] TJ Reasons, ¶¶1323-30, JR v II, A.R. 170-71. See also FN 231.

[106] TJ Reasons, ¶1328, JR v II, A.R. 171. A non-exhaustive listing of the evidence supporting the finding that palliative sedation is not always available to those suffering intolerably and/or can be unacceptable to the patient (because it may, among other things: be incompatible with the value the patient places on maintaining consciousness and dignity; give rise to concerns about its impact on surviving family members; or give rise to reasonable concerns about its effectiveness) can be found at: Angell #1, ¶¶9, 14, Ex C, p 40, JR v XI, 749, 751, 796; Ashby #1, ¶12, JR v XI, 801-02; Battin #1, ¶26, JR v XI, 916-17; Battin #2, ¶¶27, 32-35, JR v XLVII, 13273-74, 13275-76; Bereza #1, ¶¶35-36, 49, 54-55, JR v XXXI, 7842-43, 7846-49; Affidavit #1 of Marcel Boisvert, made 26 Aug 2011 ("**Boisvert #1**"), ¶¶12-13, 15, JR v XII, 1240-41; Affidavit #2 of Marcel Boisvert, made 31 Oct 2011, ¶6, JR v XLVII, 13257; Bruce #1, ¶¶9, 12, Ex C, pp 49-50, 53, JR v XIII, 1431-32, 1482-83, 1486; Affidavit #1 of Eric Cassell, made 24 Aug 2011, ¶¶13-14, JR v XIII, 1631-32; Report of Harvey Chochinov dated September 30, 2011, ¶¶41, 43, JR v XXVII, 6388-64; Cohen #2, ¶17, JR v XIII, 1764; Affidavit #1 of Nica Cordover, made 24 Aug 2011 ("**Cordover #1**"), ¶¶51-52, JR v XIV, 1909; Affidavit #1 of Michael Downing, made 03 Oct 2011 ("**Downing #1**"), ¶¶5, 49-50, 81-83, Ex H, I, JR v XXVI, A.R. 6108, 6122, 6129-30, 6236-67; Downing Cross, 2:43-3:17, 5:3-11, 14:36-15:22, 21:38-22:32, 39:16-34, JR v XLVIII, 13568-69, 13571, 13580-81, 13587-88, 13605; Affidavit #1 of Grace Fenker, made 04 Nov 2011 ("**G. Fenker #1**"), ¶¶5, 13, JR v XLVII, 13371, 13373; Report of Romayne Gallagher dated September 30, 2011, 4:22-29, 5:16-17, 14:4-6, JR v XLIV, 12381-82, 12391; Ganzini #2, ¶54, JR v XLVII, 13329; Affidavit #1 of Ann Jackson, made 28 Aug 2011 ("**Jackson #1**"), ¶15, JR v XVI, 2463; Kimsma #1, Ex D, p 39, JR v XVIII, 3457; LaForest #1, ¶¶25, 51-52, JR v IX, 143, 148; Affidavit #1 of Douglas McGregor, made 23 Sep 2011, ¶¶44-45, Ex H-L, JR v XXII, 4608-09, 4704-4802; McGregor Cross, 95:19-96:17, 98-101, Ex 9, see also 101-03, Ex 10, JR v V, 95-96, 98-103; v L, 14044-50; Affidavit #1 of Robb Miller, made 24 Aug 2011 ("**Miller #1**"), ¶8, JR v XVII, 2890; Affidavit #1 of Anthony Nicklinson, made 22 Aug 2011 ("**Nicklinson #1**"), Ex C, pp 24-25, Ex F, ¶5, JR v IX, 310-11, 322; Report of José Pereira dated October 17, 2011, ¶31, JR v XXXVII, 9790; Pereira Cross, 414:10-20, 423:12-25, 423:37-434:30, JR v VII, 414, 423-34; Rasmussen #1, ¶¶9-24, 37, JR v XLVI, 13001-06, 13008; Affidavit #1 of Jason Renaud, made 23 Aug 2011 ("**Renaud #1**"), ¶7, JR v IX, 333; Shoichet #1, ¶¶6, 9, JR v IX, 342-43; Affidavit #1 of Stephen Speckart, made 23 Aug 2011, ¶3, JR v IX, 346; Affidavit #1 of Helene Starks, made 29 Aug 2011 ("**Starks #1**"), Ex F, p 70, JR v XVII, 3135; Syme #1, ¶¶11, 17, JR v X, 354, 356-57; Affidavit #2 of Gloria Taylor, made 25 Aug 2011 ("**Taylor #2**"), ¶¶37-39, JR v XVIII, 3385-86; Affidavit #1 of Ross Upshur, made 26 Sep 2011, ¶12, JR v XXVI, 6283.

> [123] All three principles - arbitrariness, overbreadth, and gross disproportionality - compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.[107]

59. The analyses for consistency with the principles of fundamental justice in relation to the flaws of arbitrariness, overbreadth and gross disproportionality focus on the measure of the law in terms of legislative objective. Thus, we begin with identification of that objective.

i. Smith J. Correctly Identified the Impugned Laws' Objective

60. Smith J. correctly found that the objective of s. 241(b) is "to protect vulnerable persons from being induced to commit suicide at a time of weakness."[108] The prohibition against voluntary euthanasia imposed by the impugned laws[109] has a parallel objective (i.e., to protect vulnerable persons from being induced to seek assistance to die). Thus, protecting the vulnerable from being induced to seek death constitutes the objective of the impugned laws collectively.

61. "Vulnerability" for purposes of the objective must reflect the evil the law addresses - the possibility that assistance may induce someone to choose to die against their true wishes. Thus, the relevant vulnerability is "**decisional vulnerability**." Decisional vulnerability encompasses concerns about incompetence, non-voluntariness, uninformed decision-making, and ambivalence. (Collectively, in their positive form - i.e., competence, independence, informed and resolved - these characteristics constitute "**decisional capacity**").[110]

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[107] *Bedford*, ¶123, ABoA v I, Tab 10 (emphasis in original)

[108] TJ Reasons, ¶¶1184-90, JR v II, A.R. 137-40. This was the objective posited by both the appellants and AGBC in the Court below. There has been remarkable unanimity among the judges who have considered the issue as to the purpose and object of the impugned laws: *Rodriguez*, at 595, Sopinka J., ABoA v III, Tab 67; at 558, Lamer C.J., dissenting; at 625, McLachlin J., dissenting; at 629-30, Cory J., dissenting.

[109] The prohibition against voluntary euthanasia flows, in particular, from the intersection between s. 14 of the *Code* and the culpable homicide and related substantive provisions.

[110] Given the appellants' position that the presence of Major Depressive Disorder ("MDD") may itself be considered a disqualifying condition, the appellants' position throughout assumes that persons with MDD lack decisional capacity.

62. AGC, relying on *Malmo-Levine*,[111] argued below that the objective should be framed in terms of preventing even one "wrongful death."[112] Smith J. correctly rejected this submission as one that would have the court "adopt an unrealistically exacting or precise formulation of the government's objective that effectively immunizes the law from scrutiny at the minimal impairment stage."[113] As further correctly noted by Finch CJBC, dissenting, *Malmo-Levine* provides no support for the use of reasonable apprehension of harm advocated for by AGC and virtually every *Code* provision could be so framed for justification.[114]

63. AGC also argued below that a broader objective should be framed - one that includes, in addition to the objective identified in *Rodriguez* and accepted by Smith J., the following goals: expressing a state policy that the value of life is not to be depreciated by allowing a person to take another's life, discouraging everyone from choosing death, and guarding against negative social messaging both in terms of state condonation of suicide and the ascription of relative values to individual lives.[115]

64. This Court has held that the focus is properly on the objective of the "infringing measure" itself, noting that if the objective is stated "too broadly, its importance may be exaggerated and the analysis compromised."[116] The objective of the impugned laws must be framed in light of the entire *Code* and they must be given a specific objective aside from the stand-alone homicide provisions (i.e., those not implicating s. 14 of the *Code*).[117] Further, the absolute protection of

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[111] *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 [***Malmo-Levine***], ABoA v II, Tab 50

[112] AGC relied on *Burns* for the notion that "even one is too many." Smith J. noted this reliance was not "particularly apt. Capital punishment, the taking of an individual's life by the state, bears no resemblance to physician-assisted dying in the context we are concerned with here:" TJ Reasons, ¶1356, JR v II, A.R. 178-78. AGC uses the broadest notion of "wrongful death." It would include, e.g., PAD where there has been no intention by medical personnel to misinform a patient or withhold information, but the patient - who is grievously ill, decisionally capable and not subject to coercion or undue influence - has not been fully informed regarding his prognosis: TJ Reasons, ¶757, JR v II, A.R. 16-17. Sopinka J. in *Rodriguez* was more concerned with deaths that might be described as involving "abuses" or "excesses," as opposed to those involving the innocent or inadvertent "mistakes" that may occur from time to time in the good faith practice of medicine: *Rodriguez*, e.g. at 600-01, ABoA v III, Tab 67.

[113] TJ Reasons, ¶¶1231, 1352-55, JR v II, A.R. 149, 178. The same would be true with regard to overbreadth; that is, adopting the AGC's formulation would immunize the law from scrutiny for the flaw of overbreadth at the s. 7 stage.

[114] CA Reasons, ¶134, JR v III, A.R. 78

[115] In dissent, Finch CJBC found it appropriate to allow an expansion of the objective: CA Reasons, ¶¶143 and 146, JR v III, A.R. 81-82.

[116] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, ¶144, ABoA v III, Tab 66

[117] See e.g. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 [***Vaillancourt***], at 644, 660, ABoA v III, Tab 59. At issue was the constitutionality of the offence of constructive murder. This Court considered how each murder provision fit into the *Code*. It did not characterize the objective of the law as AGC has here. Such a characterization would have been

life is inconsistent with other *Code* provisions which justify and hence condone the taking of life.[118] AGC's additional so-called objectives are properly characterized as rationales or "explanations," not as objectives of the legislation.[119] As such, they fall to be considered at the s. 1 stage.[120] As the judgment of Finch CJBC dissenting makes clear, even if these are additional "objectives", the impugned laws are still not in accordance with the principles of fundamental justice.[121]

ii. The Impugned Laws are Arbitrary

65. Arbitrariness describes "the situation where there is no connection between the effect and the object of the law."[122] Inconsistency is one means of demonstrating the required connection is lacking.[123] So, for example, in *Morgentaler*[124] and *Chaoulli*,[125] this Court found laws arbitrary where the actual effect of the law contravened the very objective articulated for the law, and in *PHS_SCC*, it found the Minister's decision arbitrary because the actual effect of the decision would undermine the objects of the authorizing statute.[126]

66. In considering arbitrariness, the first step is to identify the law's objectives.[127] The "second step is to identify the relationship between the state interest and the impugned law."[128] Here, there is no relationship between the objective and the actual effects of the impugned laws. Further, the actual effects of the law undermine the objective.

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too general and would obviate the need to consider the provision in its larger scheme. It held: "Parliament intended to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death" (at 660). This was an important objective but the infringement was still unjustified because it was not minimally impairing.

[118] See e.g. *Code*, ss. 25, 33(2), 34(2)-35

[119] *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶114, ABoA v III, Tab 73. Expansion of the legislative objective by the addition of the rationales or explanations suggested by AGC would also effectively incorporate a consideration of "benefits to society" into the s. 7 analysis, notwithstanding this Court's description of the nature of the s. 7 analysis in *Bedford* and, in particular, its statement (at ¶123) that the flaws of arbitrariness, overbreadth and gross disproportionality do not "consider ancillary benefits to the population:" *Bedford*, ¶¶113, 121-23, ABoA v I, Tab 10.

[120] *Bedford*, ¶126, ABoA v I, Tab 10

[121] CA Reasons, ¶146, per Finch CJBC, JR v III, A.R. 82

[122] *Bedford*, ¶¶98 and 119, ABoA v I, Tab 10

[123] *Bedford*, ¶¶118-19, ABoA v I, Tab 10

[124] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [***Morgentaler***], ABoA v II, Tab 52

[125] *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35 [***Chaoulli***], ABoA v I, Tab 16

[126] *Bedford*, ¶¶98-100, ABoA v I, Tab 10

[127] *PHS_SCC*, ¶129, ABoA v I, Tab 13

[128] *PHS_SCC*, ¶130, ABoA v I, Tab 13

67. AGC concedes people may have a rational wish to die.[129] For those people, there is no connection between the objective and actual effects of the law. If the presumption is arbitrary in some circumstances then, a *fortiori*, it is arbitrary to make it *irrebuttable* as it is under the impugned laws.[130] The result is an unjustified, erroneous interference with autonomous choice.[131]

68. Smith J. found that under the impugned laws, deaths of the decisionally incapable occur and likely occur *because of* the blanket prohibition.[132] She also found that a strictly regulated system of PAD would probably greatly reduce or eliminate assisted deaths by *non-physicians*, leaving the field to be occupied by physicians who would assess patients for decisional capacity[133] in compliance with the requirements of a regulated system.[134] Thus the absolute prohibition actually contributes to the risk to the decisionally vulnerable, rather than reducing it, and thus the law negatively impacts such people and is arbitrary.

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[129] TJ Reasons, ¶1136 (quoting AGC's written submissions at trial), JR v II, A.R. 125

[130] The irrationality of an irrebuttable presumption was effectively conceded by AGC below: TJ Reasons, ¶1136, JR v II, A.R. 125. No such concession was made in *Rodriguez*. Further, the evidence demonstrates that a request for PAD can be a decisionally capable decision (i.e., one that is competent, independent, informed and resolved): Pellizzari #1, ¶¶4-5, JR v IX, 328; Affidavit #1 of Jonathan Leeking, made 26 Jul 2011 ("**Leeking #1**"), ¶¶21-23, JR v IX, 155-56; LaForest #1, ¶¶5-12, 46-50, JR v IX, 139-40, 145-48; Affidavit #1 of Lee Carter, made 24 Aug 2011 ("**Carter #1**"), ¶¶14-15, JR v XIII, 1582-83; Affidavit #2 of Lee Carter, made 31 Oct 2011, ¶¶4-7, 10, JR v XLVI, 13047-49; Cordover #1, ¶¶15, 47-48, JR v XIV, 1901, 1907-08; Affidavit #1 of Hollis Johnson, made 24 Aug 2011 ("**Johnson #1**"), ¶¶4-8, 12-13, JR v XVI, 2504-06; Affidavit #1 of Marlene Reisler, made 24 Aug 2011, ¶¶4-5, 10, JR v XVII, 2940-41; Bracken #1, ¶¶9, 19, 21, JR v XIII, 1425, 1427-28; Taylor #2, ¶¶4-10, 19, 21, 35-36, 43-45, JR v XVIII, 3377-79, 3381-82, 3384-87; P. Fenker #1, ¶19, JR v XIV, 2101; Affidavit #1 of Pieter Zwart, made 26 Aug 2011, ¶¶9-10, 14-15, 17, 19, 27, JR v XVIII, 3395-99 ; Affidavit #1 of Linda Ganzini, made 02 Nov 2011 ("**Ganzini #1**"), ¶¶27, 37, JR v XV, 2121-22, 2128-29; Bell #1, ¶7, JR v XII, 1071, 1071; Starks #1, ¶¶20-21, 23-24, 26, 31, 35, 38, Ex C, p 42, Ex D, pp 53, 56-59 and Tables 2 and 3, Ex F, pp 70-71, 75-76, Ex I, p 120, JR v XVII, 3056-63, 3107, 3118, 3120-24, 3135-36, 3140-41, 3185; Affidavit #1 of Sharon Cohen, made 30 Aug 2011, ¶¶13-14, 19, JR v XIII, 1714-16; Rasmussen #1, ¶31, JR v XLVI, 13007; Werth #1, ¶¶55(a), 57, JR v XLVI, 13105, 13107; Ganzini #2, ¶¶9, 43, 49, JR v XLVII, 13318, 13326-28. This is unlike "traditional" suicide. See TJ Reasons, ¶814, JR v II, A.R. 30. See also Ashby #1, Ex E, p 75, JR v XI, 880; Battin #1, ¶¶28, 38, JR v XI, 918, 921-22; Battin #2, ¶¶11-14, 20, 28-29, Ex B, JR v XLVII, 13269-70, 13272, 13274, 13287-96; Smith #1, ¶25, JR v XVII, 2950, Kimsma #1, ¶41(b), JR v XVIII, 3416-17; Starks #2, ¶¶5-6, 9-11, JR v XLVI, 13032-35; Werth #1, ¶¶20-33, 38-39, 40(d), 41, 47-49, 59-60, Ex B, C, JR v XLVI, 13095-104, 13107; Ganzini #2, ¶20, JR v XLVII, 13321. Professor Werth's evidence of the studies and association recognitions of the rationality of decision-making in assisted dying post-date *Rodriguez*.

[131] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 [***A.C.***], ¶223, ABoA v I, Tab 1, Binnie J., dissenting, also ¶¶107-08 where the majority found the law was not arbitrary because it did not set up an irrebuttable presumption.

[132] TJ Reasons ¶¶1267, 1370, JR v II, A.R. 157, 181. AGC's own evidence supports this fact: Report of Catherine Frazee dated October 11, 2011 ("**Frazee Report**"), JR v XLIV, 12248

[133] TJ Reasons, ¶1370, JR v II, A.R. 181

[134] TJ Reasons, ¶¶680, 683, JR v I, A.R. 196-97

iii. The Impugned Laws are Overbroad

69. Smith J. articulated the correct approach to overbreadth.[135]

70. She also recognized that "the legislative means chosen are entitled to a measure of deference."[136] While the government is entitled to a measure of deference in the assessment of overbreadth, the more serious the impingement on life, liberty and security, the less will be accorded.[137] Where, as here, impingement on the rights to life, liberty and security of the person are made out, the range of reasonable alternatives open to Parliament is necessarily more limited.

