No. S112688
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Party pursuant to the *Constitutional Question Act*, R.S.B.C. 1996, c. 68

AND:

FAREWELL FOUNDATION FOR THE RIGHT TO DIE (Represented by Russel Ogden, Erling Christensen, Laurence Cattoire, John Lowman and Paul Zollmann), THE CHRISTIAN LEGAL FELLOWSHIP, CANADIAN UNITARIAN COUNCIL, EUTHANASIA PREVENTION COALITION and EUTHANASIA PREVENTION COALITION – BRITISH COLUMBIA and AD HOC COALITION OF PEOPLE WITH DISABILITIES WHO ARE SUPPORTIVE OF PHYSICIAN-ASSISTED DYING (As Represented by Jeanette Andersen, Margaret Birrell, Donald Danbrook, Michelle Des Lauriers, Zofja (Zosia) Anna Ettenberg, Craig Langston, and Paul A. Spiers)

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[Submissions re *Bedford v. Canada (Attorney General)* and *Stare Decisis*]

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WRITTEN SUBMISSIONS OF THE PLAINTIFFS

THE *BEDFORD* DECISIONS AND *STARE DECISIS*

1. The Attorneys General in this case have taken the position that this Court is bound by *Rodriguez* and the principle of *stare decisis*.

2. The Plaintiffs submit that, even should this Court find the decision of the Ontario Court of Appeal in *Bedford* persuasive on the general law of *stare decisis* (and we take issue with some aspects of that judgment in this respect), none of the constitutional questions raised by the Plaintiffs are, in actuality, foreclosed by *stare decisis* in the circumstances of this case.

***Bedford v. Canada (Attorney General)*, 2012 ONCA 186 [*Bedford_CA*]**

3. We will first address the extent to which the doctrine of *stare decisis* as articulated in *Bedford_CA* arises in this case as a result of *Rodriguez*. Second, to the limited extent it does apply, we will address the issue of whether the Ontario Court of Appeal correctly articulated the law of *stare decisis* in *Bedford_CA*.

I. *Bedford_CA* Analysis

4. *Bedford_CA* makes clear that it is important to delineate between the binding and non-binding statements of a court, and that the threshold question for a trial court with respect to *stare decisis* is: what did *Rodriguez* actually decide?

***Bedford_CA*, paras. 56-60**

5. Issues that fall outside the scope of what was decided by *Rodriguez* (i.e. whether the life or liberty interest are infringed and whether any s. 7 deprivation accords with the principles of fundamental justice of overbreadth, gross disproportionality and/or equality) are not covered by the doctrine of *stare decisis*.

***Bedford_CA*, paras. 52, 75**

6. Issues that fall within the scope of what was decided by the earlier decision *may* or *may not* be covered by *stare decisis*. With regard to these issues, the Court must further consider whether there has been a significant change in the relevant law since *Rodriguez*.

7. When the Supreme Court of Canada significantly alters its prior conception of a s. 7 principle of fundamental justice (i.e., arbitrariness) or effectively alters the *Oakes* analysis (e.g., by recognizing the third proportionality step as an independent one with its own analytical framework), the Supreme Court of Canada is also implicitly indicating that the constitutional analyses carried out in its own prior decisions are no longer exhaustive, and thus no longer definitive.

8. In such circumstances – that is, both when a trial court is faced with issues not dealt with in previous cases and when a trial judge is faced with issues that engage areas of the law that have been significantly altered – a trial judge is not merely entitled but obliged to make a decision applying the "new law" to the facts as a matter of first instance. In so doing, the trial judge does not "reconsider" points of law already definitively decided, but rather creates a trial level decision on issues of first instance.

9. Applying the law as it has been developed in the manner outlined above is not only the proper role of a trial court, it is a course of action that is itself consistent with the values that underlie *stare decisis*. That is, the rationales of consistency, certainty, predictability in the law and sound judicial administration are promoted when a trial court applies the law as it has been set out in the higher court's most recent decisions.

