Court 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

AND:

ATTORNEY GENERAL OF CANADA

Respondent

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Respondent

RESPONDENT'S FACTUM

(Rules of the Supreme Court of Canada, R. 42)

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A. OVERVIEW

1. In 1993, this Court carefully considered the very difficult social, moral, and legal issues surrounding assisted suicide, and decided Parliament's prohibition was constitutional. Since that time, the *Rodriguez* decision[1] has become a foundational case in our constitutional law, relied on nearly every year since its release by this Court alone.[2] The principles expounded there have been applied in decisions on equally weighty matters such as the withdrawal of life support, the right to refuse medical treatment, and access to health care.

2. The appellants propose that *Rodriguez* be jettisoned on the basis of legal arguments that are not significantly different from those rejected in *Rodriguez*, and on the basis of a record that they claim constitutes a "material and significant change in social and legislative facts."[3] The trial judge accepted those claims, but a majority of the British Columbia Court of Appeal rejected them.

3. Neither the law nor the voluminous record in this case "fundamentally shifts the parameters of debate"[4] so as to justify the overruling of *Rodriguez*. The record discloses many heart-rending personal narratives, on both sides of the issue. It discloses the opinions of ethicists, who continue to be firmly divided on the propriety of assisted suicide. It discloses the opinions of experts who have studied the experience of jurisdictions that have legislated access to assisted suicide; they too, are divided.

4. What also has not changed since 1993 are the two objectives that underscore the need for an absolute prohibition against assisted suicide. The preservation of life and the protection of vulnerable people - the poor, the elderly, people with disabilities - are societal interests of the highest order. An absolute prohibition sends the message that all lives are valued, and worthy of protection from those who may subtly encourage vulnerable people to terminate their lives.

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[1] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 SCR 519 (Book of Authorities of the Respondent Attorney General of Canada ("RA"), Tab 44) [*Rodriguez*].
[2] Appendix A, "Application of the *Rodriguez* Decision by the Supreme Court of Canada".
[3] Factum of the Appellants dated May 13, 2014 at para. 7 [Appellants' Factum].
[4] *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101 at para. 46 (RA, Tab 6) [*Bedford*].

5. Parliament has repeatedly looked at this issue, both before and after *Rodriguez*. It has not changed its mind. Nor have leading medical associations or most of the legislatures in the developed world. The highest courts in the United States, the United Kingdom, and Ireland, as well as the European Court of Human Rights, have all rejected the existence of the rights sought by the appellants. There is no convincing evidence before this Court that something less than an absolute prohibition will achieve the laws' objectives.

B. STATEMENT OF FACTS

1) The history of the regulation of assisted suicide and euthanasia in Canada and abroad

6. Assisted suicide was banned under the common law and it has been prohibited by Parliament since the adoption of the first *Criminal Code* in 1892. The same was true of attempted suicide until 1972, when it was decriminalized.[5] In the debates surrounding the amendment (which was part of a larger bill amending many aspects of the *Criminal Code*) there was no indication that the change was being made to recognize autonomy rights. Rather, the debates reflected a desire to care for, rather than punish, those who attempt suicide.[6] Abolishing the suicide offence while maintaining an assisted suicide offence reflects important concerns about the danger of participation in suicides by third parties.[7]

7. So-called *voluntary* euthanasia, the taking of another person's life at their request in order to relieve their suffering, has also always been prohibited under the homicide laws. In the context of this case, it was called simply "euthanasia," and defined by the trial judge to be the intentional termination of life by a physician or someone acting under a physician's direction at the victim's request.[8]

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[5] Reasons for Judgment of the Honourable Madam Justice Smith pronounced June 15, 2012 at paras. 102-107 (Joint Appeal Record ("JR"), Vol. I, pp. 32-33) [TJ Reasons].
[6] TJ Reasons at para. 105 (JR, Vol. I, pp. 32-33); Notice to Admit #1 of the Attorney General of Canada dated September 23, 2011 at paras. 1-2, 11, Appendix F (JR, Vol. XX, pp. 3858-3859, 3881-3905) [Canada's NTA #1]; *Rodriguez* at 597, 620.
[7] *R.(Nicklinson) v. Ministry of Justice*, [2014]UKSC 38 at paras. 212-214[*Nicklinson*] (RA, Tab 34).
[8] TJ Reasons at paras. 37-39 (JR, Vol. I, pp. 16-17).

8. Between 1991 and the trial of this matter, nine private members' bills were introduced in the House of Commons seeking to decriminalize assisted suicide or euthanasia in some form. Three were neither debated nor voted on. The remaining six were debated in either the House or in Committee. None of these bills were passed. The most recent rejection occurred on April 21, 2010 when a bill proposing a scheme similar to that put forward by the appellants was defeated on a free vote by 228 to 59.[9]

9. There is no indication that Parliament's refusal to change the law is the result of an unwillingness to address the issue. During the debates, parliamentarians canvassed many, if not all, of the issues raised in the present litigation, including: the adequacy of safeguards; the duty of Parliament to protect human life, especially the lives of vulnerable individuals; the experiences of countries in which assisted suicide has been legalized; and the negative message concerning the value of human life that would be sent to all Canadians if assisted suicide were permitted.[10]

10. The Senate has extensively debated and studied the issue of assisted suicide and euthanasia, and has issued several reports on end of life issues. The most in-depth look at assisted suicide and euthanasia was the 1995 report, *Of Life and Death*, which was prepared by a committee established in the wake of the *Rodriguez* decision. That committee heard from provincial Ministers of Justice and Health, and over 130 non-government witnesses, including 29 witnesses from the Netherlands. The committee held 30 days of hearings across the country and received hundreds of additional letters and briefs. All committee members had "deep concerns about the implications of permitting assisted suicide". The committee as a whole recommended that euthanasia remain an offence, and that there be no change to the offence of counselling suicide. The majority also recommended that no change be made to the prohibition on assisting suicide. [11]

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[9] TJ Reasons at paras. 108-113 (JR, Vol. I, pp. 33-34); Canada's NTA #1 at para. 15-34 (JR, Vol. XX, p. 3859-3861).
[10] TJ Reasons at para. 111 (JR, Vol. I, pp. 33-34); Canada's NTA #1, Appendix Q (JR, Vol. XX, pp. 4025-4058).
[11] TJ Reasons at paras. 113, 288-292 (JR, Vol. I, pp. 34, 91-92); Canada's NTA #1, Appendix T (JR, Vol. XX, pp. 4228-4260).

11. The vast majority of western democracies prohibit both euthanasia and assisted suicide.[12] Since *Rodriguez*, many other jurisdictions have also considered and rejected legislative proposals or efforts to legalize assisted suicide or euthanasia and many have taken steps to strengthen their laws against euthanasia and assisted suicide.[13]

12. In the United States, in the last two decades, no fewer than 24 state legislatures have considered and rejected proposals to legalize physician-assisted suicide. Ballot initiatives have also failed in at least three states. At least six states have taken steps to strengthen their laws against assisted suicide.[14]

13. The constitutionality of bans on assisted suicide has also been upheld by the United States Supreme Court. In applying the American equivalent to s. 7 of the *Charter*, that court held that the asserted right to assistance in committing suicide is not a fundamental liberty interest.[15] Nor does a prohibition against assisted suicide violate equal protection guarantees.[16] Bans on assisted suicide and euthanasia have also been upheld by the European Court of Human Rights,[17] the Irish Supreme Court,[18] and the United Kingdom Supreme Court.[19]

14. The issue has also been studied by Parliamentary and similar committees in England, Scotland, New York, and Australia.[20] These committees have heard from hundreds of witnesses

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[12] Including 36 of 43 European Union states: *Nicklinson*, at para. 35.
[13] Expert Report of Professor Mary J. Shariff at paras. 22-23, 33-44, 50-52, 135, 161-173, 177, 186-193, 197, 206, 216-217, 219, 226-235, 237-239 (AR , Vol. XXVIII, pp. 6831, 6834-6835, 6836-6837, 6853, 6859-6867, 6869, 6871-6872, 6874-6877) [Shariff Report]; Notice to Admit #2 of the Attorney General of Canada dated September 30, 2011 at paras. 2-5, 7-10, Appendices B-D, F-H (JR, Vol. XXIII, pp. 4805-4806, Appendices B-D: pp. 4870-5139, Appendices F-H: Vol. XXIV, pp. 5149-5615) [Canada's NTA #2]; *Nicklinson*, at para. 50.
[14] Shariff Report at paras. 46-48, 50, 69 (JR, Vol. XXVIII, pp. 6836-6837, 6840).
[15] *Washington v. Glucksberg*, 521 U.S. 702 (1997) at 728-735 (RA, Tab 51) [*Washington*].
[16] *Vacco v. Quill*, 521 U.S. 793 (1997) at 808-809 (RA, Tab 48) [*Vacco*].
[17] *Pretty v. United Kingdom*, (2002) 35 EHRR 1 (RA, Tab 30) [*Pretty*].
[18] *Fleming v. Ireland & Ors* , [2013] IESC 19 (RA, Tab 11) [*Fleming*].
[19] *Nicklinson*.
[20] Shariff Report at paras. 122-124, 163-165, 190-192, 206-207, 214, 219, 230-231, 233-234, 239 (JR, Vol. XXVIII, pp. 6851, 6859-6861, 6865-6867, 6860-6872, 6874-6877); Shariff Report, Appendix C, Tab 15, "*When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context*" dated May 1994 (JR, Vol. XXIX, pp. 7147-7371); Shariff Report, Appendix C, Tab 16, "*Dying for the Terminally Ill Bill [HL], Volume 1: Report*" dated April 4, 2005 (JR, Vol. XXIX, pp. 7372-7519); Shariff Report, Appendix C, Tab 17, *"End of Life Assistance (Scotland) Bill Committee Report*", SP Paper 523 dated 2010 (JR, Vol. XXX, pp. 7520-7570); Shariff Report, Appendix C, Tab 18, *"Standing Committee on Legal and Constitutional Affairs: Rights of the Terminally Ill (Euthanasia Laws Repeal)*

on the issue and prepared detailed reports. After extensive examination of the issue, none of these jurisdictions changed the law to allow for assisted suicide or euthanasia.[21]

15. The trial judge examined the law and experience in the "permissive" jurisdictions – those jurisdictions where some form of euthanasia or assisted suicide is permitted. As described in detail by Professor Shariff, each permissive jurisdiction's current scheme has had a unique evolution and is based on different ethical underpinnings. The regulatory designs of the various systems have both similarities and differences.[22]

16. **Oregon and Washington**: The laws in these states are almost identical and came about through ballot initiatives. Both jurisdictions permit physician-assisted suicide but prohibit euthanasia. Both jurisdictions only permit assisted suicide for terminally ill patients, specifically, those who are judged to be within six months of death. There is no requirement that the patient be suffering in any way. After the life-ending medication is prescribed, physicians often do not have any further involvement in the patient taking the medication. Access is limited to resident adults.[23]

17. **Belgium, the Netherlands, and Luxemburg**: The laws in these jurisdictions are substantially the same. In the Netherlands, the practice initially developed through judicial expansion of the defence of necessity. The due care requirements developed in that jurisprudence were eventually codified in legislation, which served as a model for the other countries. Both physician-assisted suicide and some forms of euthanasia are permitted. Access was originally restricted to adults, but has been extended to infants in the Netherlands and recently extended to

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Bill 2008" (JR, Vol. XXX, pp. 7571-7734) Shariff Report, Appendix C, Tab 19, "*Report on the Dying with Dignity Bill 2009*" (JR, Vol. XXX, pp. 7735-7812).

[21] Shariff Report at paras. 122-125, 163-168, 190-193, 230-232 (JR, Vol. XXVIII, pp. 6851-6852, 6859-6861, 6865-6867, 6874-6875); Shariff Report, Appendix C, Tab 15, *"When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context"* dated May 1994 (JR, Vol. XXIX, pp. 7147-7371); Shariff Report, Appendix C, Tab 16, "*Dying for the Terminally Ill Bill [HL], Volume 1: Report*" dated April 4, 2005 (JR, Vol. XXIX, pp. 7372-7519); Shariff Report Appendix C, Tab 17, *"End of Life Assistance (Scotland) Bill Committee Report*", SP Paper 523 dated 2010 (JR, Vol. XXX, pp. 7520-7570); Shariff Report Appendix C, Tab 19, "*Report on the Dying with Dignity Bill 2009*" (JR, Vol. XXX, pp. 7735-7812).

[22] Shariff Report, Appendix C, *"A Perfection of Means, and Confusion of Aims": Finding the Essence of Autonomy in Assisted Death Laws* (JR, Vol. XXVIII, pp. 6909-6977).

[23] TJ Reasons at paras. 390-393, 401-402 (JR, Vol. I, pp. 117-118, 124).

minors in Belgium. There is no requirement for the patient to be terminally ill. Access is limited to residents of these countries.[24]

18. **Switzerland**: Under the Swiss penal code, euthanasia is illegal but assisted suicide is only illegal if done for selfish reasons. The law does not impose restrictions on: eligibility (e.g. no requirement of terminal illness); residency (hence foreigners travel to Switzerland); or who can assist (i.e. it need not be a physician, as long as the person has altruistic motives).[25]

19. **Montana**: In *Baxter v. Montana,*[26] that state's highest court held 5:2 that a patient's consent in a physician-aided death case comes within the defence of consent provided for all criminal prohibitions. The defence appears to be restricted to terminally ill, adult patients, but there does not appear to be a requirement that the patient be suffering.[27]

20. **Colombia**: This is the only jurisdiction that has recognized a constitutional right to physician-assisted death. In 1997, Colombia's Constitutional Court recognized such a right, restricted to patients who consent and are experiencing intense suffering as a consequence of a terminal illness. The Court urged Congress to enact regulations for assisted death, but this has not happened.[28]

2) History of this proceeding

21. Because of the declining health of Ms. Taylor, the appellants requested that the matter proceed by way of summary trial on expedited timelines. In support of their claim, the appellants filed more than 70 affidavits. Canada and B.C. were given seven weeks to file responding material. Cross-examinations commenced as soon as the appellants filed their reply evidence (a

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[24] TJ Reasons at paras. 455-462, 505, 508-509, 594, 605-607 (JR, Vol. I, pp. 139-141, 152-153, 175-176, 178-179); Affidavit of Professor Etienne Montero sworn April 23, 2014 (English translation) at paras. 21-26, 64-67, 79-82, 87 (Respondent's Record ("RR"), Tab 3, pp. 41-42, 51-52, 55-57) [Montero Affidavit].
[25] Shariff Report at paras. 25, 31 and attached article at p. 6930 (JR, Vol. XXVIII, pp. 6831, 6833, 6930); TJ Reasons at paras. 67, 68, 205, 368, 589-593 (JR, Vol. I, pp. 24, 63, 113, 174-175).
[26] 2009 MT 449 (RA, Tab 3).
[27] TJ Reasons paras. 613-617 (JR, Vol. I, pp. 180-181); Shariff Report at paras. 26, 35, 61-65 (JR, Vol XXVIII, pp. 6831, 6834, 6839).
[28] TJ Reasons at paras. 619-620 (JR, Vol. I, p. 182).

further 15 affidavits). They were conducted in the two weeks prior to the hearing and continued before the trial judge for the first two weeks of the hearing.

22. The trial judge released her decision on June 15, 2012. Her order declared that the impugned provisions unjustifiably infringe both ss.15 and 7 of the *Charter*. In relation to s.15, the declaration applied to physician-assisted suicide but not to euthanasia. In relation to s. 7, the declaration applied to both physician-assisted suicide and to euthanasia by a physician. The declarations only applied in the following circumstances:

- The acts must be in the context of a physician-patient relationship;
- The assisted suicide or euthanasia must be personally requested by a fully-informed, non-ambivalent, competent adult;
- The patient must be free from coercion and undue influence, and not clinically depressed;
- The patient must have a "serious illness, disease or disability (including a disability arising from traumatic injury)";
- The patient must be in a "state of advanced weakening capacities with no chance of improvement";
- The patient must have "an illness that is without remedy as determined by reference to treatment options acceptable to the person"; and
- The patient must have an "illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person".[29]

23. In addition, the s.15 declaration required that the patient "is materially physically disabled or is soon to become so."[30]

24. The declarations applied to individuals who are not terminally ill, and to individuals who only have psychological suffering. The patient would decide whether the suffering is intolerable, as well as whether the alternatives to death are acceptable. Therefore, even where suffering could be alleviated or cured by treatment, if the patient refuses the treatment, the patient would be entitled to access physician-assisted suicide or euthanasia.

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[29] TJ Reasons at para. 1393 (JR, Vol. II, pp. 186-187).
[30] TJ Reasons at para. 1393 (JR, Vol. II, pp. 186-187).

25. The trial judge stayed the declarations for one year, but granted an interim constitutional exemption to Gloria Taylor. Ms. Taylor passed away without accessing the constitutional exemption.

26. The trial judge awarded the appellants special costs, with 90% payable by Canada and 10% payable by British Columbia.