71. Where a law is overbroad, the principles of fundamental justice are violated because "individual's rights will have been limited for no reason."[138] As this Court recently held in *Bedford*, overbreadth is to be assessed in relation to impacted individuals:

> 113 [T]he focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.[139]

72. Smith J held that the impugned laws are framed more broadly than necessary to achieve the state's objective.[140] That conclusion was correct, as was Finch CJBC's affirmation of it.[141]

73. AGC effectively conceded at trial that the impugned laws apply to persons who do not fall within their objective. AGC stated: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives. Ms. Taylor may be such a person…"[142]

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[135] TJ Reasons, ¶¶1339-40,1348, JR v II, A.R. 174, 176; *Bedford*, ¶¶101-02, 107, 112-17, ABoA v I, Tab 10
[136] TJ Reasons, ¶1343, JR v II, A.R. 175
[137] CA Reasons, ¶¶135-36, JR v III, A.R. 79; *Chaoulli*, ¶131, ABoA v I, Tab 16
[138] TJ Reasons, ¶1341 (citing *R. v. Heywood*, [1994] 3 S.C.R. 761), JR v II, A.R. 174; *Bedford*, ¶¶112-13, ABoA v I, Tab 10
[139] *Bedford*, ¶113 (italicized emphasis in original; underlined emphasis added), ABoA v I, Tab 10
[140] TJ Reasons, ¶¶1364-71, JR v II, A.R. 180-81
[141] CA Reasons, ¶¶164-65, JR v III, A.R. 87 As already noted, Finch CJBC found the impugned laws to be both overbroad and grossly disproportionate notwithstanding his acceptance of a broader objective for the legislation: CA Reasons, ¶145, JR v III, A.R. 82
[142] TJ Reasons, ¶1136 (quoting AGC's written submissions at trial), JR v II, A.R. 125

AGC's concession that decisionally capable persons exist and are adversely impacted in their ability to seek PAD is sufficient, in and of itself, to establish overbreadth.[143]

74. Notwithstanding that concession, Smith J. went on to address the issue of whether the decisionally capable could be reliably identified as such as part of the overbreadth analysis.[144] She compared the approach taken to other end-of-life practices.[145] Smith J. also referenced the evidence from permissive jurisdictions regarding abuse, physician conduct and the asserted existence of a practical slippery slope (including in relation to social vulnerabilities)[146] as part of the overbreadth analysis.[147] She similarly referenced her findings regarding both consistency with medical ethics[148] and the fact that assisted deaths take place under the impugned laws.[149] In light of *Bedford*, all of these matters fall for consideration in the s. 1 analysis,[150] and will be addressed below in that context.[151]

iv. The Impugned Laws are Grossly Disproportionate

75. Smith J. articulated the correct test for gross disproportionality, addressing it as a distinct principle of fundamental justice.[152]

76. The law at the time of trial was unclear as to whether the beneficial social effects of a law were relevant to gross disproportionality.[153] However, Smith J. rendered dispute on the point irrelevant by specifically concluding that the impugned laws were grossly disproportionate *even if the beneficial effects claimed by AGC* were considered.[154]

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[143] TJ Reasons, ¶1129, JR v II, A.R. 123
[144] TJ Reasons, ¶1365, JR v II, A.R. 180
[145] TJ Reasons, ¶1368, JR v II, A.R. 181
[146] AGC made arguments relating to what were referenced in argument below as "social vulnerabilities." These include age, sex, race, ethnicity, socio-economic status, and disability. These characteristics are relevant to the case due to the oft-made speculative assertion (disproved here on the evidence) that assistance in dying will selectively disfavour patients with social vulnerabilities. In other words, the asserted concern is that social vulnerabilities increase the risk of decisional vulnerability. This factum addresses social vulnerabilities in the s. 1 analysis.
[147] TJ Reasons, ¶1366, JR v II, A.R. 180
[148] TJ Reasons, ¶1369, JR v II, A.R. 181
[149] TJ Reasons, ¶1370, JR v II, A.R. 181
[150] *Bedford*, ¶¶125-27, ABoA v I, Tab 10
[151] However, should this Court conclude that these matters do properly form part of the overbreadth analysis, then the appellants incorporate and rely upon their submissions under s. 1 in support of their position on s. 7.
[152] TJ Reasons, ¶¶1372-76, JR v II, A.R. 181-83; *Bedford*, ¶¶103-04, 120-22 ABoA v I, Tab 10
[153] In *Bedford* ¶121, ABoA v I, Tab 10, this Court held that any such benefits are not to be considered under s. 7.
[154] TJ Reasons, ¶¶1377-78, JR v II, A.R. 183. Smith J.'s reasons on gross disproportionality are so framed as she had already done a proportionality analysis under s. 1 for the s. 15 violation, thus she was in a position to hold that, even having earlier considered salutary effects as well, the deleterious effects were *still grossly* disproportionate.

77. Smith J. correctly found the effects to be very severe and grossly disproportionate.[155] Finch CJBC correctly affirmed that finding, noting that one of the effects is to cause premature deaths.[156]

v. The Impugned Laws Offend the Principle of Parity

78. The principle that requires criminal punishment to be proportional to the gravity of the offence and the degree of responsibility of the offender (the "principle of proportionality in punishment") is a long-standing legal tenet, codified in 1996.[157] It is a principle already recognized as foundational to the integrity and moral authority of the criminal law: "It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a 'fit' sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of *the system*."[158] This Court has already held that it "could be aptly described as a principle of fundamental justice under s. 7."[159]

79. The role of the principle of proportionality in punishment is not limited to sentencing considerations. As a principle of fundamental justice, the principle of proportionality in punishment can be relevant to the constitutional validity of a substantive criminal offence.[160]

80. The principle of proportionality in punishment has two core facets: cardinal proportionality and ordinal proportionality. Cardinal proportionality is non-relative and addresses the appropriateness of the punishment in relation to a specific offence. Ordinal proportionality -

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[155] See TJ Reasons, ¶¶1256-57, 1266, 1276-81, 1376-78, JR v II, A.R. 154-55, 157, 159-61, 183

[156] CA Reasons, ¶166, JR v III, A.R. 87. Finch CJBC applied a combined analysis for overbreadth and gross disproportionality: CA Reasons, ¶¶127-28, JR v III, A.R. 76.

[157] *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, ¶¶40-41 and 78-79, ABoA v II, Tab 49; *R. v. Nasogaluak*, 2010 SCC 6, ¶¶39-45, ABoA v II, Tab 53; *R. v. Ipeelee*, 2012 SCC 13 [***Ipeelee***], ¶¶36-37, ABoA v II, Tab 45; *Code*, ss. 718.1, 718.2

[158] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 [***Motor Vehicle Reference***] at 533 (Wilson J., concurring; emphasis added), ABoA v III, Tab 61; *Ipeelee*, ¶37, ABoA v II, Tab 45; *R. v. Arcand*, 2010 ABCA 363 [***Arcand***], ¶¶54-55, ABoA v II, Tab 40

[159] *Ipeelee*, ¶36, ABoA v II, Tab 45

[160] The principle of proportionality in punishment was relied on by this Court to establish minimum *mens rea* requirements for certain criminal offences as principles of fundamental justice under s. 7: *Vaillancourt*, at 652-54, ABoA v III, Tab 59; *R. v. Martineau*, [1990] 2 S.C.R. 633 [***Martineau***], at 645-46, ABoA v II, Tab 51; *R. v. Logan*, [1990] 2 S.C.R. 731, ABoA v II, Tab 48. These *mens rea* requirements represent offence-specific substantive formulations of the principle of proportionality in punishment: "The effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender," ABoA v II, Tab 51.

commonly referred to as parity - addresses how severely crimes should be sanctioned relative to one another.[161]

81. Cardinal proportionality is the facet that underlies the s. 7 *mens rea* requirements for specific substantive crimes[162] and, in relation to specific sentences, the facet that informs s. 12 of the *Charter*.[163]

82. Parity is the facet that requires offenders committing acts of comparable blameworthiness to receive sanctions of like severity.[164] Parity is integral to the principle of proportionality in punishment,[165] and has been codified both as part of that principle and as a specified secondary principle.[166] Parity readily meets the established test for a s. 7 principle of fundamental justice,[167] and has already been recognized as such, both as a facet of the principle of proportionality in punishment and as an independent principle, by the Ontario Superior Court of Justice.[168] The appellants submit it should be similarly recognized by this Court.

83. As the role of the principle of parity is to eliminate differentials of a kind and order that imperil the legitimacy of the criminal law system, the principle is materially breached by a marked departure from the norm - the flaw of gross disparity. Gross disparity denotes an extreme breach of the fundamental proposition that the criminal law must provide similar punishment for similar offenders of similar offences committed in similar circumstances ("sames").[169]

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[161] *Arcand*, ¶¶48-51, ABoA v II, Tab 40; *R. v. Johnson*, 2011 ONCJ 77 [***Johnson***], ¶¶138-39, ABoA v II, Tab 46. In *R. v. Summers*, 2014 SCC 26, ¶¶59-67, ABoA v III, Tab 58, this Court referred separately to the principles of proportionality and parity, however that was in the context of a discussion relating to ss. 718, 718.1 and 718.2 of the *Code*. The issue of whether the principle of parity outlined in s. 718.2(b) of the *Code* is also subsumed as a facet of the general principle set out in s. 718.1 was not before the Court for determination.

[162] A criminal sentence may also be considered along with other effects in the s. 7 analysis for consistency with the principle of fundamental justice that requires proportion between a law's objective and its effects (i.e., the analysis for the recognized flaw of "gross disproportionality"): *Malmo-Levine*, ¶169, ABoA v II, Tab 50. However, the principle requiring proportion between a law's objective and effects is a distinct and separate principle of fundamental justice from that requiring proportionality in punishment.

[163] *R. v. Smith*, [1987] 1 S.C.R. 1045, at 1073-74 (per Lamer J.), ABoA v III, Tab 57

[164] *Arcand*, ¶50, ABoA v II, Tab 40

[165] *Arcand*, ¶¶50, 59 and 62, ABoA v II, Tab 40; von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), pp 137-43, ABoA v III, Tab 79

[166] *Code*, ss. 718.1 and 718.2(b); *Arcand*, ¶¶59 and 61, ABoA v II, Tab 40

[167] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, ¶8, ABoA v I, Tab 14

[168] *Johnson*, ¶¶141-42, ABoA v II, Tab 46

[169] The flaws of gross disparity and arbitrariness relate to different principles of fundamental justice. In *Malmo-Levine*, at ¶¶135-40, ABoA v II, Tab 50, this Court rejected the assertion that the failure to criminalize alcohol and tobacco rendered the criminalization of marijuana arbitrary, effectively holding that Parliament need not

84. Parity is relevant to the constitutionality of substantive criminal provisions. First, parity's function is to sustain the moral and social authority of our criminal system as a just and ethical one. That authority can be undermined by the criminalization versus *non*-criminalization of sames.[170] Second, parity must logically extend to capture the grossest forms of disparate treatment. As is well-illustrated by this case, the criminal / non-criminal distinction may be compelling evidence of gross disparity. To limit the principle to the comparison of criminalized matters would enfeeble it and insulate from review what are potentially the *grossest* of disparities.

85. This case involves sames. The objective of the impugned laws is to address the possibility that assistance may induce someone to die against their true wishes. However, current legal end-of-life practices can hasten death,[171] and do so in a manner that the criminal law, in principle, considers causative.[172] As AGC concedes, Canadian criminal law does not recognize a distinction "between intentionally bringing about a prohibited consequence and doing something knowing that the prohibited consequence is virtually certain to result."[173] As concisely illustrated by Professor Sumner,[174] these legal end-of-life practices and PAD are medical treatments provided in similar circumstances for equally ethically justified reasons.[175] As already noted, assuming the patient is the medical decision-maker,[176] the risks relating to decisional

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prohibit everything connected to a particular objective in order to do *anything logically connected* to that objective. Parity is not about lack of connection between the objective and effect of a law, but rather about differential treatment of sames sufficiently disparate to undermine the ethical platform of the criminal law. Parity is a relative concept; it goes to the role of a law in the rationality of the criminal law *as a system*. Nor does parity oblige Parliament to do everything in order to do anything; it merely obliges Parliament to avoid *excessive* distinctions between *sames* in the criminal law.

[170] E.g., if it was murder to kill someone by stabbing, but perfectly legal to kill someone by smothering; or murder to kill someone by stabbing, except on Tuesdays, when killing by stabbing is perfectly legal.

[171] Bereza #1, ¶¶28-29, JR v XXXI, 7840; Downing Cross, 21:4-20, JR v XLVIII, 13587; McGregor Cross, JR v V, 89:26-89:39; Pereira Cross, JR v VII, 416:40- 417:3, 580-1; Boisvert #1, ¶19, JR v XII, 1242. Smith J.'s findings on the ethics of these practices were summarized earlier: appellants' factum, ¶¶9-19, 36.

[172] *R. v. Nette*, 2001 SCC 78, ¶¶43-48, ABoA v III, Tab 54

[173] TJ Reasons, ¶¶327-28; JR v I, A.R. 104. See, e.g., Manning, Mewett & Sankoff, *Criminal Law* (4th ed.) (Markham: Lexis Nexis Canada Inc., 2009), pp 739-42, ABoA v III, Tab 77.

[174] Whose evidence was accepted by Smith J: TJ Reasons, ¶¶233-37, 321, 335, JR v I, 71-72, 102-03, 105; see also Sumner #1, JR v XVIII, 3217-19.

[175] Palliative sedation with the explicit intention of hastening death is a recognized form of euthanasia in Belgium and falls within the Belgian PAD reporting requirements: Affidavit #1 of Luc Deliens, made 30 Aug 2011 ("**Deliens #1**") (Ex H), JR v XXI, 4395. Compare: Boisvert #1, ¶19, JR v XII, 1242.

[176] In fact, legal end-of-life practices are *not* limited to personal decision-making and the decision to have such treatment is permitted to be made by substituted decision-makers, which makes the risks *higher* with regard to the legal end-of-life practices.

vulnerability and abuse arise equally under legal end-of-life practices and PAD.[177]. Yet, providing a fatal prescription or injection to a decisionally capable suffering patient, at their request and as medical care, is assisted suicide or murder, and the materially and morally equivalent conduct of intentionally hastening death by withdrawing treatment or administering palliative sedation at a patient's request is entirely lawful. The disparity is as gross as can be: for one, the highest possible criminal sanction: murder; for the other: nothing. The disparity violates the principles of fundamental justice; it undermines the core sense of relative rationality, fairness and justice essential to the system.[178]

86. Further, as there is no different or higher harm in PAD than is inherent in the legal end-of-life practices, then it must be the case that the differential treatment arises because of improper reliance on morality. There is no fundamental social conception of PAD as immoral,[179] and predicating the differential treatment on a particular conception of morality is itself impermissibly unconstitutional.[180]

D. Section 15

87. Smith J. reviewed the s. 15 case law and applied the legal test prevailing at the time of judgment: (a) does the law create a distinction based on an enumerated or analogous ground?; and, (b) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[181] Her conclusions under each step of the analysis were reasonable and correct.[182] In particular, although she did not have the benefit of the majority of this Court's analysis of s. 15 in *Quebec v. A.*,[183] Smith J. correctly concluded that "the concise wording of this second step of the test (formulated in *Kapp*, then reiterated in *Withler*) does not require literal reading, as if it were a statutory provision" and instead the analysis must focus on the actual impact of the law and

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[177] TJ Reasons, ¶¶207-31, 1368, JR v I, A.R. 64-70; v II, 181; Affidavit #1 of Martha Donnelly, made 29 Aug 2011 ("**Donnelly #1**"), ¶¶10-13, JR v XIV, 1983-84; Smith #1, ¶29, JR v XVII, 2951; Smith #2, ¶6, JR v XLVI, 13013; Donnelly #2, ¶¶28, 32-33, JR v XLVI, 13026-27; Cross Examination of Martha Donnelly held November 9, 2011, JR v XLVII, 13519 and 13522. See also, appellants' factum ¶¶142-43.

[178] *Arcand*, ¶¶54-55, ABoA v II, Tab 40; *Johnson*, ¶¶144-51, ABoA v II, Tab 45; TJ Reasons, ¶317; JR v I, A.R. 102

[179] See above at appellants' factum ¶¶9-19, 36.