***Bedford_CA*, para. 56**

10. The decision of the *Bedford_CA* Court in relation to the *Charter* s. 7 challenges to the bawdy house and communicating provisions, which were being raised as matters of first instance, is confirmatory of this approach:

> **52** As we will explain, we conclude that the application judge did not err in considering whether or not the bawdy-house and communicating provisions violate s. 7 of the *Charter*. The reason is that both the legal issues raised, and the legal framework to be applied, are different now than they were at the time of the *Prostitution Reference*. By contrast, we conclude that the application judge erred in reconsidering whether or not the communicating provision is an unjustified infringement of s. 2(b) of the *Charter*. The Supreme Court of Canada definitively[1] decided this issue in the *Prostitution Reference*, and only that court may revisit it.

[1] As set out below, the plaintiffs in *Bedford* did not argue that there had been a significant change in the s. 1 legal framework following the *Prostitution Reference*. Such an argument is made in this present case.

***Bedford_CA*, para. 52 (emphasis added)**

A. Threshold Question - What Did *Rodriguez* Decide?

11. With respect to s. 7 of the *Charter*, it is too broad a reading of the majority decision in *Rodriguez* to say the Supreme Court of Canada found that s. 241(b) of the *Criminal Code* was consistent with s. 7 of the *Charter*.

***Bedford*, paras. 62-63**

***R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76**

12. The majority in Rodriguez determined only the following specific points:

a. that s. 241(b) of the *Code* engaged the right to security of the person under s. 7;

b. that the resulting deprivation of security of the person accorded with the principle of fundamental justice requiring that laws not be arbitrary; and

c. assuming that s. 241(b) violated the s. 15 right to equality, that this s. 15 violation could be justified under s. 1 of the *Charter*.

B. Section 7

Section 7 Interests at Issue

13. In *Rodriguez*, it was asserted that s. 241(b) of the *Code* infringed Ms. Rodriguez's s. 7 rights to liberty and security of the person.

***Rodriguez*, para. 125**

14. In *Rodriguez*, Sopinka J. for the majority, held that s. 241(b) impinges on security of the person. The doctrine of *stare decisis* applies to this conclusion. Although the majority considered life and autonomy as animating values in s. 7, it did not address the question whether s. 241(b) (or any of the other Impugned Provisions at issue in this case) infringed the right to life or liberty.

***Rodriguez*, paras. 128-137**

15. In the present case, the Plaintiffs assert that s. 241(b), and the other Impugned Provisions, infringe each of the s. 7 rights, including the right to life.

16. *Bedford_CA* makes clear that s. 7 interests are to be treated as distinct claims and a judgment that deals with s. 7 will only be binding to the extent that the particular s. 7 right is considered. The silence of the Court on independent interests cannot preclude future consideration of those interests by a court of first instance.

***Bedford_CA*, paras. 64-66**

***R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*], para. 13 (per Beetz J.)**

17. Further, a deprivation of one s. 7 interest may be upheld as against a particular principle in circumstances where the deprivation of a different s. 7 interest would not accord with that same principle. The Plaintiffs submit that where more than one s. 7 interest is impacted, the combined deprivations can have a synergistic effect for purposes of the principles of fundamental justice (and also for purposes of s. 1 analysis).

***Morgentaler*, para. 137 (per Beetz J.)**

18. Thus, specific s. 7 interests must have been considered as against specific principles of fundamental justice in order for there to be a binding determination, for purposes of *stare decisis*, as to whether that combination accords with fundamental justice. *Rodriguez* provides no authority on whether s. 241(b)'s infringement of the life or liberty interest or a combination of s. 7 interests, is arbitrary, as *Rodriguez* did not address these points.

***Bedford_CA*, paras. 96, 144**

New Principles of Fundamental Justice

19. The following principles of fundamental justice were not considered by the *Rodriguez* Court in 1993 because they had yet to be recognized: (a) that laws not be overbroad; (b) that laws not be grossly disproportionate; and (c) that laws operate equally on individuals. All three of these principles are advanced in this case. *Rodriguez* offers no binding authority with respect to any interest/principle combinations involving these principles.