27. The British Columbia Court of Appeal allowed Canada's appeal, with the majority finding that the trial judge was bound by this Court's decision in *Rodriguez*. The majority also ordered that each party bear its own costs in that court and at the trial court.

28. Pursuant to the order of this court,[31] Canada filed the affidavit of Professor Etienne Montero containing fresh evidence of developments in Belgium since the trial.

3) The Evidence at Trial

29. The evidence adduced at trial generally fell into one of several categories. That evidence, and the trial judge's treatment of it, is summarized below.

a) The Nature of the Wish to Die

30. Both parties led evidence in relation to the ambivalence of the wish to die and the efficaciousness of various treatments.

31. The respondent's expert evidence from psychologists, psychiatrists and palliative care doctors demonstrated that the desire for death is most often ambivalent and transitory.[32] In the vast majority of cases, an expressed wish to die can be successfully addressed with good

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[31] Order of the Honourable Justice Rothstein dated May 16, 2014 (RR, Tab 1, p. 1).

[32] TJ Reasons at paras. 832-841 (JR, Vol. II, pp. 34-35); Expert report of Dr. Harvey Chochinov filed October 5, 2011, Exhibit F at pp. 97-98 (JR, Vol. XXVII, pp. 6471-6472) [Chochinov Report]; Affidavit #1 of Baroness Ilora Finlay sworn October 11, 2011 at paras. 81-92, Exhibit K, pp. 123-125 (JR, Vol. XXXVI, pp. 9672- 9675, Ex. K: pp. 9774- 9776) [Finlay Affidavit]; Expert report of Dr. Romayne Gallagher dated September 30, 2011 at p. 13:3-6 (JR, Vol. XLIV, p. 12390:3-6) [Gallagher Report]; Expert report of Dr. Brian L. Mishara dated October 6, 2011 at paras. 22, 27-29, 31-32, 43-46 (JR, Vol. XLV, pp. 12730-12731, 12733-12737, 12742-12745) [Mishara Report]; Cross-examination of Dr. Michael Downing on November 9, 2011, pp. 12:2-13:7 (JR, Vol. XLVIII, pp. 13578:2-13579:7).

treatment, including palliative care, dignity therapy, and other therapeutic interventions.[33] The appellants' experts were of the view that in relation to ambivalence, there was a distinction between "traditional" suicide and those seeking assisted dying.[34] In respect of the ability to successfully address a wish to die, the appellants' experts discounted the evidence of the respondent's experts on the basis that they were studying individuals who simply expressed a wish to die rather than those who actually pursued assisted death in a permissive jurisdiction.[35]

32. The trial judge found that ambivalence could be addressed by assessing capacity and requiring "some time" to pass between the decision and its implementation.[36] In the context of such an irreversible decision, the trial judge rejected concerns that individuals may change their minds, or that physicians may make mistaken prognoses. She was of the view that it was hypothetical that individuals who lose their lives might regret the decision, "if regret is possible after death."[37] In coming to a conclusion on this point, the trial judge made no mention of a witness with serious disabilities who had been prevented from committing the suicide she desired; this person was very grateful that she had not succeeded and was able to lead a fulfilling life.[38]

33. The trial judge found that, in the context of obtaining informed consent, physicians could discuss with their patients the availability of treatments, including palliative care, that might overcome the wish to die. Although she did not specifically reject it, the trial judge appears to have discounted expert evidence that demonstrated that descriptions of such treatments are not a

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[33] TJ Reasons at paras. 189, 821-823, 825, 827, 830-831 (JR, Vol. I, p. 59 and Vol. II, pp. 31-33); Chochinov Report at paras. 39-42, 44-45, Exhibits C, K, N (JR, Vol. XXVII, pp. 6387-6389, Ex. C: 6442- 6450, Ex. K: 6507-6510, Ex. N: 6527); Finlay Affidavit at paras. 16-18 (JR, Vol. XXXVI, pp. 9656-9657); Expert report of Dr. Jose Pereira dated October 17, 2011 at paras. 15-42, 82 (JR, Vol. XXXVII, pp. 9783-9795, 9813-9814) [Pereira Report]; Gallagher Report at pp. 10:8-23, 11:9-16 (JR, Vol. XLIV, pp. 12387:8-23, 12388:9-16); Mishara Report at paras. 39-41 (JR, Vol. XLV, pp. 12470-12472); Expert Report of Dr. Gary Rodin dated October 4, 2011 at pp. 5-9 (JR, Vol. XLVI, pp. 12854-12858); Cross-examination of Dr. Scott Meckling on November 4, 2011, pp. 2:7-3:47 (JR, Vol. XLVII, pp. 13341:7 to 13342:47).

[34] TJ Reasons at para. 833 (JR, Vol. II, p. 34).

[35] TJ Reasons at para. 828 (JR, Vol. II, pp. 32-33).

[36] TJ Reasons at para. 843 (JR, Vol. II, p. 36).

[37] TJ Reasons at paras. 757, 843, 1268 (JR, Vol. II, pp. 16-17, 36, 157).

[38] Affidavit #1 of Alison Davis sworn September 27, 2011 (JR, Vol. XXVII, pp. 6809-6814) [Davis Affidavit].

suitable substitute for actual experience of the relief they can provide.[39] The evidence also indicated that not all physicians treating serious diseases are familiar with palliative care options.[40]

b) The Ability to Assess the Authenticity of a Request to Die

34. Both parties filed evidence addressing the ability of physicians to determine if a patient's wish to die was influenced by cognitive impairment, depression, or outside influence.

35. The evidence from both parties' experts showed that determining, for example, the role of depression in decision-making is difficult, even by expert assessment.[41] Doctors in Oregon involved in assisted suicide do not appear to comply with the requirement for referral to a mental health professional for patients suffering from depression which may impair judgment.[42] The appellants' witnesses documented cases in Oregon of patients with major depressive disorders being provided with lethal prescriptions, and concluded that the Oregon system may fail to protect some patients with mental illnesses.[43]

36. The appellants' expert also testified that patients with depression and cognitive impairments such as dementia may be vulnerable to being euthanized in Belgium.[44] This vulnerability is demonstrated in some of the recent cases cited by Professor Montero. For example, in late 2012, a woman suffering from a psychiatric disability was euthanized. A 48-year–old psychiatric inmate was euthanized in September 2012, and a 44-year-old individual suffering from psychological pain after a botched sex reassignment surgery was also euthanized. In addition, the incidence of euthanasia for neuropsychiatric conditions, including Alzheimer's, depression, dementia and psychosis, increased more than tenfold, from 9 to 105, between 2006

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[39] TJ Reasons at paras. 385, 821, 831 (JR, Vol. 1, p. 116 and Vol. II, pp. 31, 33); Affidavit #1 of Dr. Eugene Bereza sworn September 30, 2011 at para. 62 (JR, Vol. XXXI, p. 7850); Affidavit #2 of Dr. Eugene Bereza sworn October 12, 2011 at para. 34 (JR, Vol. XXXVI, p. 9567); Finlay Affidavit at para. 72 (JR, Vol. XXXVI, pp. 9669-9670).
[40] Pereira Report at paras. 44, 52-53 (JR, Vol. XXXVII, pp. 9795, 9801-9802); Gallagher Report at p. 7 (JR, Vol. XLIV, p. 12384).
[41] See for example, TJ Reasons at paras. 431, 432, 766, 768, 771, 774, 785, 788-792 (JR, Vol. I, p. 132-133 and Vol. II, pp. 19-21, 23-25).
[42] TJ Reasons at paras. 448-450, 649 (JR, Vol. I, pp. 137, 189).
[43] TJ Reasons at para. 433 (JR, Vol. I, p. 133).
[44] TJ Reasons at paras. 545, 548, 672 (JR, Vol. I, pp. 162-163, 194-195).

and 2012.[45] Attempts are also being made to specifically amend the Belgian legislation to allow for euthanasia of patients with dementia and other related conditions.[46]

37. The trial judge acknowledged that capacity assessments in the context of requests for assisted death require an in depth knowledge of the patient. In most of the European jurisdictions, most doctors have long term relationships with their patients.[47] As one of the appellants' experts testified, that is generally not the case in Canada, but she was of the view that physicians would take the necessary time to conduct multiple interviews and collect collateral information.[48] The evidence from Oregon showed that 50% of patients who receive a lethal prescription have known the prescribing doctor for less than ten weeks and some are given such prescriptions by doctors who have known them for less than one week.[49] The trial judge was of the view that doctors could take the necessary time to ensure that they are able to assess that the patient's expressed wish was consistent with their values.[50]

38. The trial judge also recognized the existence of subtle pressure on, or coercion of, patients. She found that the evidence from Oregon and the Netherlands did "not support the conclusion that pressure or coercion is at all wide-spread or readily escapes detection." She relied on evidence from one of the appellants' experts that "the involvement of family members was usually to try to dissuade rather than persuade patients from seeking assisted death". While she noted that the possibility of subtle or overt pressure "cannot be disregarded," she considered such situations to be "highly isolated."[51]

39. The trial judge concluded that the authenticity of a patient's wish to die can be assessed so long as such assessments are conducted by properly qualified and experienced physicians, who: describe all reasonable palliative care interventions, including those aimed at a perceived

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[45] Montero Affidavit at paras. 32-34, 40-41, 60-61 (RR, Tab 3, pp. 43-45, 50-51).
[46] Montero Affidavit at para. 86 (RR, Tab 3, p. 57).
[47] TJ Reasons at paras. 671, 678, 744, 784, 795, 798 (JR, Vol. I, pp. 194, 196 and Vol. II, pp. 13-14, 23, 25-26).
[48] TJ Reasons at paras. 678, 784 (JR, Vol. I, p. 196 and Vol. II, p. 23).
[49] TJ Reasons at para. 400 (JR, Vol. I, pp. 121-124).
[50] TJ Reasons at paras. 784, 795, 798 (JR, Vol. II, pp. 23, 25-26).
[51] TJ Reasons at para. 671 (JR, Vol. I, p. 194).

loss of personal dignity; apply a very high level of scrutiny; proceed with great care; and are aware of the risks, including the risks of subtle influence and unconscious biases.[52]

c) Personal Narratives

40. Both parties filed evidence from lay witnesses about the impacts on them of a ban on physician-assisted death. The appellants filed numerous affidavits from individuals with various diseases who would like the choice of assisted suicide or euthanasia to be available. These individuals described their difficulty in coping with the impacts of their conditions and their fears for the future if assisted death remains unavailable.[53]

41. Canada filed evidence of individuals who described the protection provided to them by a ban on assisted suicide and euthanasia, and their fears should physician-assisted death be legalized.[54] There were also descriptions of the difficulty in coping which people experience upon becoming disabled or being diagnosed with a serious illness, and how, given the opportunity, people overcome their fears, adapt to their circumstances and lead meaningful lives.[55] For example, Ms. Alison Davis has multiple significant disabilities, and suffered through many years in her life when she would have qualified for assisted death in a permissive regime, and would have chosen it had it been available. However, as that choice was not available to her, and her suicide attempts were unsuccessful, she went on to have a very fulfilling life.

42. The trial judge weighed the experience of the appellants' witnesses heavily in both the s.7 and s.1 analysis. She described the benefits associated with the ban as "generalized" and being experienced by "unknown persons."[56]

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[52] TJ Reasons at paras. 798, 815, 831 (JR, Vol. II, pp. 26, 30, 33).
[53] TJ Reasons at para. 1277 (JR, Vol. II, p. 159).
[54] TJ Reasons at para. 848 (JR, Vol. II, pp. 37-38); Affidavit #1 of David Martin sworn September 28, 2011at paras. 13-14 (JR, Vol. XXVII, p. 6818) [Martin Affidavit]; Affidavit #1 of Rhonda Wiebe sworn September 15, 2011 at paras. 50-61 (JR, Vol. XXXI, pp. 7827-7830) [Wiebe Affidavit]; Expert Report of Professor Catherine Frazee dated October 11, 2011at paras. 49-57, 65 (JR, Vol. XLIV, pp. 12111-12112, 12114) [Frazee Report].
[55] TJ Reasons at para. 841 (JR, Vol. II, p. 35); Davis Affidavit (JR, Vol. XXVII, pp. 6809-6814); Wiebe Affidavit at paras. 45-49 (JR, Vol. XXXI, pp. 7825-7827); Finlay Affidavit at paras. 81-92, Exhibit K at pp. 123-125 (JR, Vol. XXXVI, pp. 9672- 9675, Ex. K: pp. 9774- 9776).
[56] TJ Reasons at paras. 1275, 1277-1281, 1283, 1322-1330 (JR, Vol. II, pp. 159-162, 170-171).

d) The Negative Impact on Individuals with Disabilities and Elderly Individuals

43. Canada filed both expert and lay evidence regarding the experiences of people with disabilities in dealing with a society that equates their challenges with a loss of dignity. This evidence demonstrated that, even within the medical profession, individuals with disabilities face prejudice and stereotyping from those who assume that their quality of life is much lower than they themselves perceive.[57] The appellants did not challenge this evidence and it was accepted by the trial judge.

44. That evidence included the expert report of Professor Frazee, and the affidavits of Rhonda Weibe and David Martin. They outlined their own experiences, and those of other individuals with disabilities, encountering medical professionals who assume the quality of their current and future lives is much lower than it is in fact, or will be. These medical professionals sometimes assume that such people do not desire life-saving treatments, and even encourage patients with disabilities and their families to agree to forgo such treatments.[58]

45. Despite this uncontradicted evidence of prevalent and often unconscious bias against individuals with disabilities, the trial judge found that risks to persons with disabilities can be avoided through "careful and well-informed capacity assessments" by qualified physicians alert to those risks.[59]

46. Canada also produced evidence of the prevalence of elder abuse in Canada. Evidence from Belgium showed that elderly individuals are "at risk of substandard decision-making" in relation to assisted death. The trial judge held that this risk could be avoided by ensuring an

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[57] TJ Reasons at paras. 194, 811, 819, 848-853 (JR, Vol. I, p. 60 and Vol. II, pp. 29, 31, 37-38); Martin Affidavit at paras. 10, 12-14 (JR, Vol. XXVII, pp. 6817-6818); Wiebe Affidavit at paras. 17-23, 27-38 (JR, Vol. XXXI, pp. 7817-7818, 7820-7823); Frazee Report at paras. 31, 33-40 (JR, Vol. XLIV, pp. 12107-12110).

[58] TJ Reasons at paras. 811, 819 (JR, Vol. II, pp. 29, 31); Frazee Report at paras. 28-40, Exhibits B-C, H, I, J, K (JR, Vol. XLIV, pp. 12107-12110, Ex. B-C: 12131-12140, Ex. H: 12770-12288, Ex. I: 12289-12290, Ex. J: 12291-12295, Ex. K: 12296-12297) ; Martin Affidavit at paras. 11, 12, 14 (JR, Vol. XXVII, pp. 6817-6818); Wiebe Affidavit at paras. 32-38 (JR, Vol. XXXI, pp. 7821-7823).

[59] TJ Reasons at paras. 848-851, 853 (JR, Vol. II, pp. 37-39); Martin Affidavit at paras. 10, 12-14 (JR, Vol. XXVII, pp. 6817-6818); Wiebe Affidavit at paras. 17-23, 27-38 (JR, Vol. XXXI, pp. 7817-7818, 7820-7823); Frazee Report at paras. 33-40 (JR, Vol. XLIV, pp. 12108-12110).

understanding of the vulnerability of such individuals in assessing the voluntariness of decision making.[60]

e) Efficacy of Safeguards

47. Extensive evidence was led by both parties regarding the efficacy of safeguards in permissive jurisdictions. In general, the appellants' witnesses were of the view that safeguards in those jurisdictions were working well, while the respondent's experts pointed to problems, many of which were identified in the details of the appellants' experts' research.

48. The evidence showed that difficulties exist with respect to obtaining reliable data on euthanasia and physician-assisted suicide in permissive jurisdictions in order to evaluate the efficacy of safeguards.[61] This is true in Belgium, as confirmed by Professor Montero.[62]

49. The trial judge also identified various compliance problems with the safeguards in permissive jurisdictions, such as a refusal by many doctors to obtain the required second opinion, the lack of required reporting, and conducting euthanasia without request from the patient.[63] These problems are also reiterated in the evidence provided by Professor Montero.[64]

50. Professor Montero provides recent examples of cases where the safeguards are not adhered to, resulting in euthanasia being provided to a much broader group than initially intended. Professor Montero refers to two well publicized examples of the euthanisation of elderly women with no serious incurable disorder. Even though euthanasia on the basis of "multiple disorders" is not explicitly permitted in the legislation, the Commission which

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[60] TJ Reasons at paras. 846-847 (JR, Vol. II, p. 37); Canada's NTA #1, Appendix T at pp. 391-392, 400 (JR, Vol. XX, pp. 4247-4248, 4256); Canada's NTA #2, Appendix L at pp. 1043-1044 (JR, Vol. XXV, pp. 5846-5847); Expert report of Dr. Marnin Heisel dated October 12, 2011 at paras. 46-49, 59-64, 77-78 (JR, Vol. XLV, pp. 12477-12479, 12484-12486, 12492-12493); Cross-examination of Dr. Martha Donnelly on November 9, 2011, pp. 5:2-8:23 (JR, Vol. XLVII, pp. 13501:2-13504:23) [Donnelly Cross Examination]; Donnelly Cross Examination Exhibit 1 and 2 at pp. 40-41 (JR, Vol. XLVII, Ex. 1: 13523-13538, Ex. 2: 13562-13563); Trial Exhibit 66 at pp. 94-101 (JR, Vol. LI, pp. 14591-14598).