[180] As to the permissible place of morality in criminal law see: *R. v. Butler*, [1992] 1 S.C.R. 452 [***Butler***], at 493-96, ABoA v II, Tab 42; *Malmo-Levine*, ¶¶77, 116, 121, ABoA v II, Tab 50; and *Morgentaler*, at 177-80 per Wilson J., ABoA v II, Tab 52

[181] TJ Reasons, ¶1026, JR v II, A.R. 90; *Withler v. Canada (Attorney General)*, 2011 SCC 12 [***Withler_SCC***], ¶30, ABoA v III, Tab 76

[182] *Withler v. Canada (Attorney General)*, 2008 BCCA 539, ¶145, ABoA v III, Tab 75

[183] *Quebec (Attorney General) v. A.*, 2013 SCC 5 [***Quebec v. A***], ¶¶319-38, 349-57, ABoA v II, Tab 37

inquire into whether the law works substantive inequality.[184] In the end, the one question addressed by s. 15 analysis (and by Smith J.'s judgment) is whether the impugned laws violate the norm of substantive equality.[185]

Distinction: The Law Creates a Distinction by Imposing a Burden

88. Generally, laws that impact individuals either bestow a benefit (e.g., a pension or medical service) or impose a burden[186] (e.g., a restriction on liberty). They are subject to s. 15 review accordingly. The first step is to identify which kind of effect the law has and whether, in having this effect, it creates a distinction on the basis of an enumerated or analogous ground. As Smith J. recognized the impugned laws create a distinction *by imposing a burden* on disabled individuals that is not imposed on others.[187]

89. The law denies the option of choosing to die to one group while leaving it available to others, thereby imposing a very significant burden on the former. Even prior to the *Charter*, this kind of burden was recognized as prohibited discrimination.[188]

90. This protection from burdens of the law was maintained with the enactment of the *Charter*. In *Andrews*, McIntyre J. made clear that the principles developed in these early human rights cases are equally applicable in s. 15(1) cases,[189] and continued to hold the view that s. 15(1) protects against burdens of the law.[190]

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[184] TJ Reasons, ¶¶1080-86, JR v II, A.R. 107-10
[185] *Quebec v. A.*, ¶325 ABoA v II, Tab 37
[186] All criminal offences impose burdens as all restrict the individual's liberty to act.
[187] TJ Reasons, ¶¶1063-64, JR v II, A.R. 102-03
[188] In *Drybones*, the SCC explained that "without attempting any exhaustive definition of 'equality before the law' I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law:" *The Queen v. Drybones*, [1970] S.C.R. 282 [***Drybones***], at 297, ABoA v II, Tab 39. In *Simpsons-Sears*, the SCC considered whether a rule requiring employees to work on Friday evenings and Saturdays amounted to religious discrimination. Although there is no "right" to having particular days off and the rule was facially neutral in that it applied equally to all, it was discriminatory because of the burden it imposed on Seventh-Day-Adventists who were not free to observe their Sabbath: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 [***Simpsons-Sears***], at 539-40, 543-44, McIntyre J., for the Court, ABoA v II, Tab 33.
[189] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [***Andrews***], at 173-75, ABoA v I, Tab 4, see also endorsement by the Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [***Eldridge***], ¶63, ABoA v I, Tab 19
[190] *Andrews*, 164-65, 173-75, ABoA v I, Tab 4. In *Eldridge*, this Court considered the equality analysis undertaken by the Chief Justice in *Rodriguez* and endorsed his general approach*: Eldridge*, ¶64, ABoA v I, Tab 19, see also *Rodriguez*, at 549-50, 552-54, ABoA v III, Tab 67. The Court noted that "[u]nlike in *Simpsons-Sears* and *Rodriguez*," the issues in *Eldridge* "stem not from the imposition of a burden not faced by the mainstream

91. Since 1972 there has been no criminal sanction for suicide or attempted suicide. Persons physically able to commit suicide are free to do so; however, the *Code* amendments in 1972 left the prohibitions under the impugned laws in place.[191]

92. Assuming the assisted person is informed, rational, autonomous and suffering intolerably, there is no ethical distinction between suicide and assisted suicide.[192]

93. The effect of the impugned laws is that choosing to die is criminalized only for the materially physically disabled. The laws are thus more burdensome for the disabled than the able-bodied. This burden is felt acutely by persons who are grievously and irremediably ill, materially physically disabled or soon to become so, decisionally capable, and who wish to have control over their circumstances at end of life.[193]

94. The impugned laws disproportionately burden disabled individuals by: (a) standing between them and a timely end to suffering, leaving them the choice of either suffering longer than they wish or, in order to be autonomous, acting to die earlier than they otherwise would; (b) robbing them of the quality of their remaining life; and/or (c) subjecting them to psychological suffering related to imperiling others.[194] Disabled individuals can seek court relief from this disproportionate burden. This has been repeatedly recognized in s. 15 jurisprudence.[195]

95. Yet Smith J. erred in law when she limited her finding of a s. 15 breach to the prohibition against physician-assisted suicide and failed to extend it to the prohibition against voluntary euthanasia by act of a physician.[196] The s. 15 declaration thus struck down the impugned laws

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population, but rather from a failure to ensure that they benefit equally from a service offered to everyone:" *Eldridge*, ¶66, ABoA v I, Tab 19. See also ¶77 noting that s. 15 "makes no distinction between laws that impose unequal burdens and those that deny equal benefits."

[191] TJ Reasons, ¶1011, JR v II, A.R. 85

[192] TJ Reasons, ¶339, JR v I, A.R. 106. Similarly, by the same reasoning, where the same assumptions are in place, there is no ethical distinction between suicide and voluntary euthanasia: Sumner #1, JR v XVIII, 3268-69

[193] TJ Reasons, ¶¶15, 1077, 1140, JR v I, A.R. 10-11; v II, A.R. 106, 126

[194] TJ Reasons, ¶¶1041-48, JR v II, A.R. 95-97

[195] TJ Reasons, ¶1064, JR v II, A.R. 102-03; see also, for e.g., *Drybones*, at 297, ABoA v II, Tab 39; *Andrews*, at 164-65, ABoA v I, Tab 4; *Eldridge*, ¶77, ABoA v I, Tab 19; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 **[*Law*]**, ¶¶26, 48, ABoA v I, Tab 29; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, ¶27, ABoA v I, Tab 5; *R. v. Kapp*, 2008 SCC 41 [***Kapp***], ¶15, ABoA v II, Tab 47; *Withler_SCC*, ¶29, ABoA v III, Tab 76; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54 [***Martin***], ¶84, ABoA v II, Tab 31; *Rodriguez*, at 549-50, ABoA v III, Tab 67

[196] TJ Reasons, ¶1392, JR v II, A.R. 186

only "to the extent that they prohibit physician-assisted suicide by a medical practitioner."[197] The s. 15 remedy granted addresses discrimination against those physically disabled people who require a limited level of assistance to kill themselves,[198] but not those people so physically disabled that they require such a degree of assistance as would render the physician's act voluntary euthanasia.[199]

96. This remedy ignores the disproportionate burden that ss. 14 and 222 of the *Code* have on extremely materially physically disabled individuals.

97. Sections 14 and 222 prohibit causing anyone's death, even in response to a competent, informed, voluntary and resolved request by a patient to a physician to so act in order to relieve intolerable suffering. On their face, these provisions apply to everyone. Yet these provisions have a disproportionate impact on those whose disability is severe enough to render them unable to act on their own – even with the limited assistance of a physician – to carry out their decision to die. In other words, the prohibition against voluntary euthanasia imposes a disproportionate burden on the *extremely* materially physically disabled.

98. The reference point for the discrimination claim is the autonomy to choose to die in the face of intolerable suffering, not the degree to which the suffering person may need their physician to act in order to realize the wish to die. One person with ALS may suffer intolerably while still able to swallow drugs; another not until after the window for oral ingestion has closed, making it necessary to obtain drugs by injection. The former could obtain medication from a physician for self-ingestion but for s. 241; the latter suffers the same burden under ss. 14 and 222, which prohibit a physician from providing a requested injection. The burden and discrimination are the same; the impact is the same; only the *Code* sections differ.

The Impugned Laws are Discriminatory

99. The second step asks: whether this distinction is discriminatory?[200] Smith J. correctly considered the factors articulated in *Law* and applied in most s. 15 cases - pre-existing

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[197] TJ Reasons, ¶1393(a) (i.e., by excluding the phrase "consensual physician-assisted death" (compare: ¶1393(b)), JR v II, A.R. 186-87
[198] TJ Reasons, ¶37, 1389, JR v II, A.R. 16; v III, A.R. 186
[199] TJ Reasons, ¶38-39, JR v I, A.R. 16-17
[200] *Quebec v. A.*, ¶¶325, 349, ABoA v II, Tab 37

disadvantage, correspondence with actual characteristics, ameliorative purpose and nature of the interest affected.[201]

i. Pre-Existing Disadvantage

100. AGC properly conceded in the Court below that disabled individuals, including persons like Gloria Taylor who have acquired physically disabling conditions through illness but have not lived with such disabilities throughout their lives, are subject to pre-existing disadvantage.[202]

ii. No Correspondence

101. As Smith J. found, the law does not correspond to the circumstances of materially physically disabled people as a group, nor did it apply to Gloria Taylor in particular.

102. In *Law*, this Court elucidated the purpose of this factor, explaining, e.g., with respect to disability that "the avoidance of discrimination will frequently require that distinctions be made to take into account the actual personal characteristics of disabled persons"; and that "it will generally be more difficult to establish discrimination to the extent that the law takes into account the claimant's actual situation in a manner that respects his or her value as a human being or member of Canadian society."[203]

103. However, a law which makes no *intentional* distinctions but does make *adverse effects* distinctions cannot be said to correspond with the actual needs and circumstances of the unintended group. No evidence suggests a distinction was made by Parliament *in order to* take into account the actual characteristics of disabled persons in general or the materially physically disabled in particular.[204] It having been demonstrated that the impugned laws have a disproportionate (albeit unintended) adverse effect on the materially physically disabled and Gloria Taylor in particular, it cannot be maintained that the unintended consequence (a prohibition on the choice to die for only the materially physically disabled) respects the materially physically disabled person's value as a human being. This is not what this Court

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[201] *Law*, ¶¶62-75, ABoA v I, Tab 29; *Quebec v. A.*, ¶ 331, ABoA v II, Tab 37; TJ Reasons, ¶¶1085-86, 1096, JR v II, A.R. 109-10, 113
[202] TJ Reasons, ¶1102, JR v II, A.R. 114-15
[203] *Law*, ¶¶69, 88, ABoA v I, Tab 29
[204] AGC disavowed this argument below: TJ Reasons, ¶¶1126, 1129, JR v II, A.R. 122-23

meant in *Law* when it spoke of distinctions drawn to enhance equality by better corresponding to the circumstances of a group.[205]

104. Further if, *arguendo*, this factor has any application here, the issue at this stage of the s. 15 analysis is the relationship between the ground of distinction - material physical disability - and the *actual* needs, capacities and circumstances of not only the *group* to which the claimants belong but also of the *claimant in particular*.[206]

iii. No Correspondence to the Group

105. A distinction's correspondence with the *actual* needs, capacities and circumstances *of the claimant group* is a relevant consideration often arising in cases involving benefits of the law: e.g., in *Martin*, where this Court held the law denying compensation to a particular subset of disabled workers (those with chronic pain) was discriminatory. There, Gonthier J. for the Court held:

> [5] … It is discriminatory because it does not correspond to the actual needs and circumstances of injured workers suffering from chronic pain, who are deprived of any individual assessment of their needs and circumstances. Such workers are, instead, subject to uniform, limited benefits based on their presumed characteristics as a group.[207]

106. Here, as in *Martin*, there is a lack of correspondence because the distinction does not correspond to the *actual* needs and circumstances of the materially physically disabled (the claimant group). Instead, the impugned laws impose on the claimant group's members a uniform prohibition against choosing the manner and time of their death based on presumed characteristics *of the group*[208] - presumptions which do *not* apply to every or even a significant number of the group's members and which, in fact, stereotype the physically disabled.

107. While *Quebec v. A.* makes clear that prejudice and stereotyping are not discrete elements of the s. 15 analysis that claimants are obliged to meet, in this case they are two *indicia* that show

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[205] This Court meant, e.g., the provision of a sign language interpreter for the hearing impaired, but not for those able to hear.

[206] In *Ferraiuolo v. Olson*, 2004 ABCA 281, ¶108, ABoA v I, Tab 20, the Court said: "the inquiry here is not directed to whether the legislation corresponds to the needs of those whom it benefits, but whether it corresponds to the needs of those in the claimant group, that is those excluded based on proscribed grounds." (emphasis added) See also *Martin*, ¶92, ABoA v II, Tab 31.

[207] *Martin*, ¶5, ABoA v II, Tab 31

[208] TJ Reasons, ¶¶1110-14, 1129-30, JR v II, A.R. 117-19, 123

that the impugned laws violate the norm of substantive equality[209] because in this case the disproportionate impact of the law described above is sought to be justified and perpetuated on the basis of prejudicial and stereotypical assumptions about the claimant group.

108. One such presumption is that the materially physically disabled lack autonomy. There is no evidentiary support for this argument and it was expressly disavowed by AGC at trial.[210]

109. Another presumption is that all persons who seek to die are vulnerable and in need of protection and that the disabled are in even greater need of protection.

110. First, this assertion disregards the inequality flowing from the impugned laws' disproportionate impact on materially physically disabled persons as compared to able bodied persons. The able bodied are not proscribed by law from committing suicide;[211] yet mentally competent and rational disabled persons are prohibited by law from choosing to die if they are disabled in a manner that renders them unable to fulfil that wish without assistance.

111. Second, insofar as it is appropriate to conflate suicide with PAD (and Smith J. correctly found it is not appropriate),[212] the materially physically disabled are no more likely to be "suicidal" than the able bodied.[213] Insofar as the concern is that the physically disabled[214] will disproportionately seek PAD, as addressed elsewhere, the evidence from other jurisdictions does not bear out this concern.[215]

112. It is one thing to use the social model of disability as a shield to *prevent* Parliament from imposing burdens on the disabled based on its imputation of socially constructed limitations to

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[209] *Quebec v. A.*, ¶¶325-31, ABoA v II, Tab 37
[210] TJ Reasons, ¶¶1126, 1129, JR v II, A.R. 122-23
[211] Although the *Mental Health Act*, R.S.B.C. 1996, c. 288 [*Mental Health Act*] provides for the apprehension of persons acting in a manner likely to endanger their own safety, these provisions only authorize continued detention if the person has a mental disorder; ss. 22(3), (4), 28. An able bodied person who is apprehended but, following individualized assessment, is determined not to have a mental disorder must be discharged.
[212] TJ Reasons, ¶¶813-14, JR v II, A.R. 29-30. For further discussion of why this is erroneous see: Ashby #1, Ex E, p 75, JR v XI, 880; Battin #2, ¶¶11-14, 20, 28-29, Ex B, JR v XLVII, 13269-70, 13272, 13274, 13287-96; Kimsma #1, ¶41(b), JR v XVIII, 3416-17; Starks #2, ¶¶5-6, 9-11, JR v XLVI, 13032-35; Werth #1, ¶¶20-33, 38-39, 40(d), 41, 47-49, 59-60, Ex B, C, JR v XLVI, 13095-13104, 13107, 13134-72; Ganzini #2, ¶20, JR v XLVII, 13321. Arguments asserting that allowing PAD amounts to encouraging "traditional" suicide or undermines suicide prevention are premised on this erroneous conflation and are, therefore, unsustainable.
[213] Affidavit #1 of Sheila McLean made 03 Nov 2011 ("**McLean #1**"), Ex B, ¶18; JR v XLVII, 13409
[214] In the sense of having a pre-existing physical disability in addition to the disabling condition qualifying the patient for PAD (e.g., having both spina bifida *and* cancer).

the disabled; it is entirely another to allow Parliament to *impose* burdens on the disabled based on assumptions that socially constructed ideas or limitations overwhelm the autonomy of the disabled in their own decision-making.[216]

113. These arguments assume, as Smith J. noted, that "even the most independent-minded, clearest-thinking person with physical disabilities needs protection from the bias of doctors and caregivers."[217] That assumption is not borne out in the evidence and, further, "feeds rather than starves discriminatory attitudes."[218]

iv. No Correspondence to Ms. Taylor and Individuals Like Her

114. Section 15 protects the equality of individuals as well as groups.

115. The Court must consider whether the distinction corresponds to the actual needs, capacities and circumstances of Ms. Taylor and those like her - independent-minded and clear-thinking materially physically disabled individuals.

116. With respect to Ms. Taylor,[219] Smith J. found that she had always been a strong and independent person and continued to be so despite her illness,[220] and that she experienced having strangers assist her with very personal matters as an assault on her privacy, dignity and self-esteem.[221] Smith J. held that Ms. Taylor faced the prospect of becoming unable, due to her illness, to end her life at the time of her choosing[222] and that her quality of life was impaired by the fact that she would be unable to seek assistance when her life ceased to be worthwhile to her. She lived in apprehension that her death would be slow, difficult, unpleasant, painful,

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[215] TJ Reasons, ¶¶9, 847, 1113-14, JR v I, A.R. 9; v II, A.R. 37, 119
[216] TJ Reasons, ¶¶1134-35, JR v II, A.R. 124-25. Notwithstanding the emphasis placed by AGC's experts on the social model theory, that theory has been criticized and even abandoned by some of its previously most ardent adherents especially insofar as it applies to PAD, see e.g. McLean #1, Ex B, ¶10 and pp 34-35 JR v XLVII, 13407, 13411A-B; see also McLean #1, JR v XLVII, 13377-13411YY and Frazee Report, JR v XLIV, 12101-376.
[217] TJ Reasons, ¶1129, JR v II, A.R. 123
[218] TJ Reasons, ¶1111, JR v II, A.R. 118-19
[219] TJ Reasons, ¶¶46-56, JR v I, A.R. 19-22
[220] TJ Reasons, ¶51, JR v I, A.R. 20
[221] TJ Reasons, ¶50, JR v I, A.R. 19
[222] TJ Reasons, ¶1041, JR v II, A.R. 95

undignified and inconsistent with her values and principles.[223] She was neither depressed nor vulnerable.[224]

117. Courts have held (particularly in the context of a challenge to an elaborate statutory benefit package) that *perfect* correspondence is not required. However, *close* correspondence is required in cases like this - cases that involve *burdens* imposed by the criminal law, that pit the state as main antagonist against the individual, and that involve fundamentally important interests. In such cases, this Court's comments in *Winko* are apposite:

> The essence of stereotyping, as mentioned above, lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group… [225]

118. The *Winko* scheme was not discriminatory because it provided for an individual assessment of circumstances resulting in a disposition based on the specific individual's situation and needs, not stereotypes. Comparable individual assessment is wholly lacking under the impugned laws. The appellants do not seek "perfect correspondence" but there is a total *lack* of correspondence between the needs and circumstances of strong, independent and autonomous persons like Ms. Taylor and the objective of protecting the vulnerable.

v. Ameliorative Purpose or Effect is Not Relevant

119. Smith J. correctly concluded that the ameliorative purpose or effect factor has no application here.[226]

120. In the wake of *Quebec v. A.*, it is questionable whether this factor (especially a law's ameliorative purpose) ever has a proper role in s. 15 analysis.[227] The appellants submit it is a factor better considered under either s. 15(2) (which was quite properly not pled or argued at any level in this case) or s. 1.