***Rodriguez*, paras. 147-75**

***Bedford_CA*, paras. 52, 68**

Significant Evolution of a Recognized Principle of Fundamental Justice: Arbitrariness

20. In *Bedford*, the Ontario Court of Appeal stated that "the jurisprudence on arbitrariness is not entirely settled." The Court considered the ambiguity arising from *Chaoulli* as to "whether a more deferential standard of inconsistency, or a more exacting standard of necessity, should drive the arbitrariness inquiry." In light of the equal split in the justices expressing a view in *Chaoulli*, the Ontario Court of Appeal concluded that the more conservative test from *Rodriguez* continued to apply.

***Bedford_CA*, paras. 146-47**

21. Even if this Court accepts that the Court of Appeal in *Bedford_CA* was correct to consider itself bound by the more conservative approach to arbitrariness with respect to the issue of necessity, that Court's reasoning as to the state of the law on arbitrariness was limited by the case law it was asked to consider in this regard. In the present case, the Plaintiffs assert the existence of a substantial change in the law on arbitrariness based on Supreme Court of Canada decisions not considered in *Bedford*.

22. In particular, the Plaintiffs take the position that the following significant developments have taken place regarding arbitrariness. In *Malmo-Levine*, the Supreme Court of Canada made it clear that societal interests have no role to play in the balancing of interests under s. 7. Perhaps of even greater significance is the decision of *A.C.*, where the majority and dissenting reasons both recognized that a law that is arbitrary in its *application* to the challenging group (as opposed to arbitrary in relation to its broader target group) is "inherently arbitrary."

***R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, paras. 96-99**

(see Plaintiff's Rule 9-7 Written Submissions dated December 1, 2011, paras. 23-26)

***A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30 [*A.C.*], para. 114 (per Abella J.) and paras. 222-23 (per Binnie J, in dissent)**

(see Plaintiff's Rule 9-7 Written Reply dated December 16, 2011 ("Plaintiff's Written Reply"), paras. 113-129)

23. In *A.C.*, the majority of the Supreme Court of Canada held that if the statutory scheme in question set up an irrebuttable presumption of incapacity for those under 16 years of age, it would have been arbitrary. Binnie J. found that the statutory scheme *did* set up such a presumption and was therefore arbitrary. In the present case, not only does the law not allow a

perfectly capable adult of deciding whether to seek medical assistance with death, but it does not allow anyone to try to persuade a court or any other competent body that such a death is in his or her best interest. The Impugned Provisions set up an irrebuttable presumption of incapacity that would offend not only Justice Binnie but also the majority in *A.C.* This approach to the doctrine of arbitrariness simply cannot be reconciled with the approach of the majority in *Rodriguez.*

24. Likewise in *PHS_BCCA*, the law was found to be arbitrary in its *application* to the specific individuals, and that finding was specifically noted without disapproval by the Supreme Court of Canada.

PHS Community Services Society v. Canada (Attorney General) (2008), 293 D.L.R. (4th) 392, 2008 BCSC 661; upheld on appeal (2010), 314 D.L.R. (4th) 209, 2010 BCCA 15, para. 69

(see Plaintiff's Written Reply, para. 125)

PHS Community Services Society v. Canada (Attorney General) (2011), 336 D.L.R. (4th) 385, 2011 SCC 44, paras. 108-09

25. These developments, which the Plaintiffs say constitute a significant and recognized change in the law regarding arbitrariness since the time of *Rodriguez*, were not raised to the Court of Appeal's attention in *Bedford*. If this Court is satisfied, based on more current caselaw, that the Supreme Court of Canada has either implicitly overruled its statements about arbitrariness in *Rodriguez* (in *Malmo-Levine*) or recognized a further way in which the principle that laws not be arbitrary may be engaged (in *A.C.* and *PHS*), this Court should apply the Supreme Court's more recent articulation of arbitrariness.

26. Further, a lower court that is faced with conflicting decisions by a higher court and is unable to determine that the latter was intended to overrule the former, is entitled to "act on [its] own opinion" in choosing the *ratio decidendi* it finds more convincing. In the face of an evenly divided higher court (and, importantly, an evenly divided court that consciously, explicitly and intentionally left the matter unsettled), it is submitted that the lower court must return to first principles and decide which of the two competing Supreme Court of Canada decisions are best supported. The Plaintiffs submit that the reasoning in *A.C.* is not only the more recent, but also the more compelling and more applicable to the arguments advanced in this case.