[61] TJ Reasons at paras. 406, 524, 649, 655-657 (JR, Vol. I, pp. 124-125, 158, 189, 190-191).

[62] Montero Affidavit at paras. 17-19, 27-28, 71-78 (RR, Tab 3, pp. 40, 42, 53-55).

[63] See for example, TJ Reasons at paras. 9, 431, 433, 435, 483, 541, 554, 560, 562-563, 568, 576-577, 635, 649, 653, 655- 656, 671-672, 785, 789, 793, 818 (JR, Vol. I, pp. 9, 132-133, 146, 161, 164, 166, 167-169, 171, 186, 189-191, 194-195 and Vol. II, pp. 23-25, 30-31).

[64] Montero Affidavit at paras. 19, 27-28, 48-49, 52-56, 61-63, 68 (RR, Tab 3, pp. 40, 42, 47-53).

oversees the legislation rationalizes these cases by saying that in elderly individuals the cumulative effect of a combination of ailments may cause unbearable pain and justify euthanasia. The 2012 report of the Commission indicated that incidents of euthanasia as a result of "multiple disorders," including people suffering from disorders due to old age, increased from 44 in the previous report to 57 in the 2012 report. There were only three such cases reported in the Commission's first report in 2004.[65]

51. In addition, the appellants' own experts had come to the conclusion in published papers that "legalisation alone does not seem sufficient to guarantee due care" by those administering euthanasia,[66] and that "legalisation alone does not seem sufficient to reach the goal of transparency...and to guarantee the careful practice of euthanasia."[67]

52. The trial judge concluded that: 1) the evidence does not support a conclusion that physician-assisted death has imposed a particular risk to socially vulnerable populations; 2) in Canada physicians would comply, (although she noted that there are some doctors who do not currently comply with the absolute prohibition); and 3) weaknesses could be addressed through "stringent limits that are scrupulously monitored and enforced."[68]

f) Ethics

53. Both parties filed evidence regarding the ongoing ethical debate over assisted suicide. The trial judge found that "thoughtful and well-motivated people can and have come to different conclusions about whether physician-assisted death can be ethically justifiable," and that there is no clear societal consensus either way.[69] She also found that within the medical and bioethical community, it is an open question whether an ethical distinction exists between physician-assisted death and other end of life treatments such as palliative sedation.[70] The trial judge found that physician-assisted death is not "clearly inconsistent" with medical ethics.[71]

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[65] Montero Affidavit at paras. 42-43, 51-56 (RR, Tab 3, pp. 45-49).
[66] TJ Reasons at para. 558 (JR, Vol. I, pp. 165-166).
[67] TJ Reasons at para. 565 (JR, Vol. I, pp. 167-168).
[68] TJ Reasons at paras. 204, 667, 854, 883, 1240, 1282, 1284 (JR, Vol. I, p.63, 193 and Vol. II, pp. 39, 51, 151, 162).
[69] TJ Reasons at paras.343 and 358 (JR, Vol. I, pp. 107, 110-111).
[70] TJ Reasons at para. 334 (JR, Vol. I, p. 105).
[71] TJ Reasons at para. 1369 (JR, Vol. II, p. 181).

54. The ethical debate is further confounded by misunderstandings, even within the medical community, about whether increasing doses of opiates hasten death. Recent studies have now established that they do not, but some doctors base their ethical position on there being no difference between the use of opiates for pain at the end of life, and assisting suicide.[72]

g) The Slippery Slope

55. The trial judge concluded that "a system with properly designed and administered safeguards could, with a very high degree of certainty, prevent vulnerable persons from being induced to commit suicide."[73] However, she also indicated that if there had been evidence of a practical slippery slope, an absolute prohibition may be called for.[74]

56. The trial judge distinguished between two types of "slippery slope." She described the "logical slippery slope" as the granting of legal permission for physician-assisted death in some circumstances which creates a foundation for future claims beyond those originally contemplated circumstances. She described the "practical slippery slope" as "the concern that even carefully crafted criteria will, over time, be reinterpreted or ignored, leading to euthanasia or assisted suicide of people never contemplated at the outset."[75]

57. These kinds of concerns were addressed in the evidence before the trial judge and supplemented by the affidavit of Professor Montero regarding the situation in Belgium. Professor Montero outlines a number of changes to the Belgium law, some through legislative amendment and many through liberal interpretation, since its passage. For example, when the legislation was enacted, assisted suicide was specifically excluded and the legislation was limited to the provision of euthanasia. However, the Commission which oversees the legislation has since interpreted it to allow for assisted suicide.[76]

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[72] TJ Reasons at paras. 195-198 (JR, Vol. I, pp. 60-62); Pereira Report at para. 27 (JR, Vol. XXXVII, p. 9789); Gallagher Report at p. 10:8-37 (JR, Vol XLIV, p. 12387:8-37); Affidavit #1 of Dr. Michael Ashby sworn August 26, 2011 at para. 10 (JR, Vol XI, p. 801).
[73] TJ Reasons at para. 1367 (JR, Vol. II, p. 180).
[74] TJ Reasons at para. 1366 (JR, Vol. II, p. 180).
[75] TJ Reasons at para. 365 (JR, Vol. I, pp. 112-113).
[76] Montero Affidavit at paras. 64-67 (RR, Tab 3, pp. 51-52).

58. The expert evidence at trial described shifts in the Dutch regime, including broadening the definition of "unbearable suffering" to include more situations than qualified ten years ago when the legislation in question was first passed. The focus expanded from unbearable physical suffering to also include requests for death based on age-related maladies. [77] In Belgium in some cases, multiple disorders, none of them serious in themselves, have been considered sufficient to warrant euthanasia even though the legislation requires that the patient suffer from a serious incurable disease.[78] Furthermore, recently patients suffering only from psychological and psychiatric conditions have been euthanized despite the fact that when the legislation was being developed it was repeatedly stated that patients with psychiatric disorders, dementia or depression were to be excluded.[79]

59. Moreover, although the Belgian legislation requires "constant unbearable suffering" as a precondition, euthanasia is approved where there is no current suffering but only a fear of future suffering. In these cases, euthanasia is used as a "preventative measure," not originally anticipated or intended by the legislation. For example, it may be used at the first symptoms of Alzheimer's, or shortly after a cancer diagnosis. A recent example is the case of twin brothers, who were born deaf and euthanized at 45 as a result of a glaucoma diagnosis which had not yet made them blind.[80]

60. The evidence showed that in the Netherlands euthanasia had been extended to newborn babies.[81] Professor Montero's evidence was that although the Belgian legislation was originally restricted to adults, it has recently been amended to allow for euthanasia of terminally ill minors with physical suffering,[82] and that calls are being made to amend the legislation to allow for euthanasia without request "when the quality of life has become insufficient."[83]

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[77] Affidavit #1 of Professor Johan Legemaate, made 25 August 2011, at para. 21 (JR, Vol. XVI, p. 2523); Keown Affidavit #1, made October 4, 2011, at para. 17 and Exhibits B and C (JR, Vol. XXXV, p. 9377, Ex. B: pp. 9389-9409, Ex. C: 9410-9499); Dr.Gerrit Kimsma, 10 November 2011, pp. 35:39 to 37:30 (JR, Vol. XLVIII, pp. 13732-13734); Kimsma Affidavit #1 at para. 12 (JR, Vol. XVIII, pp. 3405-3406).
[78] Montero Affidavit at paras. 24, 34, 42-43, 51-56 (RR, Tab 3, pp. 41-42, 44-49).
[79] Montero Affidavit at paras. 22, 24, 32-34, 40-41, 57-63 (RR, Tab 3, pp. 41, 43-44, 49-51).
[80] Montero Affidavit at paras. 35-39, 62-63 (RR, Tab 3, pp. 44-45, 51).
[81] Dr. Gerrit Kimsma, 10 November 2011, p. 20:7-34 (JR, Vol. XLVIII, p. 13717); Legemaate Affidavit #1 at para. 26 (JR, Vol. XVI, p. 2525).
[82] Montero Affidavit at paras. 79-82 (RR, Tab 3, pp. 55-56).
[83] Montero Affidavit at para. 88 (RR, Tab 3, p. 58).

PART II-- ISSUES

61. The five constitutional questions stated by the Chief Justice, and the Respondent's position on them, are 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?
> **Answer**: The provisions of the *Criminal Code* apply to physician-assisted death.
>
> 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*?
> **Answer**: None of the provisions infringe s. 7 of the *Charter*.
>
> 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*?
> **Answer**: It is not necessary to answer the question but if it is, the answer is yes, the sections constitute reasonable limits on the s. 7 rights.
>
> 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*?
> **Answer**: None of the provisions infringe s. 15 of the *Charter*.
>
> 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*?
> **Answer**: It is not necessary to answer the question but if it is, the answer is yes, the sections constitute reasonable limits on the s. 15 rights.

62. With respect to the other two issues raised by the appellants, the respondent's position is that: a) the decision of the majority of this Court in *Rodriguez v. Attorney General of British Columbia* should be followed, in accordance with the doctrine of *stare decisis*; and b) that the parties should bear their own costs, in this Court and the courts below.

PART III—ARGUMENT

A. No Scope for Provincial Interjurisdictional Immunity

63. Nothing could be more central to the exercise of the federal criminal law power under s. 91(27) than laws governing the intentional causing of death. In attempting to carve out an area of exclusive provincial jurisdiction within this field, the appellants: a) ignore the mandatory "pith and substance" analysis of the federal laws; b) minimize the doctrine of paramountcy; and c) misapply the test for interjurisdictional immunity.

1) The Provisions are, in Pith and Substance, Valid Federal Law

64. Division of powers determinations, including constitutional applicability cases, must start with a pith and substance analysis.[84] Where the issue is whether some provisions (or some applications of those provisions) in an otherwise valid federal legislative scheme intrude on provincial jurisdiction, the three part *Kitkatla* test applies, which asks: a) whether and to what extent the federal law intrudes on provincial jurisdiction; b) if the provisions do intrude, whether the scheme is valid; and c) if the provisions are part of a valid scheme, whether they are sufficiently integrated into the scheme.[85]

65. In cases such as this one, it is not necessary to go beyond the first step of the test, as noted by Dickson C.J.C. in *General Motors*:

> The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further.[86]

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[84] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 at paras. 16-17 (RA, Tab 38) [*COPA*].
[85] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at para. 58 (RA, Tab 18).
[86] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641 at 666-667 (RA, Tab 12).

66. The impugned provisions do not intrude into provincial jurisdiction at all. "Pith and substance" determinations require courts to look at the purpose of the law, in the sense of what Parliament intended to accomplish,[87] and the legal effects of the law. The purpose of one of the impugned laws, s. 241 of the *Criminal Code*, was conclusively determined by the majority in *Rodriguez* to be the protection of vulnerable people, and the preservation of life. [88]

67. The other impugned provisions of the *Criminal Code* advance these same purposes. Section 14 prevents persons from consenting to having death inflicted upon them. Section 21 prevents individuals from being parties to intentional deaths, and s. 22 prevents individuals from counselling the taking of lives. The definition of homicide in s. 222 casts the net very broadly in pursuit of the preservation of life, prohibiting the causing of death directly or indirectly. Individually and collectively, and in all of their applications, the provisions address the sort of profound moral issues that the criminal law power has always addressed.[89] There is simply no room for the appellants' proposal, one that would leave provinces free to enact exceptions and potentially create a patchwork of criminal liability across the country.[90]

68. Neither the legal effect of these provisions, nor their practical consequences,[91] demonstrates an unwarranted incursion into provincial jurisdiction. The legal and practical effect is to create criminal liability for the taking of a life, a matter wholly within federal jurisdiction. The appellants' claim that the effect is to "essentially stop the provinces from providing any medically appropriate health care to the patient"[92] is simply not borne out by the evidence in this case, even that of their own experts.[93] Defining the intentional causing of death as the "only meaningful treatment", indeed defining it as "treatment" at all, will forever be an enormously contentious assertion.

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[87] *Ward v. Canada (Attorney General)*, [2002] 1 SCR 569 at para. 17 (RA, Tab 50).
[88] *Rodriguez* at 590, 595, 601, 605, 608, 613-614.
[89] *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 at para. 1 (per McLachlin C.J.) (RA, Tab 41).
[90] *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134 at paras. 67-70 (RA, Tab 7) [*PHS*].
[91] *Reference re Securities Act*, [2011] 3 SCR 837 at para. 64 (RA, Tab 42).
[92] Appellants' Factum at para. 45.
[93] Affidavit #1 of Dr. Douglas McGregor sworn September 23, 2011 at paras. 15-16, 19, 44-45 (JR, Vol, XXII, pp. 4602-4603, 4608-4609); Affidavit #1 of Dr. Marcel Boisvert sworn August 26, 2011 at para. 13 (JR, Vol. XII, p. 1240); Affidavit #1 of Dr. David Boyes sworn July 13, 2011 at para. 10 (JR, Vol. IX, p. 33); Affidavit #1 of Dr. Deborah Cook sworn September 19, 2011 at paras. 11-18 (JR, Vol. XIX, pp. 3608-3610); Chochinov Report at paras. 39, 43 (JR, Vol. XXVII, pp. 6387-6388); Pereira Report at para. 107 (JR, Vol. XXXVII, p 9822); Gallagher Report at p. 14 (JR, Vol. XLIV, p. 12391).

2) The Paramountcy Doctrine Should Apply

69. To the extent that these laws individually or collectively encroach on provincial jurisdiction, that jurisdiction is "health," which this Court has repeatedly described as constitutionally "amorphous."[94] Indeed the federal criminal law power has always reflected concerns for public health and safety, itself a broad and compelling constitutional interest.[95] Giving weight to the provincial interest in these circumstances would present a classic "double aspect" situation, one that ought to be resolved by the doctrine of paramountcy, not interjurisdictional immunity, as this Court has done in cases such as *Mangat*[96] and *Lafarge*.[97]

70. The appellants claim, in an argument buried in a footnote,[98] that the province of B.C. does regulate in the area through the *Health Professions Act*, but point to no relevant provisions of that legislation. Whether or not there is a provincial statute at issue here, the appellants' argument seeks to preserve an area in which the provinces *can* legislate. Any such legislation would attract the application of the paramountcy doctrine, both because it would be saying "yes" to doctors where the *Criminal Code* says "no," and because it would frustrate the federal purpose of creating an absolute prohibition.[99]

3) Provincial Interjurisdictional Immunity has no Application

71. The appellants' arguments rest on a previously unrecognized "core" of provincial jurisdiction over health. That core is apparently not "physician-assisted death," as suggested by the constitutional question, but the more highly refined claim of a "power to deliver medically-indicated medical treatments for which there is no alternative treatment capable of meeting the patient's medical need."[100] However artfully phrased, the principle expressed should provide no immunity from the necessary reach of the criminal law.

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[94] *PHS* at para. 60.
[95] *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at 240-242(RA, Tab 43) [*RJR-Macdonald*].
[96] *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113 at para. 52 (RA, Tab 20).
[97] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 SCR 86 at paras. 81-87(RA, Tab 4).
[98] Appellants' Factum at footnote 94.
[99] *COPA* at para. 64; *Marine Services International Ltd. v. Ryan Estate*, [2013] 3 SCR 53 at paras. 68-69 (RA, Tab 25) [*Marine Services*]; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, at paras. 130,148 [*Tsilhqot'in*], Tab 46.
[100] Appellants' Factum at para. 43.

72. The appellants' argument is contrary to this Court's frequent assertion that the doctrine should be applied with restraint, and generally be restricted to existing applications.[101] There are no examples of its application to the health field, and this Court rejected such a proposal in *PHS*, in part because of its potential to exclude federal jurisdiction over euthanasia.[102] The appellants' suggested "core," which involves a highly contentious definition of the word "treatment," is also against the "dominant tide of constitutional interpretation,"[103] by ousting federal jurisdiction permanently in this sensitive area. Furthermore, the appellants' position can hardly be characterized as "restrained," when it relies on "exclusive provincial jurisdiction under ss. 92(7), (13) and (16), or any combination thereof."[104]

73. Even if this Court were to apply the two part analysis for application of the doctrine,[105] the appellants' argument would necessarily fail. The first part of the test asks whether the federal law trenches on a protected "core" of provincial jurisdiction. The answer must be that there is no "core" of provincial health jurisdiction that would include the power of physicians to euthanize patients or permit physicians to prescribe drugs for the purpose of allowing patients to kill themselves. Their "Proposed Core" of provincial jurisdiction is not grounded in case law or principle.