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[223] TJ Reasons, ¶1044, JR v II, A.R. 96
[224] TJ Reasons, ¶¶1112, 1130, JR v II, A.R. 119, 123. These findings were consistent with the concessions made by AGC: TJ Reasons, ¶1136, JR v II, A.R. 125.
[225] *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, ¶88 [***Winko***], ABoA v III, Tab 74
[226] TJ Reasons, ¶¶1131-41, JR v II, A.R. 124-26
[227] *Quebec v. A.*, ¶333, ABoA v II, Tab 37

121. However, if this Court is of the view that this factor is ever to be considered under s. 15, *Law* suggests that the fact a law has an ameliorative purpose or effect may weigh in the government's favour when a more advantaged person or group challenges their exclusion from a scheme that largely corresponds to the greater need or different circumstances experienced by the disadvantaged group targeted by the legislation.[228]

122. Even in *Martin*, where a scheme that provided targeted benefits to injured and disabled workers was challenged and this Court accepted that some beneficiary group members were more severely disabled than the claimants, the Court refused to give any weight to this factor, noting "there is no evidence that the comparator group as a class is in a more disadvantaged position than the group of injured workers suffering from chronic pain." As such, this Court held there was "no ameliorative purpose upon which the respondents can rely."[229] This reasoning applies *a fortiori* here where what is at issue is *not* a targeted program challenged by a relatively advantaged group, but rather legislation of general application challenged by a significantly disadvantaged group that is disproportionately burdened by the legislation.

vi. The Nature of the Interests Affected is Fundamental

123. Smith J. summarized the severity of the deprivation of these interests.[230] The related findings were made on a solid evidentiary foundation.[231] That s. 7 protects a *right* to life, liberty

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[228] *Law*, ¶¶72-73, ABoA v I, Tab 29
[229] *Martin*, ¶102 (emphasis added), ABoA v II, Tab 31
[230] TJ Reasons, ¶¶1142-57, 1325-30, JR v II, A.R. 127-30, 171
[231] A non-exhaustive list of supporting evidence is: *Shortened lifespan* – see above under "Life"; *Denied opportunity to make choice important to sense of dignity, personal integrity and consistent with lifelong values and experiences* –Taylor #2, ¶¶4-5, 10, 19, 43-45, JR v XVIII, 3377, 3379, 3381, 3386-87; Carter #1, ¶¶14-15, JR v XIII, 1582-83; Johnson #1, ¶¶12-13, JR v XVI, 2506; LaForest #1, ¶¶5, 28-37, 50-52, JR v IX, 139, 144-45, 148; Cordover #1, ¶¶46-48, JR v XIV, 1907-08; Leeking #1, ¶¶24-27, 30, JR v IX, 156; Ganzini #2, ¶43, JR v XLVII, 13326-27; *Impaired ability to discuss and receive support from physicians* – Cordover #1, ¶¶11-13, 35, 44, 63, JR v XIV, 1900-01, 1906-07, 1911-12; Affidavit #1 of Ian Petrie, made 28 Aug 2011 ("**Petrie #1**"), ¶¶14, 17, JR v XVII, 2935-36; Affidavit #1 of Wanda Morris, made 29 Aug 2011 ("**Morris #1**"), ¶¶38, 47, JR v XVII, 2912, 2914; Starks #1, Ex C, pp 43-45, JR v XVII, 3108-10; *Deprivation of self-worth of physically disabled* – Taylor #2, ¶24, JR v XVIII, 3382; Nicklinson #1, Ex F, ¶¶13-14, JR v IX, 324; Shapray #1, ¶¶11-12, JR v IX, 337; *Unavailability of palliative care due to nature of illness* –Shapray #1, ¶21, JR v IX, 339; Nicklinson #1, Ex C, pp 24-25, JR v IX, 310-11; *Unacceptability of palliative care due to personal values and worries* – Taylor #2, ¶¶37-39, JR v XVIII, 3385-86; LaForest #1, ¶¶51-52, JR v IX, 148; Cordover #1, ¶¶51-52, JR v XIV, 1909; G. Fenker #1, ¶¶5, 13, JR v XLVII, 13371, 13373; Shoichet #1, ¶6, JR v IX, 342, 342; Rasmussen #1, ¶¶16-17, JR v XLVI, 13002-03; Boisvert #1, ¶15, JR v XII, 1241; Battin #1, ¶26, JR v XI, 916-17; Battin #2, ¶¶32-35, JR v XLVII, 13275-76; Downing Cross, 2:43-3:17, 21:38-22:32, 39:16-34, JR v XLVIII, 13568-69, 13587-88, 13605, also Downing #1, Ex H, I, JR v XXVI, 6236-67; Pereira Cross, 432:47-434:30, JR v VII, 432-434; *Physical pain, psychological suffering, fear of what is to come* – Taylor #2, ¶¶26-29, 36, JR v XVIII, 3383, 3385; Carter #1, ¶¶9-12, JR v XIII, 1581-82; LaForest #1, ¶¶22-27, JR v IX, 142-44; Shapray #1, ¶¶11, 13-17, JR v IX, 337-38; P. Fenker #1, ¶¶7-15,

and security of the person underlines the importance of the private, decision-making zone at issue - one protected by the highest law. The freedom to choose the time and manner of one's death is a fundamental one (liberty); the right to bring an end to suffering at the point it becomes intolerable (security to the person), and not beforehand in order to have self-determination at all (life), even more so.[232] Thus, the arguments about the interests at stake under s. 15 intersect with those made above regarding s. 7.

124. The law has extreme consequences, sharply localized on the materially physically disabled. By ignoring these burdens, AGC fails to recognize this group and the impact of the law on them.[233] The prohibition against PAD undermines the fundamental promise of s. 15. It feeds discriminatory attitudes, and confines the disabled to the stereotyped role society has unfairly consigned them.[234] It indelibly impresses all disabled with the label of "vulnerable." While able-bodied people may make life and death medical decisions under the individualized assessment built into informed consent and the benefit of individualized assessment of their non-medical decisions to commit suicide,[235] the impugned laws stereotype disabled people as neither worthy of nor susceptible to individual assessment, as incapable of demonstrating rationality and autonomy in pursuit of control over their lives.

E. Section 1

125. A separate s. 1 justification must be carried out with respect to each independent *Charter* violation.[236] That said, as noted by this Court in *Bedford*, the nature and significance of the s. 7 rights make it unlikely that a law that violates s. 7 can be justified under s. 1.[237]

17, JR v XIV, 2098-100; *Stress from non availability of peace of mind* – Examination of Nagui Morcos held June 22, 2011 ("**Morcos Examination**"), QQ. 31-32, JR v XLIX, 13-15; Syme #1, ¶¶6(l)-(m), 13, JR v X, 352, 355; Nicklinson #1, Ex F, ¶12, JR v IX, 321; Cordover #1, ¶¶24-25, 57, JR v XIV, 1904, 1910; Bracken #1, ¶18, JR v XIII, 1427; Jackson #1, ¶¶14-18, JR v XVI, 2463-64; Petrie #1, ¶¶14, 16-17, JR v XVII, 2935-36; Morris #1, ¶43, JR v XVII, 2913; Kimsma #1, Ex D, p 37, JR v XVIII, 3455; *Risk of prosecution* – this fact was admitted by AGC, JR v IV, A.R. 116. See also, listing of evidence set out at FN 102, 106

[232] If suicide was not decriminalized pre-*Charter*, the prohibition would be contrary to s. 7. It is unnecessary to decide this point but if that law were re-enacted now, it would be unconstitutional in its application to grievously and irremediably ill persons suffering intolerably. Even if there was no right to commit suicide it would be a choice of unparalleled significance: *Lavoie v. Canada*, 2002 SCC 23, ¶45, ABoA v I, Tab 28.

[233] *Law*, ¶74, ABoA v I, Tab 29

[234] McLean #1, Ex B, ¶16, JR v XLVII, 13409

[235] *Mental Health Act*, ss. 22(3)-(4), 28

[236] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [***Whatcott***], ¶158, ABoA v III, Tab 68; As no s. 7 violation was found in *Rodriguez*, ABoA v III, Tab 67, the s. 1 analysis conducted there was with respect to a presumed s. 15 violation alone and is not a s. 1 justification "at large" for purposes of any and all *Charter* violations.

126. Here, the s. 7 violation cannot be justified. AGC is unable to justify even the s. 15 infringement in this case (see below) and the burden of justifying a s. 7 violation is heavier.

127. The proper articulation of the impugned laws' objective is addressed above.[238]

There is No Rational Connection

i. Reasonable Apprehension of Harm

128. The reasonable apprehension of harm[239] standard of proof originated as a means of enabling the government to discharge its burden to demonstrate that the objective of the law was pressing and compelling and, more commonly, to demonstrate a rational connection between a law's effect and the law's objective. It has most commonly arisen in freedom of expression cases where the harm claimed to be caused by the expression in question was not amenable to proof by means of scientific or other conventional evidence. In that context, it was considered sufficient if Parliament demonstrated it had a reasonable apprehension that the expression was harmful.[240]

129. The case law makes clear that the "apprehension" standard for proof of harm applies only with respect to the existence of harm and the causal relationship between a harm and an

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This is illustrated in *Bedford*, where this Court carried out a separate s. 1 analysis for the s. 7 violations found even though a s. 1 analysis had previously been carried out with respect to a s. 2(b) violation in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, ABoA v III, Tab 64: *Bedford*, ¶¶40, 160-63, ABoA v I, Tab 10. As is also evident from *Bedford*, a separate s. 1 analysis must be carried out for any s. 7 violation found here, even if the *Rodriguez* s. 15 / s. 1 analysis is found to engage the doctrine of *stare decisis* (which the appellants submit it does not).

[237] *Bedford*, ¶¶129, 161-63, ABoA v I, Tab 10; *Motor Vehicle Reference*, at 518, ABoA v III, Tab 61; TJ Reasons, ¶¶1379-83, JR v II, A.R. 183-84

[238] In *Fleming v. Ireland & Ors*, [2013] IEHC 2, ABoA v I, Tab 21, the Irish courts recently upheld an absolute ban on assisted suicide. In doing so while the Irish Court asserted that it was applying the same proportionality test that was developed by the Canadian courts (¶73), it rightly recognized that its understanding of our proportionality test was dated and expressly stated that "it would be inappropriate for us in this context to comment or purport to analyse the manner in which the Canadian courts have developed and refined their own proportionality analysis over the last two decades or so." (¶90) Applying its own proportionality test, the Irish Court articulated the objective of the law much more broadly than would a Court in Canada saying it was "protecting the sanctity of all human life." (¶74) Such a broad and absolute objective drove the rest of its analysis and made it almost inevitable that it would uphold the law in question. It is perhaps for that reason that the remainder of its analysis was very thin. After briefly considering whether the law was rationally connected to its objective over the course of two paragraphs (¶¶75-76) the Court dispensed with the final two steps of the proportionality analysis in one sentence (¶77). This manner of analysis is no substitute for the rigorous one conducted by Justice Smith in this case which this Court should consider with appropriate deference. Further, every constitutional case is a product of the constitution of that country which in turn is a function of the culture and fundamental values and norms of that country: see Preamble of Irish Constitution.

[239] More accurately, the "reasoned" apprehension of harm standard: *Butler*, at 504, ABoA v II, Tab 42.

impugned law. It may *only* be resorted to where the nature of the harm is such that traditional forms of evidence are not available to establish the harm.[241] Further, its use has been limited to cases where the harm in question was harm to a *societal* interest.[242] Here, traditional forms of evidence are available and were put into evidentiary record.[243]

130. Nor can the AGC discharge its burden of proof by demanding the appellants prove that something less than an absolute prohibition will pose absolutely no risk of harm. First, in assessing the evidence under s. 1, the onus lies with AGC. Second, such a "zero tolerance" standard is unreasonable in light of the medical context and the accepted approach to harm in that context.[244] Third, such a standard is inconsistent with *Hutterian*.[245] Rather, AGC must prove by evidence that only an absolute prohibition can meet the legislation's objective in a "real and substantial manner." As found by Smith J. and Finch CJBC, AGC has not done so.

ii. Analysis of Rational Connection

131. *Oakes* involved the validity of the *Narcotic Control Act* provisions that created a presumption, on proof of possession, that possession was for purposes of trafficking. The law was not saved by s. 1. There was no rational connection between the basic fact (possession) and the presumed fact (possession for the purpose of trafficking).[246]

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[240] CA Reasons, ¶¶130-31, JR v III, A.R. 77-78; *Butler*, at 504, ABoA v II, Tab 42, see also *Whatcott*, ¶¶128-35, ABoA v III, Tab 68, *R. v. Bryan*, 2007 SCC 12 [***Bryan***], ¶¶10, 16, 20, 28, ABoA v II, Tab 41

[241] See CA Reasons, ¶132, per Finch CJ, JR v III, A.R. 78

[242] The classic cases are the expression cases. Obscenity is said to harm women generally: *Butler*, ABoA v II, Tab 42. Child pornography is said to harm children generally: *R. v. Sharpe*, 2001 SCC 2 [***Sharpe***], ¶¶100-01, ABoA v III, Tab 56. The harms of expression which are considered in these cases are attitudinal harms. See e.g. *Whatcott*, ¶132, ABoA v III, Tab 68.

[243] *Butler*, at 493-94, 502-04, ABoA v II, Tab 42; *Sharpe*, ¶89, ABoA v III, Tab 56; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 993-94, ABoA v I, Tab 25; *Malmo-Levine*, ¶136, ABoA v II, Tab 50; *Bryan*, ¶¶10, 16, 20, 28, ABoA v II, Tab 40. The appellants reject, in particular, the idea that an apprehension of pressure too subtle to be perceived would be sufficient to ground the impugned laws. Drs. Ganzini and Donnelly both testified that the presence of undue influence could be detected as part of the capacity assessment. Both disagreed with the suggestion that a person should be disqualified from medical decision-making based on the supposition that there may be influences so subtle as to be undetectable. As stated by Dr. Ganzini, medicine is ultimately an evidence-based endeavour. The adoption of such a standard in this or any other medical decision-making context would effect a dramatic shift towards paternalism in modern medicine and would fly in the face of the factual findings made by Smith J. (who accepted the evidence of Drs. Ganzini and Donnelly on this point): TJ Reasons, ¶¶803-06, 815, JR v II, A.R. 27-28, 30.

[244] *A.C.*, ¶235, ABoA v I, Tab 1

[245] *Hutterian*, ¶55, ABoA v I, Tab 3

[246] *R. v. Oakes*, [1986] 1 S.C.R. 103 [***Oakes***], at 141-42, ABoA v III, Tab 55. *Oakes* is one of the few cases determined at this stage. See also *Whatcott*, ABoA v III, Tab 68.

132. The impugned laws equally fail this test. There is no rational connection between the basic fact (seeking assistance to die) and the presumed fact (weakness and susceptibility). In order to be rationally connected, the prohibition must only capture conduct "that is likely to cause" the vulnerable to be induced to commit suicide in times of weakness.[247] It is irrational to infer that a suffering person is weak and susceptible because they seek an assisted death if they are otherwise decisionally capable. If the presumption is irrational in some circumstances then, a *fortiori,* it is irrational to make it *irrebuttable* as the impugned laws do.[248]

133. The steps in the *Oakes* analysis are mutually informing. In this case, there is a strong inter-relationship between rational connection and minimal impairment. AGC asserts it is impossible to distinguish between those who are decisionally vulnerable and those who are not. If AGC's assertion is, as Smith J. found, incorrect, then the impugned laws lack a rational connection to their objective and are also not minimally impairing.

The Laws are Not Minimally Impairing

134. Minimal impairment asks whether Parliament gave sufficient weight to the values underlying the right in question and whether the prohibition is sufficiently tailored or whether it risks capturing conduct that – while perhaps not valued by all and perhaps even disavowed by many – is not conduct giving rise to the harm protected against.[249]

135. The impugned laws do not give sufficient weight to the core values underlying the *Charter* including equality, dignity and autonomy. Prohibiting *everyone* in *every* circumstance from seeking assistance to end their suffering by dying captures a great number of individuals who, while perhaps making a choice that not everyone agrees with and which is even offensive to some people, falls short of engaging the harms at which the legislation is aimed.

136. Smith J. had the benefit of extensive evidence regarding alternative, less drastic means of achieving the legislative objective in a real and substantial manner, in particular, the evidence from permissive regulatory jurisdictions. She also had unchallenged evidence demonstrating the psychological establishment's acceptance of the concept of a rational wish to die as distinct and

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[247] *Whatcott*, ¶92, ABoA v III, Tab 68

[248] See also *A.C.*, ¶223, ABoA v I, Tab 1, Binnie J., dissenting, and ¶¶107-08 (where the majority found the law was not arbitrary because it did *not* set up an irrebuttable presumption).

distinguishable from traditional suicidal thinking. (None of which evidence was before the Court in *Rodriguez*.)

137. AGC asserted that it was it is not possible to assess decisional capacity. In addressing that argument,[250] Smith J. noted that:

> An absolute prohibition would seem necessary if the evidence showed that physicians are unable reliably to assess competence, voluntariness and non-ambivalence in patients, or that physicians fail to understand or apply the informed consent requirement for medical treatment.[251]

138. However, on extensive evidence before her, Smith J. found that:

a. Even taking into account possibilities of cognitive impairment or depression in patients, and that physicians may be influenced by inaccurate assumptions about patients, it is feasible for physicians to assess competence with high reliability.[252]

b. Coercion and undue influence can be detected in a capacity assessment.[253]

c. Just as physicians routinely assess the requirements for informed consent in patients seeking or refusing medical treatment, it would be feasible to require informed consent for PAD.[254]

d. It is feasible to screen out patients who are ambivalent.[255]

e. Risks relating to a patients' ability to make well-informed decisions and their freedom from coercion or undue influence and to physicians' ability to assess capacity and voluntariness can be very largely avoided through safeguards.[256]

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[249] *Whatcott*, ¶¶107-09, ABoA v III, Tab 68
[250] As noted in the discussion under overbreadth, Smith J. referenced these findings in support of her conclusion that the impugned laws were overbroad. The appellants submit these considerations properly come into play under minimal impairment under s. 1, rather than forming part of the overbreadth analysis.
[251] TJ Reasons, ¶1365, JR v II, A.R. 180
[252] TJ Reasons, ¶¶795, 798, JR v II, A.R. 25-26; see also ¶¶762-64, 775, 778-90, 793, JR v II, A.R. 17-18, 21-25
[253] TJ Reasons, ¶815, JR v II, A.R. 30
[254] TJ Reasons, ¶831, JR v II, A.R. 33
[255] TJ Reasons, ¶843, JR v II, A.R. 36
[256] TJ Reasons, ¶10, JR v I, A.R. 9

f. There is a risk of unconscious bias about the quality of life of a disabled person; however such risk can be avoided through practices of careful and well-informed capacity assessments by qualified physicians who are alert to those risks.[257]

g. She further found that there is little evidence that physicians and other care-givers would, even unconsciously, respond differently to requests for assisted death from physically disabled persons as opposed to others.[258]

139. Thus, AGC failed to discharge its onus to demonstrate that the impugned laws were minimally impairing because of difficulties in assessing decisional capacity. To the contrary, Smith J. positively found, on the evidence before her, that decisional capacity could be assessed with a high degree of certainty.[259] That degree of certainty is more than sufficient to enable a system based on individual assessment of decisional capability to meet the legislation's objective in a "real and substantial manner."