B. Section 7, *Stare Decisis,* and the Continuing Vitality of *Rodriguez*

74. In *Bedford*, this Court considered the application of the principle of *stare decisis* in constitutional cases, and decided that revisiting prior decisions may be considered where: a) a new legal issue has been raised, or there has been a significant legal development; or b) new circumstances or evidence emerges that "fundamentally shifts the parameters of debate."[106] The exercise involves measuring the asserted need to revisit against the values that *stare decisis* promotes, such as certainty in the law and consistency in its application.[107] Overruling a previous

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[101] *Marine Services* at para. 49; *Tsilhqot'in*, at para. 149.
[102] *PHS* at paras. 66-70.
[103] *Marine Services* at para. 54.
[104] Appellants' Factum at para. 43; *PHS* at para. 68.
[105] *Marine Services* at paras. 54-56.
[106] *Bedford* at paras. 42, 44.
[107] *Bedford* at paras. 38, 44; *Ontario (Attorney General) v. Fraser,* [2011] 2 SCR 3 at paras. 129-139 (per Rothstein, dissenting) (RA, Tab 27) [*Fraser*].

decision has an adverse impact on those who have relied on the certainty created by the earlier decision.[108]

75. The trial judge, and Finch C.J.B.C., justified the departure from *Rodriguez* on both legal and factual grounds. The legal bases were essentially three: a) the appellants' reliance on the "life" interest in s.7; b) the identification of new principles of fundamental justice, overbreadth and gross disproportionality, by this Court post- *Rodriguez*; and c) the development of s. 1 law by this Court in *Hutterian Brethren*.[109] Factually, the trial judge considered the allegedly transformative impact of evidence concerning: a) medical ethics; b) the necessity of a blanket prohibition (by examining the impact in jurisdictions without one); and c) the feasibility of safeguards.[110] Neither alone nor in combination did these factors justify the trial judge's departure from *Rodriguez*, nor do they justify this Court overruling it.

1) *The Alleged Legal Justifications for Departing from Rodriguez are Insufficient*

a) The "Life" Interest in Section 7 of the Charter

76. Although the trial judge agreed with the appellants that *Rodriguez* did not address whether there had been a deprivation of Ms. Rodriguez's s.7 "life" interest and as such was a new issue,[111] the trial judge's decision does not in any way turn on that issue; rather, she felt that "the security of the person and liberty interests…encompass the essence of the plaintiffs' claim."[112] The impacts on the alleged "life" interest are no different than those on the "liberty" and "security of the person" interests considered in *Rodriguez*. Accordingly, identification of this "new" issue cannot justify the revisiting of *Rodriguez*.

77. Chief Justice Finch, dissenting in the Court of Appeal, would have recognized a new, much broader scope to the "life" interest in s.7.[113] The majority of the Court of Appeal correctly

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[108] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) at 854-855 (RA, Tab 28).
[109] Reasons for Judgment of B.C. Court of Appeal dated October 10, 2013 at paras. 77, 97-98 (Finch CJBC, dissenting) (JR, Vol. III, pp. 62 and 67-68) [CA Reasons].
[110] CA Reasons (majority) at para. 247 (JR, Vol. III, pp. 104-105).
[111] TJ Reasons at paras. 924, 1322 (JR, Vol. II, pp. 63, 170).
[112] TJ Reasons at paras. 1321-1322 (JR, Vol. II, p. 170).
[113] CA Reasons (Finch CJBC) at paras. 84-86 (JR, Vol. III, pp. 64-65).

concluded, however, that such an interpretation of "life" would effectively swallow the liberty and security interests whole,[114] and was inconsistent with both the majority's reasoning in *Rodriguez* and this Court's post-*Rodriguez* characterizations of "life" in cases such as *Chaoulli*.[115] Other courts have also refused to interpret a constitutional right to life as encompassing a right to terminate life.[116]

b) The Identification of "New" Principles of Fundamental Justice

78. The trial judge held that two "new" principles of fundamental justice had been recognized by this Court post-*Rodriguez*, "overbreadth" and "gross disproportionality."[117] Those principles were important to her judgment, since she found that the deprivations of the appellants' liberty and security of the person interests did not accord with those principles.[118] However, even if we accept the characterization of these principles as "new", the trial judge erred in attributing dispositive effect to them.

79. In *Rodriguez*, Sopinka J. (and other judges as well) certainly considered whether the legislation was "over-inclusive," as that was the essence of Ms. Rodriguez's argument,[119] and also considered whether the legislation was "overbroad," when considering s. 1 of the *Charter*.[120] In the context of the s. 1 analysis, Sopinka J. also considered whether the law was proportionate.[121] To suggest that the case would have been decided differently had these two principles been formally recognized is to overstate the effect of their recognition.

80. More importantly, it is the treatment of the principles of "arbitrariness," "overbreadth," and "gross disproportionality" in the post-*Rodriguez* decisions of this Court that demonstrates why their emergence or refinement could not possibly have affected the *Rodriguez* judgment. The case law concerning these principles was extensively reviewed in *Bedford*, where this Court

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[114] CA Reasons (majority) at paras. 278-279 (JR, Vol. III, p. 120).
[115] CA Reasons (majority) at paras. 278, 281 (JR, Vol. III, pp. 120-121).
[116] *Pretty* at paras. 38-42; *Fleming* at paras. 104-108; *Haas v. Switzerland* (2011) 53 EHRR 33, at para. 55.
[117] TJ Reasons at paras. 983-985 (JR, Vol. II, p. 78).
[118] TJ Reasons at paras. 1371, 1378 (JR, Vol. II, pp. 181, 183).
[119] *Rodriguez* at 525, 590.
[120] *Rodriguez* at 614.
[121] *Rodriguez* at 615.

noted the "significant overlap" between the three principles.[122] Arbitrariness (which was expressly considered by Sopinka J.) and overbreadth address the same evil, the "absence of connection between the law's purpose and the s. 7 deprivation."[123] In *Khawaja*, decided shortly before *Bedford*, this Court considered the overlap between overbreadth and gross disproportionality, without deciding whether they were actually distinct legal doctrines.[124]

81. Even accepting that these principles should be regarded as distinct,[125] it is very difficult to conclude that assessing the s.7 deprivations against them individually could have had any impact on the judgment in *Rodriguez*. To conclude that it would, as the Court of Appeal noted, would have the unfortunate effect of rendering uncertain the validity of many pre-*Malmo-Levine* decisions,[126] as well as diminishing the force of the principles themselves and the public's respect for the courts.[127]

82. The appellants' attempt to have this Court recognize a new principle of justice, one they call "parity,"[128] should similarly be rejected, since that purported principle could not have affected the outcome in *Rodriguez*. "Parity" also fails to satisfy the *Malmo-Levine* test for creation of a new principle of fundamental justice:

> ... it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[129]

83. The appellants' proposed principle is not a "manageable standard" in that it lacks precision, is unnecessary, and is being used simply to re-order Parliament's priorities in determining what conduct should be criminal. The appellants mix a number of subjects – parity of treatment, proportionality of punishment, sentencing law, mental element law—in one large bucket in order to create the principle. The proposed principle, however, covers nothing that is

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[122] *Bedford* at para. 107.
[123] *Bedford* at para. 108.
[124] *R. v. Khawaja*, [2012] 3 SCR 555 at para. 40 (RA, Tab 38).
[125] *Bedford* at paras. 107-108.
[126] CA Reasons (majority) at para. 246 (JR, Vol. III, p. 104).
[127] CA Reasons (majority) at para. 313 (JR, Vol. III, p. 136).
[128] Appellants' Factum at paras. 78-86.
[129] *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 SCR 571at para. 113 (RA, Tab 39) [*Malmo-Levine*].

not already fully covered by s. 15 (equality of treatment), or s. 12 (cruel and unusual treatment). In large measure, the proposed principle sounds like no more than the "gross disproportionality" test employed in s. 12 *Charter* cases. No s. 12 challenge has been brought in this case against the *Code* provisions at issue (having been rejected in *Rodriguez*), and it should not be entertained through the back door of s. 7.

84. Moreover, the appellants' attempt to use the principle to impugn Parliament's distinction between acts that should be criminal from those that are not, was an argument that was rejected in *Malmo-Levine*. Whether two matters are "likes" deserving of similar treatment is a subject on which reasonable people may differ. That line-drawing exercise is fundamental to Parliament's authority,[130] and is not one of those principles "setting out our minimum requirements for the dispensation of justice."[131]

c) The Impact of the Hutterian Brethren Case

85. The Court of Appeal was unanimous in its view that this Court's decision in *Hutterian Brethren* did not constitute a new point of departure requiring a re-assessment of *Rodriguez*. The Court accurately characterized *Hutterian Brethren* as a s.1 *Charter* decision which contributed to an understanding of the final *Oakes* factor - the balancing of salutary and deleterious effects - but had no impact on the *Rodriguez* analysis.[132]

2) *The Alleged Factual Justifications for Departing from Rodriguez are Insufficient*

86. There is no doubt that the 43 volume record assembled by the parties here is much larger than the *Rodriguez* record (key elements of the *Rodriguez* record were part of the trial record).[133] The record here also covers subject areas, such as medical or medico-legal ethics, which had not been the subject of expert evidence in *Rodriguez*. However, despite the size of the record and the erudition of the scholarly contributions, nothing in the expansive record serves to "fundamentally

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[130] *Malmo-Levine* at paras. 139-140.
[131] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 SCR 76 at para. 11 (RA, Tab 8) [*Canadian Foundation*].
[132] CA Reasons (majority) at para. 270 (JR, Vol. III, p. 117); CA Reasons (Finch CJBC) at paras. 103-106 (JR, Vol. III, pp. 69-70).
[133] JR, Vols. XXX-XXXV.

change the parameters of debate." The core issue identified in *Rodriguez* remains unchanged: is something short of an absolute prohibition on assisted suicide capable of meeting Parliament's objectives of preserving life and protecting the vulnerable?

87. The best guidance in determining what sort of evidence is necessary to "fundamentally change the parameters of debate" is to be found in the decisions of this Court considering whether a previous case should be overturned. The factors justifying change were comprehensively reviewed by Rothstein J. in *Fraser.*[134] Two of the factors identified by Rothstein J. have particular application to claims that new facts justify overruling, namely:

a) Has the precedent become unworkable in practice?; and
b) Have facts so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification?

88. With respect to the notion of "workability," *Bedford* may be seen as an example of a case in which the evidence was used to demonstrate that the law was "unworkable" in the sense that its negative impacts on prostitutes' security were out of sync with the public nuisance objectives being pursued. Considerable evidence was marshalled to demonstrate that the each of the challenged anti-soliciting laws directly and adversely impacted the safety of prostitutes.[135] It was a case in which new research was used to consider the law's impact on a s. 7 interest, the security of the person, that had not been raised in the *Prostitution Reference.*[136]

89. This case, however, does not involve a "new" s. 7 interest; the "life" interest identified by the trial judge had no meaningful impact on her judgment. The "new" research does not disclose any impacts on affected people that were not readily apparent in Ms. Rodriguez's case.

90. The majority of the Court of Appeal described three categories of evidence which the trial judge relied on to justify her reconsideration of *Rodriguez*:

> (i) prevailing ethicists' opinions "for and against the proposition that it can ever be right for a physician to assist a patient with her own death" … (ii) whether

[134] *Fraser* at paras. 134-137.
[135] *Bedford* at paras. 136, 158-159.
[136] *Bedford* at para. 45.

> anything "short of a blanket prohibition against assisted dying is sufficient to protect vulnerable individuals from what [Canada] terms 'wrongful death'" – a question involving the consideration of other jurisdictions in which physician-assisted suicide is permitted…; and (iii) the feasibility of implementing adequate and effective safeguards in Canada.[137]

Each of those categories of evidence will be considered, although the second and third will be treated together since they both focus on the use of foreign evidence.

a) The Evidence Regarding Medical Ethics

91. The evidence concerning various aspects of the ethical debate filled many volumes of the record, consisting of the affidavits, reports and publications of many of the pre-eminent experts in the field. The relevance of the evidence was described by the trial judge as follows:

> [317] The overarching reason why the ethical debate is relevant is that both legal and constitutional principles are derived from and shaped by societal values.
>
> [318] Additionally, the ethical debate bears on these questions: (1) Would Canadian physicians be willing to assist patients with hastening death if it were legal to do so? (2) Does current medical practice with respect to end-of-life care make distinctions that are ethically defensible, and is the distinction between suicide and assisted suicide ethically defensible? (3) Does the law attempt to uphold a conception of morality inconsistent with the consensus in Canadian society?

92. The trial judge extensively reviewed the evidence. However, her conclusions make it clear that none of this evidence ought to lead to reconsideration of *Rodriguez*:

> [357] In summary, there appears to be relatively strong societal consensus about the following: (1) human life is of extremely high value, and society should never, or only in very exceptional circumstances, permit the intentional taking of human life; and (2) current end-of-life practices, including administering palliative sedation to relieve physical suffering and acting on patients' or substituted decision-makers' directions regarding withholding or withdrawal of life-sustaining treatment, are ethically acceptable.

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[137] CA Reasons (majority) at para. 247 (JR, Vol. III, pp. 104-105).

> [358] As to physician-assisted death, weighing all of the evidence, I do not find that there is a clear societal consensus either way, in an individual case involving a competent, informed, voluntary adult patient who is grievously ill and suffering symptoms that cannot be alleviated. However, there is a strong consensus that if physician-assisted dying were ever to be ethical, it would be only be with respect to those patients, where clearly consistent with the patient's wishes and best interests, and in order to relieve suffering.

93. With respect, these results were entirely predictable. The consistent view of most of the major medical associations, in Canada and abroad, remains where it was at the time of *Rodriguez*: opposed to physician-assisted death.[138] That there are individuals among the memberships of those organizations who oppose the official view and would assist patients to take their lives if the law permitted them to, is no different than it was at the time of *Rodriguez*. That reputable scholars can mount an ethical case for either position is not at all surprising. None of this is evidence of a shifting societal consensus, as the trial judge fairly concluded. And, as the Court of Appeal majority pointed out, it echoes the conclusion of Sopinka J. in *Rodriguez*.[139] Sopinka J. noted that it was unnecessary to resolve any issue concerning ethical distinctions, which suggests the trial judge may have been overreaching in the manner in which she framed the issues.[140] As it was unnecessary to resolve the ethical issues, further evidence on this issue could not be said to "fundamentally shift the parameters of debate."

b) The Use of Evidence Regarding Foreign Jurisdictions

94. The trial judge examined the operation of the laws in jurisdictions where some form of assisted dying is permitted, such as Oregon, Washington, the Netherlands, Switzerland and Belgium. The trial judge looked at this evidence in order to determine whether the safeguards in those regimes were sufficient to protect vulnerable populations and ensure compliance with the law. While she concluded that vulnerable populations do not suffer and compliance is generally adequate, in this area her conclusions do not follow from her findings of fact or her analysis.

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[138] CA Reasons (majority) at paras. 248-249 (JR, Vol. III, pp. 105-106).
[139] CA Reasons (majority) at paras. 251-252 (JR, Vol. III, pp. 106-107).
[140] *Rodriguez* at 590-591.

Indeed, whether a trial judge can even make such assessments about foreign law and practice in a summary trial is seriously open to question.[141]

95. One of the important points that the foreign evidence did establish beyond dispute was that in each of the jurisdictions at issue, the relevant law governing access to assisted suicide was legislation; in none of those jurisdictions did the law develop from an appreciation of constitutional or human rights instruments.[142] In the Netherlands, the statutory law was a response to judicial development of the defence of necessity.[143] In Switzerland, the provisions of the relevant criminal statute permit individuals (not just physicians) to assist with suicides, as long as there is no selfish motive.[144]

96. Even if it is acceptable to use evaluation of foreign experience to give meaning to s. 7, the trial judge's conclusions are unsupportable because of their internal inconsistency. At places in her judgment, the trial judge recognized that the necessary evidence either was weak, or did not support the appellants' claims.[145] She accepted that there was evidence of lack of compliance with safeguards in Oregon,[146] the Netherlands,[147] and Belgium.[148] She acknowledged difficulties with the evidence on the impact of vulnerable people in the Netherlands and Oregon,[149] and that people suffering depression may slip through the approval process, if only in "highly isolated" cases.[150] But this is an area not amenable to deciding whether there is an acceptable level of risk; it is akin to this Court's example in *Bedford* of the unacceptability of laws that precluded safeguards which might have prevented another woman from entering Robert Pickton's car.[151] It is palpable and overriding error to draw conclusions that are more ambitious than warranted by the evidence.[152]

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[141] *Nicklinson*, at para. 232.
[142] The one example the appellants could find, in this regard, was Colombia.
[143] TJ Reasons at para. 457 (JR, Vol. I, p. 139).
[144] TJ Reasons at para. 591 (JR, Vol. I, p. 175).
[145] TJ Reasons at paras. 656, 672 (JR, Vol. I, pp. 191, 194-195).
[146] TJ Reasons at paras. 649, 653 (JR, Vol. I, pp. 189-190).
[147] TJ Reasons at para. 656 (JR, Vol. I, p. 191).
[148] TJ Reasons at paras. 657-659 (JR, Vol. I, p. 191).
[149] TJ Reasons at paras. 662-663 (JR, Vol. I, p. 192).
[150] TJ Reasons at paras 670-671 (JR, Vol. I, p. 194).
[151] *Bedford* at para. 158; *Nicklinson*, at para. 225, 228-229.
[152] *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 SCR 114 at 121 (RA, Tab 45); *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401 at paras. 72-74 (RA, Tab 15).

97. The difficulty with the trial judge's use of the foreign evidence is underscored by the fresh evidence admitted in this Court with respect to Belgium. Subsequent to the trial in this case, there have been many examples of people "taking advantage" of the Belgian laws in ways that could only come as a surprise to the framers of a scheme ostensibly loaded with safeguards. These cases—a woman suffering from anorexia, middle-aged twins with glaucoma, old people "weary of life" but not suffering from a serious illness[153]—should give pause to those who feel very strict safeguards will provide adequate protection: paper safeguards are only as strong as the human hands that carry them out.

98. The trial judge's reasoning is further flawed in that she used alleged "cultural differences" between Canada and other countries as a reason to reject suggestions that the problems the evidence suggested in other countries may occur here. Her chief conclusions were the following:

> [683] First, cultural and historical differences between the Netherlands and Belgium, on the one hand, and Canada on the other, mean that possible concerns about the level of compliance with legislation in those countries do not necessarily transpose into concerns about Canada. The experience of compliance in Oregon is more likely to be predictive of what would happen in Canada if a permissive regime were put in place, although even there only a weak inference can be drawn.
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> [684] Second, the expert opinion evidence from persons who have done research into the question is that, with respect to all three jurisdictions, the predicted abuse and disproportionate impact on vulnerable populations has not materialized. Again, inferences for Canada can only be drawn with caution.
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> [685] Third, although none of the systems has achieved perfection, empirical researchers and practitioners who have experience in those systems are of the view that they work well in protecting patients from abuse while allowing competent patients to choose the timing of their deaths.

99. With respect, it is wrong to conclude that problems with compliance will not occur in Canada because we are "culturally different." The trial judge had no evidence before her to conclude that Canadians are much better at following rules than the Belgians or the Dutch. There was only one appropriate conclusion: that no definitive conclusions can be drawn on the basis of

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[153] Montero Affidavit at paras. 38, 41-43 (RR, Tab 3, pp. 45-46).

the law and practice in foreign jurisdictions. In other words, that evidence was incapable of "fundamentally changing the parameters of the debate."

100. This was a critical point in the trial judge's analysis. She asserted "with a high degree of certainty"[154] that safeguards would protect the vulnerable. The boldness of that assertion stands in stark contrast to the shortcomings in the evidence she identified.

c) Conclusion

101. Finally, with respect to the second *Bedford* justification for departing from precedent, relating to the nature of the issue being seen through a more modern lens, the best example is this Court's decision on extradition to face the death penalty in *Burns and Rafay*.[155] *Burns* was, like this case and *Bedford*, a case about the application of the principles of fundamental justice. *Burns* was also, like this case, a case which featured much evidence on foreign and domestic practices in an attempt to discover societal consensus on the issues under consideration. The foreign evidence was used to show "significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment."[156] No such claim can be made here, where the vast majority of jurisdictions have not altered their legislation and have rejected proposals to relax the protection, and most courts have rejected claims of rights to assisted suicide.

C. An Absolute Prohibition does not Offend the Principles of Fundamental Justice

1) The Nature of the Deprivation

102. The respondent accepts that an absolute prohibition on physician-assisted dying engages an individual's liberty and security of the person rights. But it is critical to define the right with precision before determining whether any deprivation is contrary to the principles of fundamental justice; a right defined loosely may quickly lead to unwarranted expansion. The appellants do not define the nature of the rights at play with sufficient precision.

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[154] TJ Reasons at para. 1367 (JR, Vol. II, p. 180).
[155] *United States v. Burns*, [2001] 1 S.C.R. 283 (RA, Tab 47) [*Burns*].
[156] *Burns* at para. 89.

103. The reason the s. 7 rights to liberty and security of the person are engaged are described in the reasons of Sopinka J. in *Rodriguez*:

> That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(*b*) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.[157]

104. This Court emphasized in *Ruby* that:

> [i]n order to determine whether an alleged deprivation of the right to life, liberty and security of the person is or is not in accordance with the principles of fundamental justice, it is necessary to appreciate the exact nature of the deprivation.

The "exact nature of the deprivation" recognized by Sopinka J. was a right to security of the person informed by a principle of patient autonomy. But it was not the sweeping rights to self-determination and "to end intolerable suffering" asserted by the appellants.[158] Sopinka J. rejected the notion that security of the person included the right to choose the manner and timing of one's death.[159] Foreign courts have been alive to the slippery slope inherent in defining claimants' rights too broadly, rejecting arguments that would lead to a "right to commit suicide," or a "right to consent to euthanasia."[160]

105. Subsequent to *Rodriguez*, this Court has been cautious in describing the limits of personal autonomy. This Court has, for example, recognized that autonomy claims may "exist in tension with a protective duty on the part of the state."[161] Indeed the Chief Justice has described *Rodriguez* as a case in which "there was broad agreement that the s.7 right to make decisions

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[157] *Rodriguez*, at 588-589.
[158] Appellants' Factum at paras. 123, 164.
[159] *Rodriguez*, at 585-586.
[160] *Washington*, at 722-726; *Pretty*, at para. 75; *Fleming*, at paras. 114-115.
[161] *A.C. v. Manitoba* (*Director of Child and Family Services*), 2009 SCC 30, [2009] 2 SCR 181at para. 82 (RA, Tab 1) [*A.C.*].

about one's body and life may be constrained by law to reflect other competing societal interests."[162]

106. The approach taken by Sopinka J. to describing the nature of the deprivation continues to have the advantage of being much clearer than what is proposed by the appellants. Principles of fundamental justice "must be identified with sufficient precision to yield a manageable standard;"[163] we should demand no less in describing the alleged rights.[164]

2) The Provisions are not Arbitrary

107. The trial judge accepted that the principle of vertical *stare decisis* meant that *Rodriguez* was binding on her in determining whether the impugned provisions were arbitrary.[165] The correctness of her decision that the provisions were not arbitrary has been further confirmed by this Court's recent judgement in *Bedford*, which held that statutes will be considered arbitrary when they have *no connection* to the legislative objective.[166]

108. In *Rodriguez*, Sopinka J. looked at the history of the statutory provisions and held that the purpose of the absolute prohibition was the preservation of life and the protection of the vulnerable.[167] The trial judge accepted this characterization,[168] as did the Court of Appeal.[169] Both courts below held that the prohibitions were not arbitrary,[170] and as a matter of logic, it cannot be said that an absolute prohibition against assisting someone to commit suicide has *no connection* to the objectives of preserving life and protecting the vulnerable. The absolute nature of the law reinforces the strong public policy in favour of discouraging suicide, sending a strong message that all lives are valued.

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[162] *A.C.* at para.137 (McLachlin C.J., concurring); see also *Nicklinson*, at paras.160, 263-264.
[163] *Malmo-Levine* at para. 113.
[164] *Washington* at 721.
[165] TJ Reasons at para. 1005 (JR, Vol. II, p. 84).
[166] *Bedford* at paras. 111-112.
[167] *Rodriguez* at 561, 590, 595, 601, 605, 608, 613, 614.
[168] TJ Reasons at para. 1190 (JR, Vol. II, p. 140).
[169] CA Reasons at para. 315 (JR, Vol. III, p. 137).
[170] TJ Reasons at paras. 1331, 1337 (JR, Vol. II, pp. 172, 174); CA Reasons (majority) at para. 315 (JR, Vol. III, p. 137).

3) The Provisions are not Overbroad

109. The absolute prohibition is not overbroad in that it cannot be said to go too far "by sweeping conduct into its ambit that bears no relation to its objective."[171] In determining whether a law is overbroad, the Court is required to give a measure of deference to legislators;[172] the onus is on the appellants to demonstrate that the laws clearly go beyond what is necessary for the government to achieve its objectives.[173] Despite the voluminous record here, that standard cannot be met: the evidence from the permissive jurisdictions does not permit a finding that an absolute prohibition overshoots its objectives of preserving life and protecting vulnerable people.

110. The claim of overbreadth is the very heart of this case. It is evident from the appellants' language, which speaks to the laws' impact on "grievously and irremediably ill" people with "intolerable suffering."[174] It is evident in the remedy proposed by the trial judge, which seeks to describe a narrow class of people who should be immune from the prohibitions.[175] And it is evident from the legislative schemes in the permissive jurisdictions, which describe varying classes of people who may access the scheme, and then provide numerous safeguards to protect those people and underscore the exclusion of others.

111. The trial judge erred by reducing the burden of proof on the appellants. She described that burden in the following manner:

> In the specific context of their claim that the absolute prohibition infringes the principle of fundamental justice regarding overbreadth, they have the burden to show that the absolute prohibition (the means chosen) is not the least restrictive of their interests in life, liberty and security of the person and is not necessary to achieve the state's objective.[177]

112. It is not enough for the appellants to demonstrate that the option chosen is not the "least restrictive," when this Court's decisions make it abundantly clear that a "measure of deference" must be given to the legislative choice. In *RJR-MacDonald*, for example, McLachlin J. noted that

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[171] *Bedford* at para. 117.
[172] *R. v. Clay,* [2003] 3 SCR 735 at paras. 38-39(RA, Tab 35) [*Clay*].
[173] *R. v. Heywood*, [1994] 3 SCR 761 at 793-794 (RA, Tab 36).
[174] Appellants' Factum at paras. 1, 182.
[175] TJ Reasons at paras. 1393, 1414-1415 (JR, Vol. II, pp. 186-187, 193-194).
[177] TJ Reasons at para. 1361 (JR, Vol. II, pp. 179-180).

"the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice."[178] *Increased* deference may be owed, for example, where legislative provisions concerning social values are at stake.[179] Assisted suicide is an area involving competing conceptions of morally acceptable behaviour and professional ethics, well-based fears by members of vulnerable groups, and the state's obligation to protect all of its citizens from potential harm. An approach which requires only that the appellants demonstrate that it is more likely than not that a less restrictive scheme would meet the state's objectives is insufficiently exacting.

113. In examining the experience in foreign jurisdictions to attempt to resolve the difficult issue of whether something less than an absolute prohibition would suffice, the trial judge ought to have approached her task with a much greater sense of diffidence, for reasons noted by U.S. Supreme Court Justice Souter in *Washington v. Glucksberg*:

> The principal enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country's legal administration can be soundly undertaken through American courtroom litigation.[180]

The wisdom of Justice Souter's observation is reinforced by the fresh evidence before this Court on developments in Belgium. Since the summary trial in this matter concluded, there have been numerous reports of individuals availing themselves of the Belgian law that have attracted controversy. The circumstances of these deaths speak to the unforeseen applications of a law that appears to be narrowly drafted and replete with safeguards.[181]

114. On her own reasoning, such evidence would have caused the trial judge to reject the claim, since she stated:

> An absolute prohibition might be called for if the evidence from permissive jurisdictions showed abuse of patients, or carelessness or callousness on the part of physicians, or evidence of the reality of a practical slippery slope.

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[178] *RJR-McDonald* at para. 135.
[179] *R. v. Sharpe*, [2001] 1 SCR 45 at paras. 89 (per McLachlin C.J.) and 191-192 (Per L'Heureux-Dubé (dissenting) (RA, Tab 40) [*Sharpe*]; *Pretty* at para. 74; *Nicklinson*, at paras. 166-167, 171, 232, 267.
[180] *Washington* at 787; *Nicklinson* at para. 164.
[181] Montero Affidavit at paras. 38, 41-43 (RR, Tab 3, pp. 45-46).

With respect, the trial judge had such evidence before her, but rejected the evidence showing the problems in Belgium and the Netherlands on the basis of "cultural differences."[182]

115. Although not every person who may desire physician-assisted suicide may be considered "vulnerable," from a legislative perspective, every person is *potentially* vulnerable. Motivations and subtle pressure are difficult to discern.[183] Given the absence of a reliable way of identifying *in advance* those who are vulnerable, it cannot be said that the absolute prohibition includes conduct that bears no relation to its purpose.

116. The systemic and widespread bias against those who are less than fully independent and healthy cannot be erased with the wave of a judicial or legislative wand requiring "careful and well-informed assessments." As this Court noted in *Burns* "[l]egal systems have to live with the possibility of error."[184] In dismissing or minimizing the likelihood of error in this context, the trial judge was requiring Parliament to accept a level of risk with which she was comfortable, but which Parliament had specifically rejected. Parliament is entitled to make that assessment. The *Charter* should not be used to compel Parliament to quantify the number of lives that must be saved to justify the absolute prohibition.[185]

117. In this very difficult area, Parliament has made a policy choice, reaffirmed many times over, to continue the absolute prohibition. The experience in the few foreign jurisdictions that have relaxed their laws may well persuade other jurisdictions, or even a future Parliament, to adopt some similar scheme.[186] But the evidence before the trial judge was not sufficient to prove that an absolute prohibition is outside a range of reasonable alternatives that would advance Parliament's important objectives.[187] Indeed it is difficult to imagine how it could be outside the range when most Western democracies have adopted the same approach.

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[182] TJ Reasons at para. 683 (JR, Vol. I, p. 197).
[183] *Nicklinson*, at para. 228.
[184] *Burns* at para. 1.
[185] *Nicklinson*, at para. 229.
[186] *District of Columbia v. Heller* (per Breyer J. dissenting), 554 U.S. 570 (2008) at 701-702 (RA, Tab 9); *Nicklinson,* at para. 190.
[187] *Clay* at para. 40.

4) The Provisions are not Grossly Disproportionate

118. To be contrary to the principles of fundamental justice, a law's effects must be "so grossly disproportionate to its purposes that it cannot be rationally supported."[188] "Gross disproportionality" is very similar in principle to overbreadth, [189] and the result of the analysis should be the same. In view of the gravity of the risks at which the prohibition is directed, this is not one of the "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."[190]

119. It is important to re-iterate the purposes of the law: preservation of life and protection of the vulnerable. The law protects people from dying against their wishes, and reaffirms the message that every life is valuable and worthy of protection, purposes of super-ordinate importance. It is not a case like *Bedford*, where the risk to the claimants' lives was measured against governmental objectives of preventing public nuisance.[191] Parliament's purpose here is not disproportionate, much less grossly disproportionate, in its effects on those who wish to commit suicide with assistance or be euthanized.[192]

D. The Prohibitions do not Infringe Section 15 of the *Charter*

120. The prohibitions against assisted suicide and euthanasia support the fundamental purpose of s.15. They affirm that every life, including the lives of severely disabled individuals, should be valued by society and is worthy of protection. For a violation of s.15 to exist, a law must not only draw a distinction between individuals on the basis of an enumerated or analogous ground, but that distinction must also be discriminatory. Prohibitions which reinforce the value of the lives of the claimant group are not discriminatory.

121. The prohibitions reinforce the value of the lives of people with disabilities; removing them as a violation of s. 15 would not. A finding that the prohibitions violate s. 15 would require that Parliament provide less protection to the lives of those with serious physical disabilities than

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[188] *Bedford* at para. 120.
[189] *Bedford* at para. 107; *Khawaja* at para. 40.
[190] *Bedford* at para. 120.
[191] *Bedford* at paras. 113, 147.
[192] *Pretty* at para. 76; *Nicklinson*, at para. 201.

it could provide to others. For those individuals, the protection would be incongruously removed in the name of equality. Justice Sopinka acknowledged this potential in *Rodriguez*, when he stated that the prohibition against assisted suicide "protects all individuals against the control of others over their lives. To introduce an exception to this blanket protection for certain groups would create an inequality."[193]

122. Furthermore, such a finding would lead to what has been referred to as the "logical" slippery slope. If individuals with severe disabilities must be granted access to physician-assisted death to avoid inequality, a similar right would arise for less severely disabled individuals as they would then be limited to much more difficult courses of action than physician-assisted death, thus creating a new inequality.

123. Similarly, any boundaries that Parliament may draw in order to try to minimize the dangers that the trial judge acknowledged are inherent in assisted suicide would also be subject to challenge under s.15. Once a right is recognized there is a tendency towards an expansive rather than restrictive definition of the right. Many of the "safeguards" in other jurisdictions involve making distinctions between different groups. The limit imposed in Oregon and Washington, that patients be terminally ill, would have to be justified, as would any age limit or any prohibition against allowing physician-assisted death for those suffering from specific psychological disorders, such as dementia. These are all boundaries that have faded in Belgium as a result of the practical slippery slope, but in the face of a recognition of a constitutional right to physician-assisted death, as opposed to a policy decision, the incline becomes that much steeper as the practical and logical slippery slopes combine.