140. That individual assessment - as implemented by obtaining informed consent - does in fact fulfil the objective in real and substantial manner is further demonstrated by the fact that such individual assessments are implicitly condoned by Canada for use in other end-of-life medical decisions that pose identical risks of decisional vulnerability.[260]

141. As noted at paragraphs 9-19, 36, accepted legal end-of-life practices that can hasten death include palliative sedation, the administration of medications in sufficient dosages,[261] and the withdrawal of life-sustaining equipment. Life-sustaining drugs, treatment and/or artificial food and nutrition can be refused. In order to make these medical decisions for themselves, a patient need only be adjudged decisionally capable by their physician. Further, if the patient is

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[257] TJ Reasons, ¶853, JR v II, A.R. 39. In making this finding, Smith J. relied on evidence that established that the degree of scrutiny applied in assessing capacity for purposes of informed consent will be commensurate with the circumstances and that Canadian physicians are already in the practice of applying a high level of scrutiny to medical decisions in the context of other decisions that involve the potential to hasten death: Donnelly #1, ¶¶10-16, JR v XIV, 1983-85, Donnelly #2, ¶¶4-10, JR v XLVI, 13020-22. Further, Dr. Donnelly (who, as a professor, teaches consent assessment) provided expert evidence that Canadian physicians are very diligent assessors and, in her opinion, would be especially so in relation to PAD and that, if a specific standard for assessing capacity was set by law for PAD, Canadian physicians would adhere to that standard: Donnelly #2, ¶¶26, 29, 31, JR v XLVI, 13024-26.
[258] TJ Reasons, ¶1129, JR v II, A.R. 123
[259] TJ Reasons, ¶1367, JR v II, A.R. 180
[260] TJ Reasons, ¶¶207-31, JR v I, A.R. 64-70. Regulation through provincial laws of general application is addressed in more detail at FN 94, 273 and 313 of this factum.
[261] TJ Reasons, ¶¶5, 185, 195-98, 202, 226, 309, JR v I, A.R. 8, 58-63, 69, 96

incapable, the law allows physicians to follow a *substitute decision-maker*'s instructions with regard to these legal end-of-life practices.[262]

142. In regard to decisional vulnerability, Smith J. made the following findings which are equally relevant to current legal end-of-life practices as to PAD:

a. When it comes to persons with grievous and irremediable illness, the risk of diagnostic error is very low. Prognosis, however, is an inexact science.[263]

b. Elder abuse exists and the assessment of voluntariness in elders must incorporate an understanding of that reality.[264]

c. Palliative care is not universally available in Canada and even the best palliative care cannot alleviate all suffering.[265]

d. Patients' experience within the medical system, including palliative care, may be affected by factors such as their age and disability.[266]

143. Concerns about decisional capacity, including issues of abuse and potential physician bias,[267] apply equally in PAD and other end-of-life medical decision-making contexts.[268] Physicians must determine whether seriously ill patients are decisionally capable for purposes of giving informed consent whenever a patient decides to withdraw or refuse life-saving treatment, or undergo palliative sedation. In these circumstances, patients are individually assessed for

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[262] In the critical care setting, almost all cases of withholding and withdrawal of treatment, symptom management and terminal sedation involve incompetent patients. Health care providers look to advance directives, family and friends to make these decisions. Their needs and wishes are important considerations in appropriate high quality services for end-of-life care. Health care providers rarely receive explicit requests for these treatments: Cook #1, ¶¶26-27, JR v XIX, 3613-14; G. Fenker #1, ¶¶15, 19, 21-22, JR v XLVII, 13373-75; Downing Cross, 32:7-28, JR v XLVIII, 13598; Affidavit #1 of Heather Davidson, made 04 Oct 2011, ¶¶4, 7, 23, 33, 44, 52, JR v XXVII, 6529-30, 6534, 6536, 6538-40, 6542; Pereira Cross, 564:43-565:2, JR v VII, 564-65. Approximately 90% of deaths among critically ill patients in Canada occur following the withdrawal of some form of life support, most commonly the withdrawal of medical ventilation, dialysis or inotrope medications: TJ Reasons, ¶185, JR v I, A.R. 58-59.
[263] TJ Reasons, ¶¶817-18, JR v II, A.R. 30-31
[264] TJ Reasons, ¶847, JR v II, A.R. 37. Notwithstanding its knowledge of this fact, there is no evidence that Canada has taken any steps to address elder abuse.
[265] TJ Reasons, ¶¶4, 188, 190, 192, 309, 823, JR v I, A.R. 8, 59-60, 96; v II, A.R. 31-32
[266] TJ Reasons, ¶194, JR v I, A.R. 60
[267] CA Reasons, ¶162, JR v III, A.R. 86
[268] TJ Reasons, ¶1368, JR v II, A.R. 181

decisional capability by their physicians and, if found capable, permitted to make their own medical decisions.[269]

144. Notwithstanding identical risks of decisional vulnerability, Parliament has left these end-of-life medical decisions unregulated and unmonitored[270] - even though provincial laws allow these decisions to be made by substitute decision-makers. Nonetheless, and presumably due to the professionalism of Canadian physicians, there is no evidence to suggest that many wrongful deaths occur in the context of these other end-of-life practices.[271]

145. It is fundamentally inconsistent for Canada to assert that it is impossible for medical decision-making to be sufficiently reliable to permit PAD under any conceivable regime and that a blanket prohibition is thus minimally impairing,[272] while at the same time it considers individualized assessments of decisional capacity made in the context of the physician-patient relationship and informed consent satisfactory for other end-of-life decisions. The decisional risks are identical, and that fact - along with Smith J.'s factual findings - belies AGC's assertion that the impugned laws are minimally impairing.[273]

146. With regard to Canada's concerns regarding patient abuse, physician attitudes and the alleged practical slippery slope,[274] Smith J. found:

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[269] TJ Reasons, ¶¶207-31, JR v I, A.R. 64-70

[270] E.g., the timing of withdrawal of life support is not uniform and is informed by factors related to the patient, the family, the clinicians and the institution. There is a paucity of policies and guidelines to guide these decisions and there is variability among the few policies there are: Cook #1, ¶¶21-25, 28-30 Ex D, G-I, JR v XIX, 3611-13, 3614-15, 3799-806, 3825-55.

[271] Regulating PAD (and other end-of-life practices) would likely reduce the risk even further. The trial reasons inform how these risks could be further addressed. (Many of the safeguards implemented in other jurisdictions to safeguard assisted dying are equally relevant to Canada's existing end-of-life practices, but few are in place.)

[272] Further, as disclosed by the evidence, liberalization does not lead to routinization of the practice; physicians struggle with requests for assistance in dying under permissive regimes: Ganzini #1, ¶¶21, 25, Ex Q, U, JR v XV, 2118, 2120, 2329-40, 2373-84; Starks #2, ¶¶25-26, JR v XLVI, 13042; Kimsma #1, ¶¶27(b)-(d), 41(a), Ex D, pp 37-38, JR v XVIII, 3410-11, 3415-16, 3455-56.

[273] Should this litigation result in the constitutional declaration sought, and should the regulation of the resultant constitutionally permitted practice of PAD be left to the provinces, and should the provinces opt to leave PAD to be regulated by the laws of general application relating to informed consent, PAD would *still* be more regulated than other end-of-life decision-making, in that its parameters would continue to be defined by the constitutional declaration and reinforced by the constitutional aspects of the impugned laws. For example, whereas other end-of-life decisions may be permitted by provincial law to be made by substitute decision-makers, the constitutional declaration would limit PAD to personal (as opposed to substitute) decision-making, and a failure to so limit the practice would expose a physician to criminal liability.

[274] TJ Reasons, ¶1366, JR v II, A.R. 180

a. A number of jurisdictions either permit or do not criminalize PAD or assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia.[275]

b. Permissive jurisdictions that regulate assisted dying have safeguards to ensure only defined categories of patients are involved and protocols are followed.[276]

c. There is no evidence from permissive jurisdictions of inordinate impact on socially vulnerable populations.[277] The empirical evidence from the Netherlands and Oregon does not support the hypothesis that PAD poses a particular risk to socially vulnerable populations.[278] Rather, it supports the proposition that a system can be designed that both permits some individuals to access PAD and protects those with social vulnerabilities.[279]

d. There is no evidence that health insurers in Oregon or Washington refuse to fund palliative care now that assisted death is available.[280]

e. There is no evidence that those obtaining prescriptions under the Oregon legislation are ambivalent about assisted dying.[281]

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[275] TJ Reasons, ¶¶9, 363, 389-403, 455-69, 505-17, 589-93, 605-12, 613-20, JR v I, A.R. 9, 112, 117-24, 139-43, 152-56, 174-75, 178-82

[276] TJ Reasons, ¶9, JR v I, A.R. 9

[277] TJ Reasons, ¶¶9, 847, 1113-14, JR v I, A.R. 9; v III, A.R. 37, 119. Smith J. considered critiques to this research and preferred the appellants' evidence because AGC's witnesses had not themselves conducted any empirical research and Smith J. doubted Dr. Hendin's impartiality: TJ Reasons, ¶664, JR v I, A.R. 192-93.

[278] The accepted evidence demonstrates that while physicians were not specifically surveyed about disabled patients in the very large "death certificate" studies done in Belgium, the death certificates themselves are coded using an international coding system ("ICD 10 Codes") which allowed researchers to code what kind of diseases the patients had prior to their deaths, and that disabilities could be deduced by reference to those codes to see whether there are people with disabilities: TJ Reasons, ¶852, JR v II, A.R. 237; Cross Examination of Luc Deliens held November 23, 2011, JR v VII, 489:23-490:22. The large scale death certificate studies done in the Netherlands (on which the Belgian studies were modeled) would have made the same information available to the Dutch researchers: Deliens #1, Ex C, p 51 [Introduction], Ex J, p 112 [Study Design], JR v XXI, 4351, 4412. See also TJ Reasons, ¶¶621-45, 650-52, 662-67, JR v I, A.R. 182-90, 192-93. The AGs chose not to cross-examine Dr. van Delden who deposed there was no evidence of higher frequency of assisted dying for groups with social vulnerabilities: Affidavit #1 of Johannes van Delden, made 31 Aug 2011 ("**van Delden #1**"), ¶18, JR v XVIII, 3516. The AGs chose not to cross examine a number of witnesses who testified that in their own observation of the system in Oregon and Washington, there was no such disproportion: Renaud #1, ¶¶3, 5, JR v IX, 332; Affidavit #1 of George Eighmey, made 26 Aug 2011, ¶¶4-5, JR v XIV, 2092; Miller #1, ¶¶3, 5, JR v XVII, 2889.

[279] TJ Reasons, ¶¶667, 847, 852, 1242, JR v I, A.R. 193; v II, A.R. 37, 39, 151-52

[280] TJ Reasons, ¶735, JR v II, A.R. 11

[281] TJ Reasons, ¶¶834-37, JR v II, A.R. 34-35

f. The permissive legislation in the Netherlands and Belgium was motivated by the desire to better understand and regulate practices already prevalent and embedded in their medical cultures.[282] These legal reforms have made considerable progress in achieving the regulatory compliance goals the Dutch and Belgians set out to address[283] and in light of the cultural and historical context in operation in the Netherlands and Belgium, the level of regulatory compliance in those countries provides no basis for making an inference regarding the degree of compliance to be anticipated from Canadian physicians.[284]

g. Canadian physicians are generally compliant with the current prohibition and thus are likely to be compliant with a permissive scheme.[285]

h. The evidence regarding Oregon and the Netherlands does not support the conclusion that pressure or coercion is at all wide-spread or readily escapes detection. It is unlikely that many patients undertake PAD because of outside pressure. Any such incidents are highly isolated.[286]

i. Legalization in Oregon, the Netherlands and Belgium has not undermined palliative care; by some measures palliative care improved post-legalization.[287]

j. The research does not clearly show either a negative or a positive impact in permissive jurisdictions on the physician-patient relationship.[288] However, evidence

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[282] In both Belgium and the Netherlands the existence of "life-ending acts without explicit request" ("LAWER"), pre-existed the legalization of euthanasia: TJ Reasons, ¶¶522-23, 680, JR v I, A.R. 158, 196. LAWER is not to be conflated with PAD or "euthanasia" as that term is used in Belgium and the Netherlands. In addition to the defining characteristic of being *without request*, LAWER is associated with patient characteristics distinguishable from those seeking euthanasia: TJ Reasons, ¶¶485, 567, 570-77, JR v I, A.R. 147, 168-71. The difference between LAWER and the activities caught by the orders sought in this appeal was specifically noted by Finch CJBC, dissenting: CA Reasons, ¶¶153-56, JR v III, A.R. 84-85. The rate of LAWER in the Netherlands and Belgium *decreased* following legalization of euthanasia: TJ Reasons, ¶¶486, 581, JR v I, A.R. 147, 172. Whether incidents of LAWER, although criminal, might come within the defence of necessity in those jurisdictions remains an open question: TJ Reasons, ¶¶459, 484, 679 (Netherlands), JR v I, A.R. 139-40, 146-47, 196; TJ Reasons ¶¶506, JR v I, A.R. 152; and Affidavit #1 of Penney Lewis, made 31 Aug 2011, Ex C, p 61, JR v XVI, 2659 (Belgium). LAWER exists in some countries having an absolute prohibition against euthanasia: TJ Reasons, ¶486 (Australia), JR v I, A.R. 147. Smith J. found the evidence regarding LAWER *allayed* fears of a slippery slope: TJ Reasons, ¶1241, JR v II, A.R. 151.

[283] TJ Reasons, ¶¶660, 1241, JR v I, A.R. 191; v II, 151

[284] See TJ Reasons, ¶¶660, 679, 683, JR v I, A.R. 191, 196-97; Donnelly #2, ¶¶26, 29, 31, JR v XLVI, 13024-26

[285] TJ Reasons, ¶¶680, 683, JR v I, A.R. 196-97

[286] TJ Reasons, ¶¶671, 685, JR v I, A.R. 194, 197

[287] TJ Reasons, ¶731, JR v II, A.R. 11

> from permissive jurisdictions suggests that physicians are able to provide better overall end-of-life treatment to patients at the end of their lives once the topic of assisted death is openly put on the table.[289]

147. Smith J. held that the evidence as to the ethics of PAD was relevant to the question of whether an absolute prohibition was necessary.[290] She concluded it would have been relevant had the evidence disclosed that only physicians who were prepared to disregard ethical principles would be willing to participate in PAD, but the evidence disclosed that many respected ethicists and practitioners view PAD as ethical medical care in appropriate circumstances.[291]

148. AGC has failed to discharge its burden to demonstrate by evidence *any* basis - e.g., potential for patient abuse, damage to the physician patient relationship, alleged impact of PAD on palliative care, alleged impact of social vulnerabilities on decisional vulnerability - capable of justifying the imposition of a blanket criminal prohibition. AGC has thus failed to establish that the blanket prohibition is minimally impairing.

Proportionality of Effects: The Deleterious Outweigh the Salutary

149. Smith J.'s assessment of the relative weight of the salutary and deleterious effects of the law should not be interfered with by this Court. Smith J. was generous in assessing the possible salutary effects of the impugned laws.

150. The law sends positive[292] and negative[293] messages about people with disabilities; it prevents[294] and causes[295] deaths; it causes lengthened life which can be good[296] or bad;[297] it has

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[288] TJ Reasons, ¶¶9, 746, 1269, JR v I, A.R. 9; v III, A.R. 14-15, 158
[289] TJ Reasons, ¶1271, JR v II, A.R. 158
[290] TJ Reasons, ¶1369, JR v II, 181
[291] Smith J.'s findings with respect to the ethics of PAD are summarized above at factum ¶¶9-19.
[292] TJ Reasons, ¶1265, JR v II, A.R. 157
[293] TJ Reasons, ¶1266, JR v II, A.R. 157. An absolute prohibition sends a negative message that disabled people are incapable of making self-determining decisions (McLean #1, Ex B, ¶14, JR v XLVII, 13409) and that their wishes and their suffering are not as important as other considerations (TJ Reasons, ¶1266, JR v II, A.R. 157). Further AGC has all the machinery it needs to send the right message about PAD's intended impacts to the elderly and the disabled: i.e., to empower and enable them by allowing them autonomous choice.
[294] TJ Reasons, ¶1267, JR v II, A.R. 157. The ineffectiveness of the law is a relevant consideration under this test: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 [***PHS_CA***], ¶70, ABoA v II, Tab 35; *PHS_SCC*, ¶131, ABoA v I, Tab 13. Smith J. *did not* find that the impugned laws prevent *all* wrongful deaths and abuse. In *Hutterian*, both the majority and dissenting reasons indicate the state has an evidentiary burden to prove the challenged law actually achieves the asserted benefits. This issue of fact may not require scientific proof, but it does require some proof, which in some cases can be supplemented by logic and reason: *Hutterian*,

positive[298] and negative[299] effects on the role of the physician; it has positive[300] and negative[301] effects on palliative care. If the balancing stopped there, the salutary and deleterious effects might be, at best, equal and AGC would have failed to establish its case on a balance of probabilities. Yet, in addition to these countervailing considerations, Smith J. found the law imposes extreme costs on the grievously and irremediably ill, and these are without any counter balance:

a. Using the law to keep pressure on funding palliative care uses the intolerable suffering of some as leverage for improving the provision of such care;[302]

b. Because palliative care may be unavailable (including ineffective) or unacceptable to an individual, some will be required to continue with physical pain and/or psychological suffering, possibly exacerbated by terrible fear of what is yet to come.[303]

c. It denies individuals autonomy in decision-making about their own bodies, lives and suffering that may be very important to their dignity and personal integrity and involve their lifelong values and life experience.[304]

d. The law deprives individuals of peace of mind;[305]

¶¶81-83, 85, 101, 150, 154, ABoA v I, Tab 3. Where the state claims it needs an absolute prohibition because one wrongful death is "one too many" and is faced with evidence that there are many wrongful deaths in spite of the law, the state's claim that the law has a salutary effect rings hollow: see e.g. Bereza #1, ¶¶21-22, JR v XXXI, 7837-38; Librach #1, ¶15, JR v IX, 162; Morcos Examination, Q. 30, JR v XLIX, 12-13; Affidavit #1 of Ruth Von Fuchs, made 21 Aug 2011, ¶¶2-11, JR v XI, 704-06; LaForest #1, ¶45, JR v IX, 147; Cordover #1, ¶13, JR v XIV, 1900-01; Bracken #1, ¶¶17-18, JR v XIII, 1427; Morris #1, ¶¶7, 15, 17-19, 24, 29-37, 40, 44, 50, JR v XVII, 2905-13, 2915; Carter #1, ¶¶3, 16-19, 22-27, 30-32, 34-40, 42-43, 45, JR v XIII, 1580, 1583-90; Affidavit #1 of Silvan Luley, made 23 Aug 2011, ¶¶3-4 JR v IX, 262.

[295] TJ Reasons, ¶1277, JR v II, A.R. 159. See also TJ Reasons, ¶1267, JR v II, A.R. 157.

[296] TJ Reasons, ¶1268, JR v II, A.R. 157. This was a generous reading given that there is no reason to believe that Canada's two "grateful survivor" witnesses would have qualified for PAD under a regulated regime (e.g., that they would have been decisionally capable): Affidavit #1 of Alison Davis, made 27 Sep 2011, JR v XXVII, 6809-14.

[297] TJ Reasons, ¶1268, JR v II, A.R. 157; G. Fenker #1, JR v XLVII, 13370-76

[298] TJ Reasons, ¶1270, JR v II, A.R. 158

[299] TJ Reasons, ¶1271, JR v II, A.R. 158

[300] TJ Reasons, ¶¶1273-74, JR v II, A.R. 158-59

[301] TJ Reasons, ¶1273, JR v II, A.R. 158-59. See e.g. van Delden #1, ¶31, JR v XVII, 3522

[302] TJ Reasons, ¶1274, JR v II, A.R. 159

[303] TJ Reasons, ¶1328, JR v II, A.R. 171

[304] TJ Reasons, ¶1279, 1326, JR v II, A.R. 160-61, 171

[305] TJ Reasons, ¶1280, JR v II, A.R. 161

e. The law has a deleterious effect on the care that some patients receive.[306]

151. Smith J. found the following benefits likely to inure from the prohibition's removal:

a. For some longer life and enjoyment of life.[307]

b. More open physician-patient relationships and intellectual honesty.[308]

c. It may do more to improve palliative care than the absolute prohibition.[309]

152. An absolute prohibition, compared to a prohibition with stringently limited exceptions, does not prevent wrongful deaths or abuse of the vulnerable.[310]

153. The Crown's failure to justify the impugned laws under s. 1 is stark.

F. Remedy Issues Consequent to Granting of Constitutional Declaration

No Criminal Regime Required

154. The appellants desire only to have Parliament leave them free to seek (or provide) appropriate medical treatment and to make fundamental and deeply personal health care treatment choices in the context of their physician-patient relationships.

155. A grant of the constitutional declaration sought will not *oblige* Parliament to do anything, let alone to create a regulatory system using the criminal power. If the declaration is granted and Parliament does absolutely nothing in response, the declaration will render the impugned laws inapplicable (division of powers) or ineffective (*Charter*) to the extent of the constitutional inconsistency. Or Parliament could respond by making the minimal amendment required to cure the constitutional defect by creating a bare carve out from the impugned laws that mirrors the scope of the constitutional declaration leaving the regulation of PAD to provincial legislative authority.[311]

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[306] TJ Reasons, ¶1281, JR v II, A.R. 161
[307] TJ Reasons, ¶¶1042, 1280, JR v II, A.R. 95-96, 161
[308] TJ Reasons, ¶1271, JR v II, A.R. 158
[309] TJ Reasons, ¶1273, JR v II, A.R. 158-59
[310] TJ Reasons, ¶¶1267, 1282, JR v II, A.R. 157, 162
[311] Either way, the end result would be effectively the same as the case with abortion following the *Charter* decision striking the criminal prohibitions regarding that medical procedure.

156. PAD could be regulated by the provinces through legislation specifically directed to the practice.[312] Alternatively, PAD could be regulated pursuant to provincial legislative authority under provincial laws of general application to medical matters.[313] This is not only *a* form of regulation, it is *the* form of regulation that Canada and Canadian society considers sufficient for comparable end-of-life medical decision-making.

157. If this Court grants the constitutional declaration sought under the *Charter*, but holds that it is *intra vires* Parliament to use the criminal power to regulate PAD, then Parliament would have the *option* of either creating a federal regulatory scheme (consistent with the Court decision) or, as above, leaving the regulation of PAD as a medical treatment to the provinces.

Striking Down

158. The BCCA majority invited this Court to revisit its determination, in *Ferguson*,[314] that s. 52 "with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies."

159. Instead, the majority suggested that in cases like this one which present "the spectre of a vacuum" if legislation is struck down, a constitutional exemption should be an available remedy.

160. The appellants reject this suggestion for all of the reasons articulated in *Ferguson*: striking down the law is consistent with the remedial scheme of the *Charter*,[315] constitutional exemptions create uncertainty, undermine the rule of law and have prejudicial effects in certain cases,[316] and inappropriately intrude on the role of Parliament.[317] Further, none of the factors articulated in *Fraser* and discussed above favour a departure from horizontal *stare decisis* here in respect of

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[312] See, e.g. Quebec National Assembly Bill No. 52: An Act respecting end-of-life care (2013), ABoA v III, Tab 78; Report of the Select Committee of the Assemblée Nationale of Québec on Dying with Dignity, *Mourir dans la Dignité* (March 2012) (Chair: Maryse Gaudreault), JR v LII, 14881-15063

[313] See e.g., *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3-7; *Health Care Consent Act, 1996*, S.O., c-2, Sch. A (as amended), ss. 1-11; the law of tort as it relates to informed consent in e.g., *Reibl v. Hughes*, [1980] 2 S.C.R. 880, ABoA v III, Tab 65; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, ABoA v I, Tab 17; and laws regulating the medical profession (e.g., *Health Professions Act*, R.S.B.C. 1996, c. 183)

[314] *R. v. Ferguson*, 2008 SCC 6 [***Ferguson***], ABoA v II, Tab 43

[315] *Ferguson*, ¶¶35-36, 58-66, ABoA v II, Tab 43

[316] *Ferguson*, ¶¶42, 67-73, ABoA v II, Tab 43

[317] *Ferguson*, ¶¶49-57, ABoA v II, Tab 43

this Court's recent and authoritative judgment in *Ferguson.* Finally, as above, there would be no resultant vacuum, as PAD as a medical treatment would immediately fall within provincial health laws of general application.

No Suspension of Invalidity Should Be Ordered

161. Immediate invalidity of the impugned laws, to the extent that they apply to PAD, would not pose a danger to the public or the rule of law.[318]

162. On the other hand, leaving the impugned laws in place leaves the grievously and irremediably ill at risk - to risks which violate their constitutional rights to life, liberty, security of the person and equality.

163. For many currently grievously and irremediably ill persons, including, for example, Elayne Shapray who has given evidence in this Court,[319] a suspension of any length may forever remove all possibility of a meaningful remedy for the breach of their constitutional rights.

164. If this Court sees fit to suspend a declaration of invalidity, it should outline a mechanism whereby such individuals can seek recourse to the courts to have their right to seek to have PAD provided to them by a physician who is satisfied it is appropriate treatment in the circumstances, vindicated on an individual basis pending expiration of the suspension. Smith J. articulated such a mechanism in respect of Ms. Taylor, which the appellants submit provides a useful template.

G. Costs

Principled Approach to Special Costs to Successful Party in Public Interest Litigation

165. This case presents an ideal and needed opportunity for this Court to endorse a principled approach to the awarding of special costs in public interest litigation which promotes access to justice, and to clarify the extent to which an Attorney General who participates under a *Constitutional Question Act*,[320] but takes partial carriage of the case, may be held liable for costs.

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[318] *Schachter v. Canada*, [1992] 2 S.C.R. 679, ABoA v III, Tab 69

[319] Shapray #1, JR v IX, 335-40. Elayne Shapray also provided an affidavit to this Court in the context of an application for an expedited hearing in which she described the progression of her disease and how she had resolved to take her own life while she was still able due to the delay in the legal process in determining the issues in this case.

[320] *Constitutional Question Act*, R.S.B.C. 1996, c. 68 [***CQA***]

166. It is in the public interest that this Court endorse the test for special costs articulated by the BCCA in *Adams* (and followed by Smith J.[321] in this case), where that Court held:

> ... the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:
>
> (a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;[322]
>
> (b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
>
> (c) As between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and
>
> (d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.
>
> The basic question underlying these factors is whether the public interest in resolving a legal issue of broad importance, which would otherwise not be resolved, justifies the exceptional measure of awarding special costs to a successful litigant.[323]

167. There has been no post-*Adams* flood of special costs orders in *Charter* cases. Public interest litigation costs have been given in three such cases in British Columbia: *Adams* itself, *PHS*[324] and this one.[325] The category of cases which are in the public interest and of exceptional importance has properly been set very high:[326] *Adams* involved s. 7 survival interests of the

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[321] *Carter v. Canada (Attorney General)*, 2012 BCSC 1587 [**Costs Reasons**], ¶¶29-34, 59-90, 95-99, JR v III, A.R. 13-15, 24-29, 31; see also CA Reasons, ¶338, JR v III, A.R. 146, per majority and ¶¶207-234, JR v III, A.R. 94-100, per Finch CJBC, dissenting

[322] Whether a matter has been previously resolved is to be determined with reference to this Court's approach to *stare decisis* articulated in *Bedford*. That is, if the appellants are successful on the issue of *stare decisis*, Smith J.'s order for special costs should be reinstated and extended to all levels of appeal. The appellants should also be awarded special costs if they are successful in respect of *stare decisis* even if unsuccessful on the merits. This point is returned to below.

[323] *Victoria (City) v. Adams*, 2009 BCCA 563 [***Adams***], ¶¶188-89, see also ¶¶178-93, ABoA v III, Tab 72; see also *PHS_CA*, ¶¶195-98, ABoA v II, Tab 35; and *Vancouver (City) v.* Zhang, 2011 BCCA 138 [***Zhang***], ABoA v III, Tab 71

[324] *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 1453 [***PHS_BCSC***], ABoA v II, Tab 34

[325] An order for public interest special costs was also made in *L'Association des parents de l'école Rose-des-vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2013 BCSC 1111, ABoA v I, Tab 26, a case alleging province-wide breaches of s. 23 of the *Charter* and raising systemic challenges to the funding system of the Ministry of Education; however that order was overturned on appeal *L'Association des parents de l'école Rose-des-vents v. British Columbia (Minister of Education)*, 2014 BCCA 40, ABoA v I, Tab 27.

[326] See e.g. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2011 BCCA 515, ABoA v I, Tab 18, and *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against*

homeless; *PHS* involved s. 7 survival interests of the poor and severely addicted; this case involves s. 7 (including life) and s. 15 interests of the grievously ill and suffering.

168. Nevertheless, this high standard promotes and is informed by the principle of access to justice,[327] and this Court has recently observed that:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.[328]

169. These observations apply *a fortiori* in the field of public interest *Charter* litigation, where massive evidentiary records may be required, settlement is highly unlikely, and litigants rarely have the means to pay counsel:

> 14. …As several courts have recognized, costs "can be used as an instrument of policy and that making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important public policy objective."…[329]

170. Here, Smith J. found that "the plaintiffs would not have been able to prosecute their claim without the assistance of *pro bono* counsel."[330] While the absence of *pro bono* counsel ought not to *exclude* the possibility of special costs,[331] a claimant's inability to proceed without *pro bono* assistance is a relevant factor *in favour* of such an order.[332],Smith J. noted that access to justice considerations need to be balanced against other factors,[333] and that special costs must not be

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Violence Society, 2012 SCC 45, ¶78, ABoA v I, Tab 12, where special costs were *not* ordered because of the interlocutory nature of the application.

[327] Costs Reasons, ¶¶24-27, 35, JR v III, A.R. 10-12, 15-16

[328] *Hryniak v. Mauldin*, 2014 SCC 7, ¶1, ABoA v I, Tab 24

[329] *Broomer v. Ontario (Attorney General); Johnson v. Ontario (Attorney General)*, [2004] O.J. No. 2431 (QL) (Ont. S.C.J.) [***Broomer***], ¶14, ABoA v I, Tab 8; see also *Adams*, ¶¶18-20, 177, ABoA v III, Tab 72; Costs Reasons, ¶¶29, 35, JR v III, A.R. 13, 15-16

[330] Costs Reasons, ¶¶7-10, JR v III, A.R. 7-8. This is an undisputed factual finding.

[331] *PHS_CA*, ¶197, ABoA v II, Tab 35

[332] See e.g. *Adams*, ¶¶175-77, ABoA v III, Tab 72; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 425, ¶45, ABoA v I, Tab 2; *Zhang*, ¶¶29, 33-34, ABoA v III, Tab 71; *PHS_CA*, ¶197, ABoA v II, Tab 35, and *PHS_BCSC*, ¶¶27-29, ABoA v II, Tab 34.

[333] Costs Reasons, ¶32, JR v III, A.R. 14-15

used to effectively create a legal aid system.[334] Ultimately, she concluded that: "[w]hile access to justice is not the only or even the predominant factor, it favours special costs in this case."[335]

171. Given that constitutional law is the highest law of the Country, any stunting of its development is egregious and threatens to undermine the emancipatory values underlying the *Charter*. This Court should restore the trial judge's order in respect of special costs, which was based on a careful balancing of the *Adams* factors, a recognition of the exceptionality of this case,[336] and an understanding of the need to promote access to justice.[337]

Attorney General of British Columbia Not Immune to Costs

172. With respect to the AGBC, the BCCA majority interfered with Smith J.'s assessment of the degree and nature of AGBC's participation in this case to overturn the order of special costs against AGBC. This was an inappropriate interference with the exercise of a trial judge's discretion based on her informed and unique ability to assess the proceedings.

173. AGBC was *a party* pursuant to the *CQA*. Notably, s. 8(6) of the *CQA* entitles AGBC to participate as a party, as she did here, but does not *oblige* her to do so. AGBC could have opted to participate in the nature of an intervenor. The *CQA* does not insulate AGBC from costs orders where it opts to participate as a party and did, in fact, participate actively *qua* party at all stages.[338] The AGs shared carriage of the response case *as respondents*, and cost consequences properly follow upon that arrangement.[339]

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[334] Costs Reasons, ¶39, JR v III, A.R. 18

[335] Costs Reasons, ¶88, JR v III, A.R. 29. This observation is consistent with established jurisprudence: Costs Reasons, ¶¶25-28, 31-32, 34, JR v III, A.R. 11-15

[336] Costs Reasons, ¶¶4, 30-34, 80, 87, 89-90, JR v III, A.R. 6, 13-15, 28-29

[337] It is noted that in respect of the AGC, absent the BCCA majority's erroneous approach to *stare decisis*, all justices who considered this case were of the view that Smith J. had exercised her discretion properly: CA Reasons, ¶338, JR v III, A.R. 146, per majority and ¶¶207-34, JR v III, A.R. 94-100, per Finch CJBC, dissenting

[338] AGBC filed a 15 page Response to Civil Claim detailing, *inter alia*, its position on the plaintiffs' facts, alleging extensive additional facts, opposing the relief sought and seeking an order dismissing the claim: JR v IV, A.R. 96-109 (Amended Response to Civil Claim_AGBC). In case management, AGBC advised the Court that AGBC and AGC had allocated responsibility for parts of the response between themselves: Costs Reasons, ¶15, JR v III, A.R. 8-9. AGBC submitted its own evidentiary record, made submissions at each case management conference, brought and responded to various applications, including challenging the plaintiffs' evidence and the appropriateness of plaintiffs' proceeding under the summary trial rule, produced its own witnesses for cross-examination, and cross-examined the plaintiffs' witnesses. During arguments on the merits, AGBC made full submissions in the nature of a party: Costs Reasons, ¶¶14-18, JR v III, A.R. 8-9. With regard to argument on the merits, oral argument was heard by Smith J., who also reviewed AGBC's 96 page written submission. Nor can AGBC's participation be reduced, as AGBC would have it, to time allocation on the final hearing. AGBC participated fully in the extensive pre-trial case management process. AGBC fully participated in the procedural and

174. Smith J. correctly found, as a fact, that AGBC took on the role of a party and as such was liable for costs as a party.[340] This finding of the case management and trial judge is entitled to considerably more deference than the BCCA majority accorded to it. This Court has held that an award of special costs made at trial should rarely be interfered with on appeal.[341]

Special Costs Against Canada in Any Event of Outcome

175. There is jurisdiction to order special costs even to an unsuccessful party.[342] In *Tsilhqot'in Nation*, the BCCA held that an award of costs in favour of an unsuccessful party is available in limited circumstances:

> [41] In making this order, we recognize that this case is highly unusual, and that orders that an unsuccessful appellant be granted costs will be extraordinarily rare. Such an order will not be made simply because it is perceived to be in the public interest that jurisprudence develop in a particular area of law. It must, at the very least, be shown that the development of jurisprudence in the area is of critical public importance. We are satisfied that in the unique circumstances of this case, the Court is justified in taking the extraordinary step of awarding costs to an unsuccessful litigant.[343]

176. An award of special costs in any event of the outcome following determination by this Court is different than an award of advance costs, as it does not entail any pre-judgment nor even an estimate of the relative merit of the case. The Court is in position to consider the record assembled and the nature of the arguments presented and has, in fact, assessed the merit of the case and made a determination.