1) The Prohibitions on Physician-Assisted Dying are not Discriminatory

124. Although the prohibitions on assisted suicide and euthanasia may stand between individuals with significant physical disabilities and suicide in a way that it does not for able-bodied individuals, that distinction is not discriminatory in effect, and therefore does not violate s.15. It is important to note that, contrary to the assertions of the appellants, the distinction is not

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[193] *Rodriguez* at 613-614.

that "choosing to die is criminalized only for the materially physically disabled."[194] As the trial judge recognized, the distinction is less stark. There are means of suicide available to everyone. The distinction that the impugned provisions create is that some individuals with significant physical disabilities are restricted to a "single, difficult course of action."[195]

125. The presence of a distinction on an enumerated or analogous ground is only the beginning of the analysis. The heart of the s. 15 analysis is the second step of the test, determining whether there has been discrimination in a substantive sense.[196] A distinction will be discriminatory if it has "the purpose or effect 'of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.'"[197] The inquiry is a flexible and contextual one, taking into account matters such as the nature of interests affected, pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, and the ameliorative impact of the law.[198]

a) Nature of the interest

126. An inquiry into the discriminatory character of a distinction on a prohibited ground requires evaluation of whether the "distinction restricts access to a fundamental social institution, or affects 'a basic aspect of full membership in Canadian society.'"[199] It is therefore necessary to begin by accurately characterizing what the claimant group is seeking.

127. The trial judge characterized the nature of the interest as the autonomy to relieve oneself of suffering.[200] This broad characterization is insufficiently grounded in what the claimants seek, or in the distinction created. What is at issue in this case is not the relief of suffering *simpliciter* but rather, the autonomy to relieve suffering *by ending one's life*. Furthermore, the distinction

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[194] Appellants' Factum at para. 93.
[195] TJ Reasons at paras. 1075-1076 (JR, Vol. II, p. 106).
[196] *Quebec v. A.*, [2013] 1 SCR 61 at paras. 327-331 *per* Abella J. and para. 418 *per* McLachlin C.J. (RA, Tab 32) [*A*]; *Withler v. Canada (Attorney General)*, [2011] 1 SCR 396 at para. 39 (RA, Tab 52) [*Withler*].
[197] *A.* at para. 417 per McLachlin C.J., citing *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 88 (RA, Tab 20) [*Law*].
[198] *A.* at para. 418 *per* McLachlin C.J. and para. 331 *per* Abella J.
[199] *Law* at para. 74.
[200] TJ Reasons at paras. 1155-1156 (JR, Vol. II, p. 130).

which results from the impugned provisions is not limited to the relief of suffering. Rather, the distinction is that some individuals with severe disabilities have more limited choices as to how to commit suicide, whether their wish to die is based on suffering or something else.

128. The question is therefore whether the ability to commit suicide with relative ease is a basic aspect of full membership in Canadian society. This in turn requires a consideration of access to suicide for Canadians in general. As Sopinka J. held in *Rodriguez*, the decriminalization of attempted suicide in 1972 did not "represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens."[201] Rather, the repeal reflected Parliament's recognition that its objective of *preventing* suicide is better achieved through the health sciences and that deploying the criminal law against a person who wishes to end his or her own life may actually undermine that objective. Similarly, given that a successful suicide cannot be prosecuted, a criminal prohibition on suicide proper is simply irrational.

129. Taking this history into account, the freedom to end one's own life with relative ease is not properly understood to be a fundamental social institution or a basic aspect of membership in Canadian society.[202]

b) Pre-existing disadvantage

130. Individuals with disabilities have historically been subject to disadvantage and stereotyping. Among the damaging stereotypes that individuals with disabilities face are those equating physical dependence with diminished dignity and quality of life.[203] These are the very stereotypes that render the risks inherent in assisted suicide particularly acute for individuals with disabilities. In a world that is so "relentlessly oriented" to the able-bodied,[204] and where

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[201] *Rodriguez*, at p. 597.
[202] *Washington*, at 728; *Vacco*.at 799-801.
[203] TJ Reasons at paras. 194, 811, 819 (JR, Vol. I, p. 60 and Vol. II, pp. 29, 31); Wiebe Affidavit at paras. 32-38 (JR, Vol. XXXI, pp. 7821-7823); Martin Affidavit at paras. 13-14 (JR, Vol. XXVII, p. 6818); Frazee Report at paras. 31, 37-40 (Vol. XLIV, pp. 12107-12110).
[204] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 at para. 33 (RA, Tab 14) [*Granovsky*].

individuals with disabilities are often encouraged to forgo life sustaining treatment,[205] it is not unreasonable to think that the expression of a wish to die by a person whose life is presumed to lack dignity and value may be too readily accepted as rational and durable.[206]

c) Correspondence

131. A distinction that corresponds with the actual needs, capacity, or circumstances of the claimant group in a manner that respects their value as human beings and members of Canadian society is less likely to be discriminatory.[207] Contrary to the appellants' suggestion, it does not follow from this Court's jurisprudence that effects-based distinctions are incapable of corresponding to the actual needs and circumstances of the claimant group.[208] Such an approach overlooks the contextual and purposive nature of the s. 15 inquiry and conflates the two steps of the test, effectively treating the existence of a distinction under the first part of the test as dispositive.

132. Determining the degree of correspondence between the differential treatment and the claimant group's reality requires a purposive and contextual understanding of both the legislative scheme and of the claimant group's place within the scheme and society at large.[209] In *Withler*, the Court explained that in a benefits case, the contextual inquiry under s. 15(1) "will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole."[210] The same approach is equally applicable in cases such as this, where the challenge is to a criminal prohibition intended to protect vulnerable individuals.

133. The appropriate context in which to consider the impugned provisions is one in which public policy aims to prevent all suicide, but Parliament has chosen to criminalize only certain

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[205] TJ Reasons at paras. 811, 819 (JR, Vol. II, pp. 29, 31); Martin Affidavit at paras. 10-14 (JR, Vol. XXVII, pp. 6817-6818); Wiebe Affidavit at paras. 17-38 (JR, Vol. XXXI, pp. 7817-7823); Frazee Report at paras. 28-40 and Exhibits I-K (JR, Vol. XLIV, pp. 12107-12110 and pp. 12289-12297).
[206] TJ Reasons at paras. 811, 851 (JR, Vol. II, pp. 29, 38-39); Frazee Report at paras. 42-48 and Exhibit L (JR, Vol. XLIV, pp. 12110-12111 and pp. 12298-12315); Wiebe Affidavit at paras. 51-53 (JR, Vol. XXXI, pp. 7827-7828).
[207] *Law* at para. 70.
[208] Appellants' Factum at para. 103.
[209] *Withler* at paras. 51, 65. See also *Granovsky* at para. 62; *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504 at para. 94 (RA, Tab 26) [*Martin*].
[210] *Withler*, at para. 67.

suicide-related activities, specifically the involvement of a third party in suicide. Given the reasons for the decriminalization of attempted suicide, the absence of that criminal prohibition cannot be relied upon to ground an equality-based right to suicide (or euthanasia) for individuals with serious disabilities.

134. Further, the prohibition on assisted suicide and euthanasia is based not on a failure to take into account the needs and circumstances of individuals with serious disabilities, but on the recognition that assisted suicide and euthanasia are inherently social acts and are, in this respect, fundamentally different than the act of suicide. Although it may be motivated by compassion, physician-assisted death involves intentional acts of a third party to bring about the death of another and necessarily involves an affirmation of the subject's conclusion that his or her life is not worth living. It leads to the normalization of assisted suicide and euthanasia and de-normalization of physical dependence. The re-enforcement of the societal message that death is preferable to physical dependence must be taken into account in assessing whether the protection provided by the impugned provisions creates a discriminatory distinction.

135. Canada's position does not presume that individuals with serious disabilities lack autonomy or are necessarily vulnerable.[211] Rather, Canada's position is that every person who contemplates suicide, whether able-bodied or disabled, is *potentially* vulnerable. This potential vulnerability is entrenched and exacerbated in any system that permits a third party to bring about the death of another, and which devalue the lives of individuals with disabilities. Further, although safeguards may reduce the potential harms to some extent, not all vulnerable individuals can be identified in advance.[212] There are myriad ways in which mainstream society, with its privileging of independence, may give rise to subtle pressures to request assisted suicide or euthanasia in order to avoid becoming a burden on family or public resources.

136. Perfect correspondence is not required in order for a distinction not to be discriminatory, particularly where what is at issue is legislation balancing multiple and competing interests, as is

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[211] Appellants' Factum at paras. 108-109.
[212] *Clay* at para. 40.

the case here.[213] The fact that there are some individuals who may not be vulnerable does not show that the law fails to consider the overall needs and circumstances of the claimant group or that the law is discriminatory.[214] Absent a reliable mechanism for identifying in advance who is and is not vulnerable, the blanket prohibition, understood in its full legislative context, corresponds with the needs and capacities of persons with disabilities by protecting individuals within that group who are vulnerable. The correspondence of the impugned provisions to the needs of the complainant group is further demonstrated by the support of the prohibition by groups representing large sections of the disability community.

d) Ameliorative effect

137. In *Kapp*, this Court held that programs with an ameliorative purpose should be analysed under s. 15(2) but left open the possibility that ameliorative *effects* may nevertheless be relevant to the second step of the s. 15(1) analysis.[215] The relevance of ameliorative effects or impacts has subsequently been reaffirmed in *Withler* and *A.*[216] Although this case does not involve a benefits scheme, the prohibition on assisted suicide and euthanasia reflects an attempt to balance a multiplicity of interests including those of the most vulnerable within our society. In such a case, the ameliorative impact of the prohibition for individuals who are less self-assured, less clear in their wishes, and less supported, must colour the discrimination analysis.

138. In concluding that the ameliorative effects factor was not relevant, the trial judge relied on the observation that individuals with physical disabilities are relatively more disadvantaged than their able-bodied counterparts who can lawfully end their own lives at the time of their choosing.[217] She erred, however, in failing to ask the more difficult question of whether the prohibition has an ameliorative effect on "some other, more disadvantaged group."[218]

139. The appellants cite *Martin* as an example of a case where the Court refused to give any weight to this factor. However, *Martin* is distinguishable. *Martin* dealt with a workplace injury

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[213] *Gosselin v. Quebec (Attorney General),* [2002] 4 SCR 429 at para. 55 (RA, Tab 13) [*Gosselin*]; *Withler* at para. 67; *Law* at para. 105; *Canadian Foundation* at para. 67 (RA, Tab 8); *Rodriguez* at 563-564.
[214] *Gosselin* at para. 55.
[215] *R. v. Kapp,* [2008] 2 SCR 483 at para. 23 (RA, Tab 37).
[216] *A.* at para. 418 *per* McLachlin C.J. and para. 331 *per* Abella J.; *Withler* at para. 38.
[217] TJ Reasons at para. 1140 (JR, Vol. II, p. 126).
[218] *Martin* at para. 102.

compensation scheme that effectively excluded injured workers who suffered from chronic pain. The Court's analysis of ameliorative effect was predicated on its finding that there was no serious argument that the differential treatment was aimed at improving the circumstances of another, more disadvantaged, group.[219] In contrast, the impugned provisions in this case have a direct ameliorative effect for vulnerable individuals – able-bodied and disabled alike – who would be at greater risk under any system of legalized physician-assisted death.

e) Conclusion

140. Although the prohibition on assisted suicide and euthanasia may result in a distinction on the ground of disability, understood in it its legislative and historical context, it does not discriminate in the substantive sense. As this Court held in *Granovsky*:

> The *Charter* is not a magic wand that can eliminate physical or mental impairments, nor is it expected to create the illusion of doing so. Nor can it alleviate or eliminate the functional limitations truly created by the impairment. What s. 15 of the *Charter* can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfilment in a world relentlessly oriented to the able-bodied.[220]

141. A reasonable person in the claimants' situations would not conclude that the law treats them as less deserving of concern, respect and consideration. The law neither perpetuates an arbitrary disadvantage nor relies on false stereotypes. Rather, the law affirms that every life, including the lives of individuals with severe disabilities, is worthy of protection and should be valued by society.

E. Any Infringement of the Rights is a Reasonable Limit

142. Any infringement of the appellants' ss. 7 or 15 *Charter* rights is justified under s. 1. The prohibitions' pressing and substantial objectives of preserving the lives of the vulnerable and

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[219] *Martin* at para. 102.
[220] *Granovsky* at para. 33.

upholding respect for all lives by preventing the message that some lives are not worth living, are societal concerns of the very highest order. Although this Court has indicated that a s. 1 analysis must be conducted for each *Charter* breach, given that the justification in the case of either a s. 7 or a s. 15 breach is the same in most respects, there will be a single analysis.

143. In *Bedford*, this Court noted that ss. 1 and 7 of the *Charter* ask different questions. The focus of s. 1 is to weigh the goal of the law at issue and the benefits it provides to the broader public against the impacts on the claimants' rights.[221] It is in the s. 1 analysis that societal interests are weighed.

144. This Court in *Hutterian* emphasized the importance of considering the broader social context on a s. 1 analysis:

> By their very nature, laws of general application are not tailored to the unique needs of individual claimants... Laws of general application affect the general public, not just the claimants before the court. The broader societal context in which the law operates must inform the s. 1 justification analysis. A law's constitutionality under s. 1 of the *Charter* is determined, not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact. While the law's impact on the individual claimants is undoubtedly a significant factor for the court to consider in determining whether the infringement is justified, the court's ultimate perspective is societal. The question the court must answer is whether the *Charter* infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular claimant could be envisioned.[222]

145. In *Bedford* this Court acknowledged it is possible to justify a s. 7 infringement under s. 1. In cases such as the present one, where "[t]he choice whether to permit any form of physician-assisted death implicates fundamental social values,"[223] it is essential that these societal concerns be considered in a way that leaves open the real possibility of such laws being justified.[224]

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[221] *Bedford* at paras. 125-126.
[222] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 at para. 69 (RA, Tab 2) [*Hutterian*].
[223] TJ Reasons at para. 1227 (JR, Vol. II, p. 148).
[224] *Bedford* at para. 129; Appellants' Factum at para. 125.

1) The Prohibitions are Rationally Connected to a Pressing and Substantial Objective

146. This Court in *Rodriguez* described the objective of the legislation as pressing and substantial because: a) the prohibition aims to prevent vulnerable people from being induced to commit suicide; and b) the state has an underlying interest in the protection of life and the maintenance of the *Charter* value that human life should not be taken.[225] At trial, the appellants conceded that the objective of preventing inducement of vulnerable people to commit suicide is pressing and substantial.[226]

147. The protection of vulnerable individuals, who might be induced in moments of weakness to commit suicide, is a reflection of the state's policy that the inherent value of all human life should not be depreciated by allowing one person to take another's life. However, the prohibition is also designed to discourage everyone, even the terminally ill, from choosing death over life, and to guard against the negative social messaging that would result from a system that condones suicide as an appropriate form of relief from suffering.[227] In this regard, the prohibition prevents sending the message that the lives of some are less valuable, and less worthy of protection, than others, particularly the lives of those who have to cope with various forms of illness and disability. These broader purposes, which were identified by Sopinka J. in *Rodriguez*, have been recently affirmed by Parliament when considering whether some form of assisted suicide or euthanasia should be permissible.[228]

148. Both the trial judge[229] and this Court in *Rodriguez* had no difficulty in concluding that the prohibition in s. 241 was rationally connected to its objective.[230] The satisfaction of the rational connection element of the s. 1 test is "not particularly onerous."[231] Contrary to the appellants' assertion, the "reasoned apprehension of harm" standard can and should be applied in this case.

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[225] TJ Reasons at paras. 1190, 1204-1205 (JR, Vol. II, pp. 140, 143); *Rodriguez* at 613 *per* Sopinka J. and at 562 *per* Lamer C.J.
[226] TJ Reasons at para. 1204 (JR, Vol. II, p. 143).
[227] *Rodriguez* at 595, 608, 614.
[228] *Rodriguez* at 595, 608, 614; Canada's NTA #1, Appendix Q at pp. 177-202 (JR, Vol. XX, pp. 4033-4058); See also *Vacco*, at 808-809.
[229] TJ Reasons at para. 1209 (JR, Vol. II, p. 144).
[230] *Rodriguez* at 613-614 *per* Sopinka J. and at 562 *per* Lamer C.J.
[231] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),* [2000] 2 SCR 1120 at para. 228 (RA, Tab 22).

This Court has stated in a number of cases that in relation to complex matters that elude scientific proof, such as issues involving predictions about human behavior, the proper question is whether Parliament had a reasonable basis for concluding that the perceived harms exist.[232] In a case such as this one, in which "complex and difficult predictions about human behaviour are inherent in weighing the possible means of preventing the inducement of vulnerable people, including grievously ill people, to commit suicide,"[233] and where Parliament must consider the competing interests of different groups, the appropriate standard is one of reasonable apprehension of harm.

149. The apprehension of harm in these circumstances is not just reasonable, it is irrefutable. The trial judge accepted that unregulated physician-assisted death is inherently risky and that as compared to no regulation, the prohibitions prevent the abuse of vulnerable individuals. The connection between the prohibitions and their objectives are just as rational today as when this Court decided *Rodriguez*.