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factual aspects of the case. AGBC's argument was not restricted in the manner of an intervenor, but rather canvassed procedural and factual issues at length: Costs Reasons, ¶16, JR v III, A.R. 9. AGBC's argument extended to issues such as standing, procedural issues and, *stare decisis*: TJ Reasons, ¶¶77, 139, 143, 891, 893, JR v I, A.R. 25, 38-39; v II, A.R. 53.

[339] As was properly conceded by AGBC in the BCCA, there is no absolute rule that costs may not be ordered against an AG that intervened to defend the constitutional validity of legislation. See e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [***Children's Aid Society***], ABoA v I, Tab 6; *Hegeman v. Carter*, 2008 NWTSC 48, ABoA v I, Tab 23; *Polglase v. Polglase* (1979), 18 B.C.L.R. 294 (B.C.S.C.), ABoA v II, Tab 36.

[340] Costs Reasons, ¶¶15-16, 96-100, JR v III, A.R. 8-9, 31-32. Inherent in this finding is that AGBC assumed partial carriage of the response case and materially lengthened the proceedings.

[341] *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, ¶¶24-27, ABoA v I, Tab 22. Below, AGC conceded increased costs at Scale C. The only issue before Smith J. was whether the appellants were entitled to public interest litigation special costs: *Adams*, ¶180, ABoA v III, Tab 72.

[342] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, ¶30, ABoA v I, Tab 8; *Children's Aid Society*, ABoA v I, Tab 6

[343] *Tsilhqot'in Nation v. British Columbia*, 2013 BCCA 1, ¶41, ABoA v III, Tab 70

177. In this case, the record is - and was required to be - a massive undertaking spanning numerous jurisdictions and multiple fields of expertise. The Court is in a position to know the exceptional nature of the *pro bono* time commitment required of plaintiffs' counsel in order to bring the matter to trial,[344] and to appreciate, based on its own knowledge and expertise, the amount of time required to carry such a matter forward at the appeal levels. The Court is in a position to know - whether or not it chooses to decide on these bases - that both new and novel legal concepts were raised and thoroughly and properly argued. The Court is in a position to know that the group of persons being represented were, in fact, tremendously disabled and disadvantaged persons who needed someone to speak on their behalf and that, in fact, many of the individuals who provided lay evidence at trial did not survive to see the final outcome.

178. In *Broomer*, the issue was described in the following terms:

> 15. *Charter* litigants, particularly those seeking their equality rights under s. 15 are often disadvantaged, poor, members of powerless groups in society, disabled or a combination of several of these categories. … The only way [the *Broomer* plaintiffs'] *Charter* challenge to the legislation at issue could proceed was through the *pro bono* intervention of lawyers experienced in this area of law. It is therefore appropriate to award costs to lawyers acting in this capacity in order to encourage them to continue to taking on cases of this nature. Their continued participation in *pro bono* work ensures that disadvantaged citizens, such as these applicants, receive access to justice.[345]

179. This is a case in which this Court is fully able to assess, after the fact and regardless of the outcome, both the extent of the undertaking and the extreme importance and merit of the case, and to recognize those facts with an award of costs.

PARTS IV AND V. COSTS SUBMISSION AND ORDER SOUGHT

180. If the appellants are successful in their appeal, they seek an order of special costs, on a full indemnity solicitor-client basis, throughout. With regard to the trial level, the appellants seek to have the order of Smith J. restored in full, including with regard to the apportionment between Canada and British Columbia.[346] In the event there is no apportionment against British

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[344] Costs Reasons, ¶¶11 and 51, JR v III, A.R. 8, 22 [noting that the pro bono hours invested by appellants' private practice counsel at trial had a value of approximately $1,200,00 if valued as billable hours (inclusive of tax, exclusive of disbursements), with appellants' in-house counsel at trial contributing a further 550 pro bono hours]

[345] *Broomer*, ¶15, ABoA v I, Tab 9; see also *Adams*, ¶¶18-20, 177, ABoA v III, Tab 72; Costs Reasons, ¶¶29, 35, JR v III, A.R. 13, 15-16

[346] Costs Reasons, JR v III, A.R. 5-32

Columbia, the appellants seek an order for special costs for the entire proceedings as against Canada.[347] The appellants seek an order for special costs against Canada with respect to BCCA proceedings and these proceedings.

181. In the alternative, should the appeal be dismissed, the appellants seek an order of special costs, on a full indemnity solicitor-client basis, as against Canada in any event. The BCCA majority specifically held that an order of costs in any event was not available to the appellants only because it considered that vertical *stare decisis* rendered the case one "previously determined."[348] As above, *Bedford* makes it patent that the BCCA majority's decision regarding *stare decisis* was erroneous. This case raises an open constitutional question for answer, and that question is, regardless of the outcome, one of the highest and broadest public importance. It could not, with respect, be more apparent that Canadians needed this Court's decision on the constitutionality of the prohibition against PAD, nor that, win or lose, that decision will directly impact how and when Canadians will live and die.

182. The appellants seek orders that:

a. the appeal be allowed;

b. a declaration that the impugned laws are constitutionally inapplicable to PAD by reason of the doctrine of interjurisdictional immunity;

c. in the alternative, an order reinstating Smith J.'s orders in respect of ss. 7 and 15, but expanding the s. 15 order by addition of the term "or consensual physician-assisted death" in the following manner:

> Sections c. [The impugned provisions] are or no force and effect to the extent that they prohibit physician-assisted suicide <u>or consensual physician-assisted death</u> by a medical practitioner in the context of a physician-patient relationship, […].[349]

d. the orders be immediately effective;

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[347] If AGBC is not to be held accountable for costs in relation to its participation, Smith J.'s alternative finding that AGC should pay 100% of the plaintiffs' costs was correct. The AGs cannot, by entering into an arrangement for sharing carriage of the case amongst themselves, unjustly deprive the plaintiffs of the related costs incurred.
[348] CA Reasons, ¶¶342-46, JR v III, A.R. 147-49
[349] TJ Reasons, ¶1393(b), JR v II, A.R. 157

e. in the alternative, if a suspension of a constitutional declaration is ordered, that there be a constitutional exemption for all grievously and irremediably ill individuals during the term of the suspension to make applications to the courts in the nature of the right granted by Smith J. to Ms. Taylor; and

f. special costs at all levels of court, in any event of the outcome.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 13, 2014

Joseph J. Arvay, Q.C., Sheila M. Tucker
and Alison M. Latimer
Solicitors for the Appellants

PART VI: TABLE OF AUTHORITIES

Paragraph(s)

CASES

PART VII: STATUTORY PROVISIONS

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***Canadian Charter of Rights and Freedoms*, ss. 1, 7, 12, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**	***Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada (R-U)*, 1982, c 11**
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.	**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.
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.	**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.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.
15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	**15.**(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. (2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Constitution Act, 1867 **(U.K.), 30 & 31 Vict., c. 3, ss. 91(27), 92(7), 92(13), 92(16), reprinted in R.S.C. 1985, App. II, No. 5**	***Loi constitutionnelle de 1867*****, 30 & 31 Victoria, c 3**
91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ... 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.	**91.** Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir: ... 27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, ... 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals. ... 13. Property and Civil Rights in the Province. ... 16. Generally all Matters of a merely local or private Nature in the Province.	**92.** Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir: ... 7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine; ... 13. La propriété et les droits civils dans la province; ... 16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

***Constitutional Question Act*, R.S.B.C. 1996, c. 68, s. 8(6)**
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8(6) If in a cause, matter or other proceeding to which this section applies the Attorney General of British Columbia appears, the Attorney General is a party and, for the purpose of an appeal from an adjudication respecting the validity or applicability of a law, or respecting entitlement to a constitutional remedy, has the same rights as any other party.

***Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 21-22, 25, 33(2), 34(2)-35, 222, 241, 718, 718.1, 718.2**
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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.

21. (1) Every one is a party to an offence who
(a) actually commits it;
(b) does or omits to do anything for the purpose of aiding any person to commit it; or
(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, “counsel” includes procure, solicit or incite.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
(a) as a private person,
(b) as a peace officer or public officer,
(c) in aid of a peace officer or public officer, or
(d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person’s protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;

(c) the person to be arrested takes flight to avoid arrest;

(d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

(5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the *Corrections and Conditional Release Act*, if

(a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and

(b) the escape cannot be prevented by reasonable means in a less violent manner.

33. (2) No civil or criminal proceedings lie against a peace officer or a person who is lawfully required by a peace officer to assist him in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1).

34. (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person’s role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person’s response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that

constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

35. (1) A person is not guilty of an offence if

(a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;

(b) they believe on reasonable grounds that another person

(i) is about to enter, is entering or has entered the property without being entitled by law to do so,

(ii) is about to take the property, is doing so or has just done so, or

(iii) is about to damage or destroy the property, or make it inoperative, or is doing so;

(c) the act that constitutes the offence is committed for the purpose of

(i) preventing the other person from entering the property, or removing that person from the property, or

(ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and

(d) the act committed is reasonable in the circumstances.

(2) Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.

(3) Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

222. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

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.

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

***Code criminel*, LRC 1985, c C-46**

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.

21. (1) Participent à une infraction :

a) quiconque la commet réellement;

b) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;

c) quiconque encourage quelqu'un à la commettre.

(2) Quand deux ou plusieurs personnes forment ensemble le projet de poursuivre une fin illégale et de s'y entraider et que l'une d'entre elles commet une infraction en réalisant cette fin commune, chacune d'elles qui savait ou devait savoir que la réalisation de l'intention commune aurait pour conséquence probable la perpétration de l'infraction, participe à cette infraction.

22. (1) Lorsqu'une personne conseille à une autre personne de participer à une infraction et que cette dernière y participe subséquemment, la personne qui a conseillé participe à cette infraction, même si l'infraction a été commise d'une manière différente de celle qui avait été conseillée.

(2) Quiconque conseille à une autre personne de participer à une infraction participe à chaque infraction que l'autre commet en conséquence du conseil et qui, d'après ce que savait ou aurait dû savoir celui qui a conseillé, était susceptible d'être commise en conséquence du conseil.

(3) Pour l'application de la présente loi, « conseiller » s'entend d'amener et d'inciter, et « conseil » s'entend de l'encouragement visant à amener ou à inciter.

25. (1) Quiconque est, par la loi, obligé ou autorisé à faire quoi que ce soit dans l'application ou l'exécution de la loi :

a) soit à titre de particulier;

b) soit à titre d'agent de la paix ou de fonctionnaire public;

c) soit pour venir en aide à un agent de la paix ou à un fonctionnaire public;

d) soit en raison de ses fonctions,

est, s'il agit en s'appuyant sur des motifs raisonnables, fondé à accomplir ce qu'il lui est enjoint ou permis de faire et fondé à employer la force nécessaire pour cette fin.

(2) Lorsqu'une personne est, par la loi, obligée ou autorisée à exécuter un acte judiciaire ou une sentence, cette personne ou toute personne qui l'assiste est, si elle agit de bonne foi, fondée à exécuter l'acte judiciaire ou la sentence, même si ceux-ci sont défectueux ou ont été délivrés sans juridiction ou au-delà de la juridiction.

(3) Sous réserve des paragraphes (4) et (5), une personne n'est pas justifiée, pour l'application du paragraphe (1), d'employer la force avec l'intention de causer, ou de nature à causer la mort ou des lésions corporelles graves, à moins qu'elle n'estime, pour

des motifs raisonnables, que cette force est nécessaire afin de se protéger elle-même ou de protéger toute autre personne sous sa protection, contre la mort ou contre des lésions corporelles graves.

(4) L'agent de la paix, ainsi que toute personne qui l'aide légalement, est fondé à employer contre une personne à arrêter une force qui est soit susceptible de causer la mort de celle-ci ou des lésions corporelles graves, soit employée dans l'intention de les causer, si les conditions suivantes sont réunies :

a) il procède légalement à l'arrestation avec ou sans mandat;

b) il s'agit d'une infraction pour laquelle cette personne peut être arrêtée sans mandat;

c) cette personne s'enfuit afin d'éviter l'arrestation;

d) lui-même ou la personne qui emploie la force estiment, pour des motifs raisonnables, cette force nécessaire pour leur propre protection ou celle de toute autre personne contre la mort ou des lésions corporelles graves — imminentes ou futures;

e) la fuite ne peut être empêchée par des moyens raisonnables d'une façon moins violente.

(5) L'agent de la paix est fondé à employer contre un détenu qui tente de s'évader d'un pénitencier — au sens du paragraphe 2(1) de la *Loi sur le système correctionnel et la mise en liberté sous condition* — une force qui est soit susceptible de causer la mort de celui-ci ou des lésions corporelles graves, soit employée dans l'intention de les causer, si les conditions suivantes sont réunies :

a) il estime, pour des motifs raisonnables, que ce détenu ou tout autre détenu représente une menace de mort ou de lésions corporelles graves pour lui-même ou toute autre personne;

b) l'évasion ne peut être empêchée par des moyens raisonnables d'une façon moins violente.

33. (2) Il ne peut être intenté aucune procédure civile ou pénale contre un agent de la paix, ou une personne à qui un agent de la paix a légalement enjoint de lui prêter main-forte, à l'égard de tout décès ou de toute blessure qui, en raison d'une résistance, est causé par suite de l'accomplissement, par l'agent de la paix ou cette personne, d'une obligation qu'impose le paragraphe (1).

34. (2) Pour décider si la personne a agi de façon raisonnable dans les circonstances, le tribunal tient compte des faits pertinents dans la situation personnelle de la personne et celle des autres parties, de même que des faits pertinents de l'acte, ce qui comprend notamment les facteurs suivants :

a) la nature de la force ou de la menace;

b) la mesure dans laquelle l'emploi de la force était imminent et l'existence d'autres moyens pour parer à son emploi éventuel;

c) le rôle joué par la personne lors de l'incident;

d) la question de savoir si les parties en cause ont utilisé ou menacé d'utiliser une arme;

e) la taille, l'âge, le sexe et les capacités physiques des parties en cause;

f) la nature, la durée et l'historique des rapports entre les parties en cause, notamment tout emploi ou toute menace d'emploi de la force avant l'incident, ainsi que la nature de cette force ou de cette menace;

f.1) l'historique des interactions ou communications entre les parties en cause;

g) la nature et la proportionnalité de la réaction de la personne à l'emploi ou à la menace d'emploi de la force;

h) la question de savoir si la personne a agi en réaction à un emploi ou à une menace d'emploi de la force qu'elle savait légitime.

(3) Le paragraphe (1) ne s'applique pas si une personne emploie ou menace d'employer la force en vue d'accomplir un acte qu'elle a l'obligation ou l'autorisation légale d'accomplir pour l'exécution ou le contrôle d'application de la loi, sauf si l'auteur de l'acte constituant l'infraction croit, pour des motifs raisonnables, qu'elle n'agit pas de façon légitime.

35. (1) N'est pas coupable d'une infraction la personne qui, à la fois :

a) croit, pour des motifs raisonnables, qu'elle a la possession paisible d'un bien ou agit sous l'autorité d'une personne — ou prête légalement main-forte à une personne — dont elle croit, pour des motifs raisonnables, qu'elle a la possession paisible d'un bien;

b) croit, pour des motifs raisonnables, qu'une autre personne, selon le cas :

(i) sans en avoir légalement le droit, est sur le point ou est en train d'entrer dans ou sur ce bien ou y est entrée,

(ii) est sur le point, est en train ou vient de le prendre,

(iii) est sur le point ou est en train de l'endommager, de le détruire ou de le rendre inopérant;

(c) commet l'acte constituant l'infraction dans le but, selon le cas :

(i) soit d'empêcher l'autre personne d'entrer dans ou sur le bien, soit de l'en expulser,

(ii) soit d'empêcher l'autre personne de l'enlever, de l'endommager, de le détruire ou de le rendre inopérant, soit de le reprendre;

(d) agit de façon raisonnable dans les circonstances.

(2) Le paragraphe (1) ne s'applique pas si la personne qui croit, pour des motifs raisonnables, avoir la possession paisible du bien — ou celle que l'on croit, pour des motifs raisonnables, en avoir la possession paisible —, n'invoque pas de droit sur le bien et que l'autre personne a légalement droit à sa possession.

(3) Le paragraphe (1) ne s'applique pas si l'autre personne accomplit un acte qu'elle a l'obligation ou l'autorisation légale d'accomplir pour l'exécution ou le contrôle d'application de la loi, sauf si l'auteur de l'acte constituant l'infraction croit, pour des motifs raisonnables, qu'elle n'agit pas de façon légitime.

222. (1) Commet un homicide quiconque, directement ou indirectement, par quelque moyen, cause la mort d'un être humain.

(2) L'homicide est coupable ou non coupable.

(3) L'homicide non coupable ne constitue pas une infraction.

(4) L'homicide coupable est le meurtre, l'homicide involontaire coupable ou l'infanticide.

(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain :

a) soit au moyen d'un acte illégal;

b) soit par négligence criminelle;

c) soit en portant cet être humain, par des menaces ou la crainte de quelque violence, ou par la supercherie, à faire quelque chose qui cause sa mort;

d) soit en effrayant volontairement cet être humain, dans le cas d'un enfant ou d'une personne malade.

(6) Nonobstant les autres dispositions du présent article, une personne ne commet pas un homicide au sens de la présente loi, du seul fait qu'elle cause la mort d'un être humain en amenant, par de faux témoignages, la condamnation et la mort de cet être humain par sentence de la loi.

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,

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

a) dénoncer le comportement illégal;

b) dissuader les délinquants, et quiconque, de commettre des infractions;

c) isoler, au besoin, les délinquants du reste de la société;

d) favoriser la réinsertion sociale des délinquants;

e) assurer la réparation des torts causés aux victimes ou à la collectivité;

f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.

718.2 Le tribunal détermine la peine à infliger compte tenu également des principes suivants :

a) la peine devrait être adaptée aux circonstances aggravantes ou atténuantes liées à la perpétration de l'infraction ou à la situation du délinquant; sont notamment considérées comme des circonstances aggravantes des éléments de preuve établissant:

(i) que l'infraction est motivée par des préjugés ou de la haine fondés sur des facteurs tels que la race, l'origine nationale ou ethnique, la langue, la couleur, la religion, le sexe, l'âge, la déficience mentale ou physique ou l'orientation sexuelle,

(ii) que l'infraction perpétrée par le délinquant constitue un mauvais traitement de son époux ou conjoint de fait,

(ii.1) que l'infraction perpétrée par le délinquant constitue un mauvais traitement à l'égard d'une personne âgée de moins de dix-huit ans,

(iii) que l'infraction perpétrée par le délinquant constitue un abus de la confiance de la victime ou un abus d'autorité à son égard,

(iii.1) que l'infraction a eu un effet important sur la victime en raison de son âge et de tout autre élément de sa situation personnelle, notamment sa santé et sa situation financière,

(iv) que l'infraction a été commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle,

(v) que l'infraction perpétrée par le délinquant est une infraction de terrorisme;

b) l'harmonisation des peines, c'est-à-dire l'infliction de peines semblables à celles infligées à des délinquants pour des infractions semblables commises dans des circonstances semblables;

c) l'obligation d'éviter l'excès de nature ou de durée dans l'infliction de peines consécutives;

d) l'obligation, avant d'envisager la privation de liberté, d'examiner la possibilité de sanctions moins contraignantes lorsque les circonstances le justifient;

e) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

***Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch A (as amended), ss. 1-11**
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PART I
GENERAL

Purposes

1. The purposes of this Act are,

(a) to provide rules with respect to consent to treatment that apply consistently in all settings;

(b) to facilitate treatment, admission to care facilities, and personal assistance services, for persons lacking the capacity to make decisions about such matters;

(c) to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services by,

(i) allowing those who have been found to be incapable to apply to a tribunal for a review of the finding,

(ii) allowing incapable persons to request that a representative of their choice be appointed by the tribunal for the purpose of making decisions on their behalf concerning treatment, admission to a care facility or personal assistance services, and

(iii) requiring that wishes with respect to treatment, admission to a care facility or personal assistance services, expressed by persons while capable and after attaining 16 years of age, be adhered to;

(d) to promote communication and understanding between health practitioners and their patients or clients;

(e) to ensure a significant role for supportive family members when a person lacks the capacity to make a decision about a treatment, admission to a care facility or a personal assistance service; and

(f) to permit intervention by the Public Guardian and Trustee only as a last resort in decisions on behalf of incapable persons concerning treatment, admission to a care facility or personal assistance services. 1996, c. 2, Sched. A, s. 1.

Interpretation

2.(1) In this Act,

"attorney for personal care" means an attorney under a power of attorney for personal care given under the *Substitute Decisions Act, 1992*; ("procureur au soin de la personne")

"Board" means the Consent and Capacity Board; ("Commission")

"capable" means mentally capable, and "capacity" has a corresponding meaning; ("capable", "capacité")

"care facility" means,

(a) a long-term care home as defined in the *Long-Term Care Homes Act, 2007*, or

(b) a facility prescribed by the regulations as a care facility; ("établissement de soins")

"community treatment plan" has the same meaning as in the *Mental Health Act*; ("plan de traitement en milieu communautaire")

"course of treatment" means a series or sequence of similar treatments administered to a person over a period of time for a particular health problem; ("série de traitements")

"evaluator" means, in the circumstances prescribed by the regulations,

(a) a member of the College of Audiologists and Speech-Language Pathologists of Ontario,
(b) a member of the College of Dietitians of Ontario,
(c) a member of the College of Nurses of Ontario,
(d) a member of the College of Occupational Therapists of Ontario,
(e) a member of the College of Physicians and Surgeons of Ontario,
(f) a member of the College of Physiotherapists of Ontario,
(g) a member of the College of Psychologists of Ontario, or
(h) a member of a category of persons prescribed by the regulations as evaluators; ("appréciateur")

"guardian of the person" means a guardian of the person appointed under the *Substitute Decisions Act, 1992*; ("tuteur à la personne")

"health practitioner" means a member of a College under the *Regulated Health Professions Act, 1991*, a naturopath registered as a drugless therapist under the *Drugless Practitioners Act* or a member of a category of persons prescribed by the regulations as health practitioners; ("praticien de la santé")

Note: On a day to be named by proclamation of the Lieutenant Governor, the definition of "health practitioner" is amended by striking out "a naturopath registered as a drugless therapist under the *Drugless Practitioners Act*". See: 2009, c. 26, ss. 10 (2), 27 (2).

"hospital" means a private hospital as defined in the *Private Hospitals Act* or a hospital as defined in the *Public Hospitals Act*; ("hôpital")

"incapable" means mentally incapable, and "incapacity" has a corresponding meaning; ("incapable", "incapacité")

"mental disorder" has the same meaning as in the *Mental Health Act*; ("trouble mental")

"personal assistance service" means assistance with or supervision of hygiene, washing, dressing, grooming, eating, drinking, elimination, ambulation, positioning or any other routine activity of living, and includes a group of personal assistance services or a plan setting out personal assistance services to be provided to a person, but does not include anything prescribed by the regulations as not constituting a personal assistance service; ("service d'aide personnelle")

"plan of treatment" means a plan that,

(a) is developed by one or more health practitioners,
(b) deals with one or more of the health problems that a person has and may, in addition, deal with one or more of the health problems that the person is likely to have in the future given the person's current health condition, and
(c) provides for the administration to the person of various treatments or courses of treatment and may, in addition, provide for the withholding or withdrawal of treatment in light of the person's current health condition; ("plan de traitement")

"psychiatric facility" has the same meaning as in the *Mental Health Act*; ("établissement psychiatrique")

"recipient" means a person who is to be provided with one or more personal assistance services,

(a) in a long-term care home as defined in the *Long-Term Care Homes Act, 2007*,
(b) in a place prescribed by the regulations in the circumstances prescribed by the regulations,
(c) under a program prescribed by the regulations in the circumstances prescribed by the regulations, or
(d) by a provider prescribed by the regulations in the circumstances prescribed by the regulations; ("bénéficiaire")

"regulations" means the regulations made under this Act; ("règlements")

"treatment" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan, but does not include,

(a) the assessment for the purpose of this Act of a person's capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the *Substitute Decisions Act, 1992* of a person's capacity to manage property or a person's capacity for personal care, or the assessment of a person's capacity for any other purpose,
(b) the assessment or examination of a person to determine the general nature of the person's condition,
(c) the taking of a person's health history,
(d) the communication of an assessment or diagnosis,
(e) the admission of a person to a hospital or other facility,
(f) a personal assistance service,
(g) a treatment that in the circumstances poses little or no risk of harm to the person,
(h) anything prescribed by the regulations as not constituting treatment. ("traitement") 1996, c. 2, Sched. A, s. 2 (1); 2000, c. 9, s. 31; 2007, c. 8, s. 207 (1); 2009, c. 26, s. 10 (1); 2009, c. 33, Sched. 18, s. 10 (1).

Refusal of consent

(2) A reference in this Act to refusal of consent includes withdrawal of consent. 1996, c. 2, Sched. A, s. 2 (2).

Meaning of "excluded act"

3.(1) In this section,

"excluded act" means,

(a) anything described in clause (b) or (g) of the definition of "treatment" in subsection 2 (1), or
(b) anything described in clause (h) of the definition of "treatment" in subsection 2 (1) and prescribed by the regulations as an excluded act. 1996, c. 2, Sched. A, s. 3 (1).

Excluded act considered treatment

(2) If a health practitioner decides to proceed as if an excluded act were a treatment for the purpose of this Act, this Act and the regulations apply as if the excluded act were a treatment within the meaning of this Act. 1996, c. 2, Sched. A, s. 3 (2).

Capacity

4.(1) A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the

case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1996, c. 2, Sched. A, s. 4 (1).

Presumption of capacity

(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services. 1996, c. 2, Sched. A, s. 4 (2).

Exception

(3) A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be. 1996, c. 2, Sched. A, s. 4 (3).

Wishes

5.(1) A person may, while capable, express wishes with respect to treatment, admission to a care facility or a personal assistance service. 1996, c. 2, Sched. A, s. 5 (1).

Manner of expression

(2) Wishes may be expressed in a power of attorney, in a form prescribed by the regulations, in any other written form, orally or in any other manner. 1996, c. 2, Sched. A, s. 5 (2).

Later wishes prevail

(3) Later wishes expressed while capable prevail over earlier wishes. 1996, c. 2, Sched. A, s. 5 (3).

Research, sterilization, transplants

6. This Act does not affect the law relating to giving or refusing consent on another person's behalf to any of the following procedures:

1. A procedure whose primary purpose is research.
2. Sterilization that is not medically necessary for the protection of the person's health.
3. The removal of regenerative or non-regenerative tissue for implantation in another person's body. 1996, c. 2, Sched. A, s. 6.

Restraint, confinement

7. This Act does not affect the common law duty of a caregiver to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or to others. 1996, c. 2, Sched. A, s. 7.

PART II
TREATMENT
General

Application of Part

8.(1) Subject to section 3, this Part applies to treatment. 1996, c. 2, Sched. A, s. 8 (1).

Law not affected

(2) Subject to section 3, this Part does not affect the law relating to giving or refusing consent to anything not included in the definition of "treatment" in subsection 2 (1). 1996, c. 2, Sched. A, s. 8 (2).

Meaning of "substitute decision-maker"

9. In this Part,

"substitute decision-maker" means a person who is authorized under section 20 to give or refuse consent to a treatment on behalf of a person who is incapable with respect to the treatment. 1996, c. 2, Sched. A, s. 9.

Consent to Treatment

No treatment without consent

10.(1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,

(a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or

(b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act. 1996, c. 2, Sched. A, s. 10 (1).

Opinion of Board or court governs

(2) If the health practitioner is of the opinion that the person is incapable with respect to the treatment, but the person is found to be capable with respect to the treatment by the Board on an application for review of the health practitioner's finding, or by a court on an appeal of the Board's decision, the health practitioner shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless the person has given consent. 1996, c. 2, Sched. A, s. 10 (2).

Elements of consent

11.(1) The following are the elements required for consent to treatment:

1. The consent must relate to the treatment.
2. The consent must be informed.
3. The consent must be given voluntarily.
4. The consent must not be obtained through misrepresentation or fraud. 1996, c. 2, Sched. A, s. 11 (1).

Informed consent

(2) A consent to treatment is informed if, before giving it,

(a) the person received the information about the matters set out in subsection (3) that a reasonable person in the same circumstances would require in order to make a decision about the treatment; and

(b) the person received responses to his or her requests for additional information about those matters. 1996, c. 2, Sched. A, s. 11 (2).

Same

(3) The matters referred to in subsection (2) are:

1. The nature of the treatment.
2. The expected benefits of the treatment.
3. The material risks of the treatment.
4. The material side effects of the treatment.
5. Alternative courses of action.
6. The likely consequences of not having the treatment. 1996, c. 2, Sched. A, s. 11 (3).

Express or implied

(4) Consent to treatment may be express or implied. 1996, c. 2, Sched. A, s. 11 (4).

***Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c. 181, ss. 3-7**
www.canlii.org

3(1) Until the contrary is demonstrated, every adult is presumed to be capable of
(a) giving, refusing or revoking consent to health care, and
(b) deciding to apply for admission to a care facility, to accept a facility care proposal, or to move out of a care facility.

(2) An adult's way of communicating with others is not, by itself, grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

4 Every adult who is capable of giving or refusing consent to health care has
(a) the right to give consent or to refuse consent on any grounds, including moral or religious grounds, even if the refusal will result in death,
(b) the right to select a particular form of available health care on any grounds, including moral or religious grounds,
(c) the right to revoke consent,
(d) the right to expect that a decision to give, refuse or revoke consent will be respected, and
(e) the right to be involved to the greatest degree possible in all case planning and decision making.

5(1) A health care provider must not provide any health care to an adult without the adult's consent except under sections 11 to 15.

(2) A health care provider must not seek a decision about whether to give or refuse substitute consent to health care under section 11, 14 or 15 unless he or she has made every reasonable effort to obtain a decision from the adult.

6 An adult consents to health care if
(a) the consent relates to the proposed health care,
(b) the consent is given voluntarily,
(c) the consent is not obtained by fraud or misrepresentation,
(d) the adult is capable of making a decision about whether to give or refuse consent to the proposed health care,
(e) the health care provider gives the adult the information a reasonable person would require to understand the proposed health care and to make a decision, including information about
(i) the condition for which the health care is proposed,
(ii) the nature of the proposed health care,
(iii) the risks and benefits of the proposed health care that a reasonable person would expect to be told about, and
(iv) alternative courses of health care, and
(f) the adult has an opportunity to ask questions and receive answers about the proposed health care.

7 When deciding whether an adult is incapable of giving, refusing or revoking consent to health care, a health care provider must base the decision on whether or not the adult demonstrates that he or she understands
(a) the information given by the health care provider under section 6 (e), and

(b) that the information applies to the situation of the adult for whom the health care is proposed.

***Health Professions Act*, R.S.B.C. 1996, c. 183**
www.canlii.org

***Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29**
www.canlii.org

29. In an enactment:

...

"medical practitioner" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine and to use the title "medical practitioner";

***Mental Health Act*, R.S.B.C. 1996, c. 288, ss. 22(3)-(4), 28**
www.canlii.org

22(3) Each medical certificate under this section must be completed by a physician who has examined the person to be admitted, or the patient admitted, under subsection (1) and must set out
- (a) a statement by the physician that the physician
  - (i) has examined the person or patient on the date or dates set out, and
  - (ii) is of the opinion that the person or patient is a person with a mental disorder,
- (b) the reasons in summary form for the opinion, and
- (c) a statement, separate from that under paragraph (a), by the physician that the physician is of the opinion that the person to be admitted, or the patient admitted, under subsection (1)
  - (i) requires treatment in or through a designated facility,
  - (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and
  - (iii) cannot suitably be admitted as a voluntary patient.

(4) A medical certificate referred to in subsection (1) is not valid unless both it and the examination it describes are completed not more than 14 days before the date of admission.

28(1) A police officer or constable may apprehend and immediately take a person to a physician for examination if satisfied from personal observations, or information received, that the person
- (a) is acting in a manner likely to endanger that person's own safety or the safety of others, and
- (b) is apparently a person with a mental disorder.

(2) A person apprehended under subsection (1) must be released if a physician does not complete a medical certificate in accordance with section 22 (3) and (4).

(3) Anyone may apply to a judge of the Provincial Court or, if no judge is available, to a justice of the peace respecting a person if there are reasonable grounds to believe that section 22 (3) (a) (ii) and (c) describes the condition of the person.

(4) On application under subsection (3), the judge or justice may issue a warrant in the prescribed form if satisfied that
- (a) the applicant has reasonable grounds to believe that subsection (3) applies to the person respecting whom the application is made, and
- (b) section 22 cannot be used without unreasonable delay.

(5) A warrant issued under subsection (4) is authority for the apprehension of the person to be admitted and for the transportation, admission and detention of that person for treatment in or through a designated facility.

(6) On being admitted as described in subsection (5), a patient must be discharged at the end of 48 hours detention unless the director receives 2 medical certificates as described in section 22 (3).

(7) On the director receiving 2 medical certificates as described in subsection (6), section 22 (6) and (7) applies to the patient.

Supreme Court of Canada | Cour suprême du Canada

February 18, 2014 | Le 18 février 2014

ORDER
MOTION

ORDONNANCE
REQUÊTE

LEE CARTER, HOLLIS JOHNSON, WILLIAM SHOICHET, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND GLORIA TAYLOR v. ATTORNEY GENERAL OF CANADA - and between - LEE CARTER, HOLLIS JOHNSON, WILLIAM SHOICHET, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND GLORIA TAYLOR v. ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF BRITISH COLUMBIA
(B.C.) (35591)

THE CHIEF JUSTICE:

UPON APPLICATION by the appellants for an order stating constitutional questions in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTIONS BE STATED AS FOLLOWS:

1. Are ss. 14, 21, 22, 222 and 241 of the *Criminal Code*, R.S.C. 1985, c. C-46, constitutionally inapplicable to physician-assisted death by reason of the doctrine of interjurisdictional immunity?

2. Do ss. 14, 21, 22, 222 and 241 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

3. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. Do ss. 14, 21, 22, 222 and 241 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

5. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Any attorney general who intervenes pursuant to par. 61(4) of the *Rules of the Supreme Court of Canada* shall pay the appellants and respondents the costs of any additional disbursements they incur as a result of the intervention.

À LA SUITE DE LA DEMANDE des appelants visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée,

LES QUESTIONS CONSTITUTIONNELLES SUIVANTES SONT FORMULÉES :

1. Les articles 14, 21, 22, 222 et 241 du *Code criminel*, L.R.C. 1985, ch. C-46, sont-ils constitutionnellement inapplicables à l'aide médicale à mourir en raison de la doctrine de l'exclusivité des compétence?

2. Les articles 14, 21, 22, 222 et 241 of the *Code criminel*, L.R.C. 1985, ch. C-46, violent-ils l'art. 7 de la *Charte canadienne des droits et libertés*?

3. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés* ?

4. Les articles 14, 21, 22, 222 et 241 du *Code criminel*, L.R.C. 1985, ch. C-46, violent-ils l'art. 15 de la *Charte canadienne des droits et libertés*?

5. Dans l'affirmative, s'agit-il d'une violation constituant une limite raisonnable, établie par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte canadienne des droits et libertés*?

Tout procureur général qui interviendra en vertu du par. 61(4) des *Règles de la Cour suprême du Canada* sera tenu de payer aux appelants et aux intimés les dépens supplémentaires résultant de son intervention.

C.J.C.
J.C.C.