2) The Prohibitions are Minimally Impairing

150. The evidence in this case demonstrates the reasonableness of the apprehension that harm can and does occur if something less than an absolute prohibition is implemented. The trial judge erred in holding the government to an inappropriately high standard in proving the basis for, and the benefits of, the prohibitions. She also erred in determining whether the government's objectives could be met by a complex regulatory scheme, the effectiveness of which is speculative.

151. As this Court stated in *Hutterian,* the minimal impairment analysis considers whether there are other less drastic means of achieving the government's objectives in a "real and substantial manner" – not some lesser objective. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.[234] As long as

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[232] *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 SCR 927 at 994 (RA, Tab 17); *Sharpe*, at para. 89.
[233] TJ Reasons at para. 1227 (JR, Vol. II, p. 148).
[234] *Hutterian*, at paras. 53-55; *Nicklinson*, at paras. 116, 232.

the law at issue falls within a range of reasonable alternatives, it will be found to minimally impair *Charter* rights.

152. In conducting this part of the analysis, the full range of objectives of the prohibition must be considered, which include preventing the deaths of vulnerable individuals, and upholding respect for life by preventing negative messaging concerning the value of human life.

153. The trial judge erroneously asked whether the absolute prohibition is "the least restrictive means of preventing the inducement to suicide of vulnerable persons" and proposed alternative means.[235] In doing so, the trial judge did not give adequate consideration to the broader social context. The trial judge's proposed alternative means do not meet the prohibitions' objective in a real and substantial manner. Instead, they attempt to tailor the law to the claimants' unique needs and, in doing so, require the government to significantly compromise its objectives.

154. The effectiveness of the trial judge's proposed alternative means is purely speculative, and accepts too much risk. This is underscored by the trial judge's bold pronouncement that "it is extremely unlikely that physicians in Canada would be other than rigorously compliant with legislation."[236] Her faith in the medical community is admirable, but to be more circumspect in any prediction is not to condemn the ethics or diligence of doctors: it is a simple recognition that diagnoses of imminent death may sometimes be false, that diagnosis of a remediable mental condition may have been missed, that unconscious biases are exceedingly difficult to overcome, or that opportunities for palliation may not have been tried. Physicians may aspire to rigorous compliance, but they are human. The evidence from Belgium, the Netherlands, and Oregon showed just that.

155. Furthermore, the trial judge found that in order for the inherent risks of physician-assisted suicide and euthanasia to be "greatly minimized", a "stringently limited, carefully monitored system of exceptions"[237] was necessary. The only alternative presented to attempt to achieve Parliament's goals therefore requires the creation of a complex regulatory regime, and the allocation of resources to its monitoring and enforcement in order to attempt to protect

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[235] TJ Reasons at para. 1363 [emphasis added] (JR, Vol. II, p. 180).
[236] TJ Reasons at para. 1284 (JR, Vol. II, p. 162).
[237] TJ Reasons at paras. 883, 1240, 1243 (JR, Vol. II, pp. 51, 151, 152).

vulnerable individuals. It cannot be said that a blanket prohibition is outside the range of reasonable alternatives when such a complex regulatory regime, with no assurance that it will achieve Parliament's goals, is the only other alternative.[238]

156. Furthermore, it is the very regulatory scheme proposed by the trial judge that, by defining which kinds of lives may be taken, sends the message which is antithetical to Parliament's objective of confirming the value of every life. Allowing for defined exceptions to the prohibitions results in some people who say that they want to die receiving suicide intervention, while others receive suicide assistance. Those who fall into the latter category will be defined by their health or disability status, sending the message that such lives are less worthy of protection.

157. In view of the inherent dangers of physician-assisted death, the absolute prohibitions fall within the range of reasonable alternatives for addressing Parliament's objectives of preserving life and protecting the vulnerable.

3) The Effects are Proportional

158. The issue in the proportionality analysis is whether the autonomy or equality interests of some individuals are outweighed by the benefits, both to society in general, and to the individuals involved, of preventing the death of vulnerable individuals, and upholding respect for life by preventing negative messaging concerning the value of human life.[239] In *Hutterian Brethren*, this Court indicated that the government is not required to prove that the law will produce the forecast benefits:

> Legislatures can only be asked to impose measures that reason and the evidence suggest will be beneficial. If legislation designed to further the public good were required to await proof positive that the benefits would in fact be realized, few laws would be passed and the public interest would suffer.[240]

159. The trial judge, however, required Canada to prove that safeguards would not work. At the same time, she rejected the relevance to the Canadian situation of the abuses and problems in

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[238] *Nicklinson*, at paras. 107, 120.
[239] *Rodriguez* at 595, 608, 614; Canada's NTA #1, Appendix Q at pp. 177-202 (JR, Vol. XX, pp. 4033-4058).
[240] *Hutterian* at para. 85.

permissive jurisdictions, due to cultural differences.[241] As a result, the only way Canada could have met the burden imposed appears to be by risking removal of the prohibition and hoping that none of the Canadian physicians involved in the process would fail to be rigorously compliant with a stringent set of conditions. The *Charter* does not require Parliament to expose Canadians to such risk, in the face of clear evidence of problems in other jurisdictions, and on the basis of speculation that Canadian physicians would do a better job.

160. All the benefits of the prohibitions, including the avoidance of unwarranted deaths of vulnerable individuals, must be weighed against the impacts on those seeking access to physician-assisted suicide or euthanasia. The appellants, like the trial judge, ignore or discount many of the prohibitions' salutary effects. In particular, the trial judge discounted the severity of the harms at which the prohibitions are directed as being "generalized and, in some instances, ambivalent," apparently, at least in part, because they relate to "unknown persons."[242]

161. The harms at which the prohibitions are directed are not generalized or ambivalent. They are specific in that they pertain to the killing of vulnerable individuals, the devaluation of life, and in particular, the further devaluation of the lives of those who already face a society which considers their lives lacking in dignity, such as infirm elderly individuals and those with disabilities.

162. The trial judge accepted that the prohibitions promote a positive message about the value of all human life and sends "an anti-suicide message."[243] Negative social messaging as to the value of the lives of individuals with physical disabilities is the basis for significant and widespread harm to individuals with disabilities and should not be minimized. The trial judge erred in discounting the impact of negative social messaging on society as a whole, and on individuals with disabilities in particular.[244]

163. One of the harms that the prohibitions seek to prevent is the death of individuals who may not have a genuine and non-transitory wish to die. The trial judge failed to give adequate

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[241] TJ Reasons at paras. 683-685, 1238-1243, 1284 (JR, Vol. I, p. 197 and Vol. II, pp. 150-152, 162).
[242] TJ Reasons at paras. 1275, 1283 (JR, Vol. II, pp. 159, 162).
[243] TJ Reasons at para. 1265 (JR, Vol. II, p. 157).
[244] TJ Reasons at para. 1266 (JR, Vol. II, p. 157).

weight to this harm, especially in light of her conclusion that physician-assisted death is inherently risky.[245]

164. The trial judge found that the prohibitions act as a deterrent to assisted death, including physician-assisted death, and therefore probably results in some patients continuing to live longer than they otherwise would. Nonetheless, the trial judge ignored the evidence before her in saying that it is "unknown whether those patients are grateful for that further time."[246]

165. The trial judge's findings concerning the salutary effects of the legalisation of physician-assisted suicide on the role of the physician, the physician-patient relationship, the care that some patients receive, and palliative care are purely speculative because physician-assisted suicide has never been legal in Canada. These findings again highlight the trial judge's inconsistent reliance on cultural differences discussed above.[247]

166. Although the interests of individuals seeking physician-assisted suicide or euthanasia are important, they cannot outweigh the risk to others of being wrongfully persuaded to choose death. Nor are the appellants' interests sufficient to justify sending the message that lives lived with less than full independence are not worth living. The trial judge did just that in giving more weight to the circumstances of the appellants rather than those she referred to as "unknown persons." The fact that the individuals who benefit from the prohibition may be "unknown"[248] or that they will be unable to voice their regret once they are dead, does not make their protection any less important or any less relevant to the proportionality analysis.

167. The prohibitions fall within a range of reasonable alternatives in achieving the objectives in a real and substantial way for the greater public good, and are proportionate in their impact given the risks at issue – death against one's true wishes and the devaluing of the lives of some members of society.

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[245] TJ Reasons at para. 854 (JR, Vol. II, p. 39).
[246] TJ Reasons at para. 1268 (JR, Vol. II, p. 157); Davis Affidavit #1 at para. 24 (JR, Vol. XXVII, p. 6813); Finlay Affidavit #1 at paras. 81-92, Exhibit K (JR, Vol. XXXVI, pp. 9672- 9675, Ex. K: pp. 9774- 9776).
[247] TJ Reasons at paras. 1271, 1274, 1281, 1284 (JR, Vol. II, pp. 158-159, 161-162).
[248] TJ Reasons at para. 1275 (JR, Vol. II, p. 159).

4) Remedies

168. The appellants ask this Court to strike down, among other things, the homicide provision of the *Criminal Code,* and yet argue that a suspension of such a declaration is unnecessary and that such a declaration "will not *oblige* Parliament to do anything".[249] If any of these provisions are struck down, a relatively lengthy suspension is necessary in order to preserve public safety, provide the government time to draft legislation, and give Parliament time to consider it.

169. Given that the trial judge found that "the evidence permits no conclusion other than that there are risks inherent in permitting physician-assisted death"[250] and that those risks could only be addressed through a "carefully designed system imposing stringent limits that are scrupulously monitored and enforced,"[251] it is apparent that carving out any exception is not the simple matter the appellants attempt to make it out to be.

170. The details of the trial judge's declarations fail in this regard because so many of the terms used are vague and undefined. As a result, the parameters of the breach she found are difficult to ascertain. For example, the s. 15 declaration only applies to an individual who is "materially" physical disabled, or soon to become so, but it is unclear what a "material" physical disability is, or how imminent it must be before denying access to physician-assisted death would be unconstitutional.

171. Similarly, in relation to both the ss. 7 and 15 declarations, it is unclear what would constitute a "serious" illness, disease or disability, or a "state of advanced weakening capacities" such that prohibiting a person from accessing physician-assisted death would be unconstitutional.[252]

172. If this Court finds that the impugned provisions unjustifiably infringe the *Charter*, any declaration of invalidity should be suspended for at least eighteen months to allow Parliament to consider these difficult issues. The job of crafting an exception to the blanket prohibition should

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[249] Appellants' Factum at para. 155.
[250] TJ Reasons at para. 854 (JR, Vol. II, pp. 39).
[251] TJ Reasons at paras. 883 (JR, Vol. II, p. 51).
[252] TJ Reasons at paras. 1393 (JR, Vol. II, pp. 186-187).

be left to Parliament. Parliament should determine what safeguards are the most appropriate in the Canadian context and how those safeguards should be implemented and enforced.

173. Canada agrees with the appellant that this Court should not take up the British Columbia Court of Appeal's invitation to revisit *Ferguson,* and grant constitutional exemptions. Constitutional exemptions usurp the function of Parliament. Matters as important as physician-assisted suicide and euthanasia, involving the creation of a regime to prevent the wrongful deaths of vulnerable individuals and other harms to individuals and society, should be left to Parliament to address.

PART IV -- COSTS

175. The appellants' request for special costs, whether the appeal is allowed or not, is unjustified. Should they be successful, there is no principled basis for awarding more than costs *simpliciter*; should they be unsuccessful, the British Columbia Court of Appeal's principled approach of requiring each party to bear their own costs ought to be followed.[253]

176. Special costs are awarded only in highly exceptional circumstances, usually on the basis of misconduct connected with the litigation.[254] No such exceptional circumstances or misconduct arise in this case to justify such an award.[255] The mere fact that this case involves public interest litigation is insufficient to meet the high threshold required for a special costs order.[256] This is not a case of unconstitutional Ministerial decision-making,[257] or a case where the government has demonstrated a lack of respect for a party's *Charter* rights.[258] The legal issues raised by the appellants are not novel; to the contrary, the constitutionality of the provisions at issue has previously been upheld by this Court.

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[253] CA Reasons at paras. 342-346 (JR, Vol. III, pp. 147-149).
[254] *Ludco Enterprises Ltd. v. Canada*, [2001] 2 SCR 1082 at para. 79 (RA, Tab 24); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 SCR 371 at para. 30 (RA, Tab 5).
[255] Contrary to, for example, this Court's conclusion in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, [2003] 3 SCR 3 at para. 90 (RA, Tab 10) [*Doucet-Boudreau*].
[256] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2. SCR 286 at para. 132 (RA, Tab 29).
[257] *PHS* at paras. 156, 158, 159.
[258] *Doucet-Boudreau* at para. 90.

177. Throughout these proceedings, the Attorney General has performed the important legal and constitutional duty entrusted to him of defending Parliament's laws.[259] The performance of that duty, essential within our system of justice, should not warrant an award of costs, much less special costs. This is particularly so given this Court's ruling in *Rodriguez*.

178. The appellants' unprincipled request for full indemnification of its costs throughout, based solely on the public interest nature of this case, effectively penalizes the Crown for defending federal legislation previously upheld by this Court. Access to justice is important, but it is not the paramount consideration in awarding costs.[260] It alone cannot justify an exceptional costs award. Other considerations, such as impacts on the public purse, must also be taken into consideration.

179. The appellants' position on costs is tantamount to creating a court-administered legal aid program, which is an "imprudent and inappropriate judicial overreach."[261] As demonstrated by this case, and many of the other cases which come before this Court, public interest litigation is able to proceed without the need for a court created funding program, preserving access to justice without having the Court direct the allocation of public money. For those exceptional public interest cases which demand resolution, and which could not come before the courts without assistance, advance costs are available. In the case of advance costs, this Court has indicated that a "basic level of assistance" should be provided.[262]

180. In *Adams*, the British Columbia Court of Appeal attempted to define factors relevant to the awarding of special costs, such as whether the case raised unresolved questions of public importance.[263] However, the four factors the court considered included the party's conduct, which is a relevant factor but not a matter specific to public interest cases, and the party's capacity to bear costs, a factor that will always weigh against the government. The Court in

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[259] *Department of Justice Act*, R.S.C. 1985, c.J-2, s.5(d); *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 at paras. 26-27 (RA, Tab 54).
[260] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] 1 SCR 38, at para. 35 (RA, Tab 23) [*Little Sisters #2*].
[261] *Little Sisters #2* at para. 44.
[262] *Little Sisters #2* at para. 43.
[263] *Victoria v. Adams*, 2009 BCCA 563 at para. 188 (RA, Tab 49) [*Adams*].

Adams did underscore that not all successful public interest litigants are entitled to special costs, but only those in cases involving "matters of public importance that are highly exceptional."[264]

181. This case is not exceptional. Although the appellants may have a right to revisit settled issues, special costs should remain an exceptional award rather than an invitation to re-litigate this Court's decisions. As properly held by the majority of the Court of Appeal, this is not a case where special costs should be granted.[266]

PART V—ORDER REQUESTED

182. The respondents request that the appeal be dismissed, with each party bearing their own costs, and that the constitutional questions be answered:

1) The impugned provisions of the *Criminal Code* are not constitutionally inapplicable to physician-assisted dying.

2) The impugned provisions of the *Criminal Code* do not infringe s.7 of the Criminal Code.

3) Not necessary to answer.

4) The impugned provisions of the *Criminal Code* do not infringe s.15 of the Charter.

5) Not necessary to answer.

All of which is respectfully submitted.
Dated at Ottawa, this 4th day of July, 2014

Robert J. Frater for Donnaree Nygard
Counsel for the Respondent

[264] *Adams* at para. 191.
[266] CA Reasons at para. 342 (JR, Vol. III, p. 147).

PART VI – TABLE OF AUTHORITIES

Statutes

CANADA

CONSOLIDATION

CODIFICATION

Department of Justice Act

Loi sur le ministère de la Justice

R.S.C., 1985, c. J-2

L.R.C. (1985), ch. J-2

Current to June 12, 2014

À jour au 12 juin 2014

Last amended on December 12, 2006

Dernière modification le 12 décembre 2006

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to June 12, 2014. The last amendments came into force on December 12, 2006. Any amendments that were not in force as of June 12, 2014 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 12 juin 2014. Les dernières modifications sont entrées en vigueur le 12 décembre 2006. Toutes modifications qui n'étaient pas en vigueur au 12 juin 2014 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

An Act respecting the Department of Justice

Loi concernant le ministère de la Justice

SHORT TITLE

Short title

1. This Act may be cited as the *Department of Justice Act*.

R.S., c. J-2, s. 1.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur le ministère de la Justice*.

S.R., ch. J-2, art. 1.

ESTABLISHMENT OF THE DEPARTMENT; ATTORNEY GENERAL

MISE EN PLACE

Department established

2. (1) There is hereby established a department of the Government of Canada called the Department of Justice over which the Minister of Justice appointed by commission under the Great Seal shall preside.

Constitution du ministère

2. (1) Est constitué le ministère de la Justice, placé sous l'autorité du ministre de la Justice. Celui-ci est nommé par commission sous le grand sceau.

Minister and Attorney General

(2) The Minister is *ex officio* Her Majesty's Attorney General of Canada, holds office during pleasure and has the management and direction of the Department.

Ministre et procureur général

(2) Le ministre est d'office procureur général de Sa Majesté au Canada; il occupe sa charge à titre amovible et assure la direction et la gestion du ministère.

R.S., c. J-2, s. 2.

S.R., ch. J-2, art. 2.

Deputy head

3. (1) The Governor in Council may appoint an officer called the Deputy Minister of Justice to hold office during pleasure and to be the deputy head of the Department.

Administrateur général

3. (1) Le gouverneur en conseil peut nommer, à titre amovible, un sous-ministre de la Justice; celui-ci est l'administrateur général du ministère.

Deputy Attorney General

(2) The Deputy Minister is *ex officio* the Deputy Attorney General except in respect of the powers, duties and functions that the Director of Public Prosecutions is authorized to exercise or perform under subsection 3(3) of the *Director of Public Prosecutions Act*.

Sous-procureur général

(2) Le sous-ministre est d'office sous-procureur général sauf en ce qui concerne les attributions que le directeur des poursuites pénales est autorisé à exercer en vertu du paragraphe 3(3) de la *Loi sur le directeur des poursuites pénales*.

Associate Deputy Ministers

(3) The Governor in Council may appoint two Associate Deputy Ministers of Justice, each of whom shall have the rank and status of a deputy head of a department and as such shall under the Deputy Minister exercise and perform such powers, duties and functions as deputies of the Minister and otherwise as the Minister may specify.

Sous-ministres délégués

(3) Le gouverneur en conseil peut nommer deux sous-ministres délégués de la Justice, avec rang et statut d'administrateurs généraux de ministère. Placés sous l'autorité du sous-ministre, ils exercent, à titre de représentants du ministre ou autre titre, les pouvoirs et fonctions que celui-ci leur attribue.

R.S., 1985, c. J-2, s. 3; 2006, c. 9, s. 137.

L.R. (1985), ch. J-2, art. 3; 2006, ch. 9, art. 137.

TABLE OF PROVISIONS

TABLE ANALYTIQUE

POWERS, DUTIES AND FUNCTIONS OF THE MINISTER

Powers, duties and functions of Minister

4. The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall

(*a*) see that the administration of public affairs is in accordance with law;

(*b*) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;

(*c*) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the Crown on all matters of law referred to the Minister by the Crown; and

(*d*) carry out such other duties as are assigned by the Governor in Council to the Minister.

R.S., c. J-2, s. 4.

Examination of Bills and regulations

4.1 (1) Subject to subsection (2), the Minister shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the Minister shall report any such inconsistency to the House of Commons at the first convenient opportunity.

Exception

(2) A regulation need not be examined in accordance with subsection (1) if prior to being made it was examined as a proposed regulation in accordance with section 3 of the *Statutory Instruments Act* to ensure that it was not inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*.

R.S., 1985, c. 31 (1st Supp.), s. 93; 1992, c. 1, s. 144(F).

POUVOIRS ET FONCTIONS DU MINISTRE

Attributions

4. Le ministre est le conseiller juridique officiel du gouverneur général et le jurisconsulte du Conseil privé de Sa Majesté pour le Canada; en outre, il :

a) veille au respect de la loi dans l'administration des affaires publiques;

b) exerce son autorité sur tout ce qui touche à l'administration de la justice au Canada et ne relève pas de la compétence des gouvernements provinciaux;

c) donne son avis sur les mesures législatives et les délibérations de chacune des législatures provinciales et, d'une manière générale, conseille la Couronne sur toutes les questions de droit qu'elle lui soumet;

d) remplit les autres fonctions que le gouverneur en conseil peut lui assigner.

S.R., ch. J-2, art. 4.

Examen de projets de loi et de règlements

4.1 (1) Sous réserve du paragraphe (2), le ministre examine, conformément aux règlements pris par le gouverneur en conseil, les règlements transmis au greffier du Conseil privé pour enregistrement, en application de la *Loi sur les textes réglementaires* ainsi que les projets ou propositions de loi soumis ou présentés à la Chambre des communes par un ministre fédéral, en vue de vérifier si l'une de leurs dispositions est incompatible avec les fins et dispositions de la *Charte canadienne des droits et libertés*, et fait rapport de toute incompatibilité à la Chambre des communes dans les meilleurs délais possible.

Exception

(2) Il n'est pas nécessaire de procéder à l'examen prévu par le paragraphe (1) si le projet de règlement a fait l'objet de l'examen prévu à l'article 3 de la *Loi sur les textes réglementaires* et destiné à vérifier sa compatibilité avec les fins et les dispositions de la *Charte canadienne des droits et libertés*.

L.R. (1985), ch. 31 (1er suppl.), art. 93; 1992, ch. 1, art. 144(F).

POWERS, DUTIES AND FUNCTIONS OF THE ATTORNEY GENERAL

Powers, duties and functions of Attorney General

5. The Attorney General of Canada

(*a*) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, in so far as those powers and duties are applicable to Canada, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the *Constitution Act, 1867*, came into effect, in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada;

(*b*) shall advise the heads of the several departments of the Government on all matters of law connected with such departments;

(*c*) is charged with the settlement and approval of all instruments issued under the Great Seal;

(*d*) shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada; and

(*e*) shall carry out such other duties as are assigned by the Governor in Council to the Attorney General of Canada.

R.S., c. J-2, s. 5.

POUVOIRS ET FONCTIONS DU PROCUREUR GÉNÉRAL

Attributions

5. Les attributions du procureur général du Canada sont les suivantes :

a) il est investi des pouvoirs et fonctions afférents de par la loi ou l'usage à la charge de procureur général d'Angleterre, en tant que ces pouvoirs et ces fonctions s'appliquent au Canada, ainsi que de ceux qui, en vertu des lois des diverses provinces, ressortissaient à la charge de procureur général de chaque province jusqu'à l'entrée en vigueur de la *Loi constitutionnelle de 1867*, dans la mesure où celle-ci prévoit que l'application et la mise en œuvre de ces lois provinciales relèvent du gouvernement fédéral;

b) il conseille les chefs des divers ministères sur toutes les questions de droit qui concernent ceux-ci;

c) il est chargé d'établir et d'autoriser toutes les pièces émises sous le grand sceau;

d) il est chargé des intérêts de la Couronne et des ministères dans tout litige où ils sont parties et portant sur des matières de compétence fédérale;

e) il remplit les autres fonctions que le gouverneur en conseil peut lui assigner.

S.R., ch. J-2, art. 5.

References to *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, in Supreme Court of Canada Jurisprudence

	Case / Citation	Cited for:
1.	*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 2 S.C.R. 1101	s.7 – security of the person – Determining whether there is a sufficient causal connection as to when security of the person is engaged – In the absence of government involvement Rodriguez would not have suffered a deprivation of her s. 7 rights. [para. 77]
2.	*Cuthbertson v. Rasouli*, 2013 SCC 53, [2013] 3 S.C.R. 341	s. 7 – right to life – The sanctity of life is not absolute; it is subject to exceptions where notions of dignity must prevail [para. 197] – Common law does not permit personal autonomy to be the overriding consideration for the withdrawal of life support. [para. 201]
3.	*Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61	s. 15 – equality rights – Underlying values of s. 15 are equality, dignity, freedom and personal autonomy – safeguarding personal autonomy implies the recognition of each individual's right to make decisions regarding his or her own person, to control his or her bodily integrity and to pursue his or her own conception of a full and rewarding life free from government interference with fundamental personal choices. [para. 139]
4.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134	s. 7 – security of the person – Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out. [para. 93] – It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter. [para. 105]
5.	*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206	s. 7 – security of the person – The substantial interference with Mr. Nasogaluak's physical and psychological integrity that occurred upon arrest and subsequent detention clearly brings this case under the ambit of s. 7. [para. 38]
6.	*A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181	s. 7 – security of the person – The concept encompasses a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. [para. 100]

		– Affords everyone protection from serious assault on his or her physical, psychological or emotional integrity. [para. 220] Common law – This Court nonetheless confirmed that adults have the right to refuse or discontinue treatment, regardless of the results [para 45]. – Right to personal autonomy to refuse medical treatment was recognized in *Malette v. Shulman* which was endorsed by the majority opinion in *Rodriguez*. [para 199] – The majority opinion in *Rodriguez* confirmed that *Nancy B. v. Hôtel-Dieu de Québec*, (1992), 69 C.C.C. (3d) 450, correctly states the law in common law provinces: in, *Nancy B.* the Superior Court of Quebec applied the *Civil Code of Lower Canada* to hold that Mrs. B. had the right to discontinue her respiratory support treatment, even though this would soon lead to her death. [para 200] s. 7 – principles of fundamental justice – A law that is arbitrary will not be in accordance with the principles of fundamental justice. [para 103] – A limit on a s. 7 interest is arbitrary if it "bears no relation to, or is inconsistent with, the objective that lies behind the legislation. [para. 140] – Liberty or "autonomy" is not absolute and can be constrained by law to reflect competing societal interests (e.g. protection of vulnerable persons who may be subject to coercion to end their life prematurely). [para. 137] – In order to determine whether a statutory provision is arbitrary and therefore contrary to fundamental justice the relationship between the provision and the state interest must be considered. [para 141] – The "no valid purpose" principle – "Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose." [para. 222]
7.	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791	s. 7 – security of the person – The right should be interpreted generously in relation to delays – the suffering imposed by the state impinged on the right to security of the person. [para. 43] – Encompasses a notion of personal autonomy involving, at the very least, control over one's bodily integrity free

		from state interference and freedom from state-imposed psychological and emotional stress." [para 122] – The Court held that the criminal prohibition against assisting someone to commit suicide constituted an impingement of the claimant's physical and psychological integrity that amounted to a deprivation of the right to security of the person under s. 7. [para. 205] <u>s. 7 – principles of fundamental justice</u> – Defined as legal principles that are capable of being identified with some precision and are fundamental in that they have general acceptance among reasonable people. [para 127] – A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". [para. 130] – Assessing arbitrariness – In *Rodriguez*, the majority of this Court relied on evidence from other western democracies, concluding that the fact that assisted suicide was heavily regulated in other countries suggested that Canada's prohibition was not arbitrary. [para. 150] – A deprivation of a right will be arbitrary and will thus infringe s. 7 if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation. [para. 232] – One cannot conclude that a particular limit is arbitrary because "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" without considering the state interest and the societal concerns which it reflects [para. 232].
8.	*Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248	<u>s. 7 – principles of fundamental justice</u> - Cites paragraph 8 of *Canadian Foundation* (#9 below), which in turn refers to *Rodriguez* for the principle that: "There must be sufficient consensus that the alleged principle is 'vital or fundamental to our societal notion of justice.'" [para. 68]
9.	*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76	<u>s. 7 – principles of fundamental justice</u> - There must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice." [para. 8] - A legal principle contrasts with "broad" and "vague generalizations about what our society considers to be ethical or moral" [para. 9] - The third requirement is that the alleged principle of fundamental justice be "capable of being identified with

		some precision" and provide a justiciable standard. [para. 11] s. 12 – cruel and unusual treatment or punishment - In order to engage s. 12, one must show some treatment or punishment by the state. [para. 47]
10.	*R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571	s. 91(27) – federal criminal law power – The criminal law power includes the protection of vulnerable groups. [paras. 76, 257] s. 7 – security of the person – Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. [para. 246] s. 7 – principles of fundamental justice – "Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose." [paras. 90, 131] – The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, *supra*, "in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required." [para. 98] – "A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles." [paras. 112, 224] – The principles of fundamental justice are concerned with more than process. Reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. [para. 112]

		– The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only." [para. 113] – The principles of fundamental justice may in some cases reflect a balance between the interests of the individual and those of the state. This depends upon the character of the principle of fundamental justice at issue. [para. 248] – For the state to be able to justify limiting an individual's liberty, the legislation upon which it bases its actions must not be arbitrary. [para. 291] s. 15 – equality rights – The true focus of s. 15 is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society." [para. 185]
11.	*Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325	s. 15 – equality rights - Cites paragraph 53 of *Law* (#22 below), which in turn refers to *Rodriguez* for the principle that: "the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination". [para. 81]
12.	*Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016	s. 24(1) – remedy – An immediate declaration of invalidity is not always advisable, especially where the provision pursues an important objective but is over-inclusive: "were this Court to strike down the provision effective immediately, those whom the government could protect constitutionally with a more tailored provision, and who indeed should be protected, would be left unprotected. This would clearly pose a 'potential danger to the public'..." [para. 66]
13.	*R. v. Ruzic*, 2001 SCC 24, [2001] 1 S.C.R. 687	s. 7 – principles of fundamental justice – The principles of fundamental justice must be capable of being articulated with some precision; they must be more than broad generalizations about our ethical or moral beliefs. They are the "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice." [para. 28]
14.	*Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519	s. 7 – security of the person – The s. 7 right to security of the person extends beyond physical deprivations of security of the person to protect the "psychological integrity of the individual." [para. 85]

15.	*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307	s. 7 – security of the person – In this context, security of the person has been held to protect both the physical and psychological integrity of the individual. [para. 55] – In the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights. [para. 69] – It is unquestioned that respect for human dignity is an underlying principle upon which our society is based. [para. 77] – Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. Dignity is linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake. [para. 77]
16.	*Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950	s. 15 – equality rights - Cites paragraph 53 of *Law* (#22 below), which in turn refers to *Rodriguez* for the principle that: "the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination". [para. 54]
17.	*Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 SCC 28, [2000] 1 S.C.R. 703	s. 15 – equality rights – The court distinguished *Rodriguez* because Lamer C.J. established a s. 15(1) breach based upon a comparison with able-bodied people. [para. 75]
18.	*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46	s. 7 – security of the person – The right to security of the person protects "both the physical and psychological integrity of the individual." [para. 58]
19.	*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625	s. 15 – equality rights - Cites paragraph 53 of *Law* (#22 below), which in turn refers to *Rodriguez* for the principle that: "the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination". [para. 74]
20.	*R. v. White*, [1999] 2 S.C.R. 417	s. 7 – general approach – The contextual analysis that is mandated under s. 7 of the Charter is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient

		importance that they may appropriately be characterized as principles of fundamental justice in Canadian society. [para. 47]
21.	*Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203	s. 24(1) – remedy – The remedy of constitutional exemption has been recognized in a very limited way in this Court, to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended. [para. 22] – A remedy should normally be as extensive as the violation of equality rights which has been found. The constitutional exemption may apply when it has not been proven that legislation is unconstitutional in general, but that it is unconstitutional in its application to a small subsection of those to whom the legislation applies. [para. 111]
22.	*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497	s. 15 – equality rights – The equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. [para. 53]
23.	*R. v. Thomas*, [1998] 3 S.C.R. 535	s. 7 – principles of fundamental justice – The determination of what "justice requires" is informed by the remedial purpose of s. 686(8) and involves a consideration of both the individual interest of the accused in a fair trial and the collective interest in the proper administration of justice. This is in accordance with the interpretation of similar expressions, such as... the "principles of fundamental justice" from s. 7 of the *Canadian Charter of Rights and Freedoms* [para. 39]
24.	*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844	s. 7 – principles of fundamental justice – "I cannot subscribe to the opinion... that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required." [para. 77].
25.	*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624	s. 15 – equality rights – Section 15(1) was intended to ensure a measure of substantive and not merely formal equality. As a corollary to this principle a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation [para. 61-62] – To promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting

		provisions without taking into account their possible impact on already disadvantaged classes of persons. [para. 64]
26.	*Augustus v. Gosset*, [1996] 3 S.C.R. 268	s. 7 – right to life – Court cites the Rodriguez as an illustration of the difficulty in defining life under s.7 [para. 64]
27.	*Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876	s. 12 – cruel and unusual treatment or punishment – Sopinka suggested that a penalty was a punishment when it arose out of the commission of a particular offence. [para. 33]
28.	*R. v. O'Connor*, [1995] 4 S.C.R. 411	s. 7 – principles of fundamental justice – While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice [para. 63]
29.	*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199	s. 91(27) – federal criminal law power – This Court upheld the constitutionality of legislation that criminalized an ancillary activity without also criminalizing the underlying activity or "evil." [paras. 50, 210-211]
30.	*Miron v. Trudel*, [1995] 2 S.C.R. 418	s. 24(1) – remedy – Lamer C.J. suggested that an order of suspension of invalidity might be coupled with individual relief in the form of a "constitutional exemption" to the applicant who has suffered the Charter violation and has initiated court proceedings to obtain Charter relief. [para. XCIX]
31.	*R. v. Heywood*, [1994] 3 S.C.R. 761	s. 7 – principles of fundamental justice – Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court. [p. 793]
32.	*R. v. Levogiannis*, [1993] 4 S.C.R. 475	s. 7 – principles of fundamental justice – The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society [p. 486]