Regina v. Dennis and Dennis (1974), 56 D.L.R. (3d) 379 (BC Prov.Ct.), paras. 11-18

see also, by analogy, _Baker v. The Queen_, Privy Council Appeal No. 22 of 1975, p. 9

Section 7 and Rodriguez

27. The *Rodriguez* decision considered only one s. 7 interest (security of the person) and one principle of fundamental justice (arbitrariness). The combinations of s. 7 interests and principles of fundamental justice raised for the first time in the present case fall outside the scope of *stare decisis*. These combinations include:

a. security of the person and overbreadth;

b. security of the person and gross disproportionality;

c. security of the person and equality;

d. liberty and each principle of fundamental justice raised;

e. life and each principle of fundamental justice raised; and

f. any combination of life, liberty and/or security of the person and each principle of fundamental justice.

28. Further, as there has been a substantial change in the law regarding arbitrariness, we submit that it is also open to this Court to reconsider security of the person and arbitrariness as a s. 7 combination. While this is the same combination addressed in *Rodriguez*, the doctrine of arbitrariness has changed, making the issue of security of the person as measured against the re-articulated doctrine of arbitrariness a question of first instance.

C. Section 1

Section 1 Analysis Must Correspond to Specific Violation Found

29. The majority of the *Rodriguez* Court conducted a s. 1 analysis with respect to an assumed violation of s. 15 only (and not with respect to any breach of s. 7).

30. A s. 1 analysis is specific to the right the violation of which is sought to be justified under the analysis. That this correspondence is essential is clear in the Supreme Court of Canada's description of the proportionality part of the *Oakes* test:

> **70** Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

***R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], para. 70 (emphasis added)**

31. This specificity is also illustrated by the recognized proposition that not all *Charter* right violations are equally capable of being justified under s. 1 and, in particular, by the accepted fact that s. 7 violations will be nearly impossible to justify. The Supreme Court of Canada has consistently indicated that it would be a rare occasion when s. 1 could be applied to cure a breach of the principles of fundamental justice, and that such occasions would likely involve emergency situations.

***Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, para. 83**

***New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, para. 99**

***Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 78**

***Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9, para. 66**

32. The Supreme Court of Canada has also indicated that a s. 7 violation involving a breach of the principle that laws not be overbroad would appear to be incapable of s. 1 justification, given the minimal impairment requirement under the s. 1 analysis.

***R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46, para. 46**

***R. v. Heywood*, [1994] 3 S.C.R. 761, para. 69**

33. Thus, it is possible for a statutory provision to be justified under s. 1 with respect to its violation of one *Charter* right, while the same provision's separate violation of a different

Charter right is not justifiable. For example, in the Polygamy Reference, s. 293 of the *Criminal Code* was found to violate both s. 2(a) (freedom of religion) and s. 7 (liberty) of the *Charter*. Under the s. 1 analysis, Bauman C.J. found the s. 2(a) violation to be justified, whereas the s. 7 violation was not saved under s. 1. It should be noted, in particular, that even though s. 293 of the *Code* was found to be minimally impairing of the s. 2(a) right, s. 293 was found to be overbroad for purposes of the s. 7, and that overbreadth finding rendered s. 293 incapable of justification under s. 1.

***Reference re: Criminal Code of Canada*, 2011 BCSC 1588, paras. 1329-57**

34. Similarly, in *Bedford_CA*, even though the Court unanimously held that the doctrine of *stare decisis* applied to the s. 1 analysis from the *Prostitution Reference* for purposes of the s. 2(b) violation caused by the communication provision, the justices who concluded that there was also a s. 7 violation under the communication provision (MacPherson and Cronk, JJA), went on to specifically conclude that the trial judge had correctly concluded that the communication provision was "unconstitutional." It is implicit in that finding that MacPherson and Cronk JJA did not regard the s. 1 analysis done under the *Prostitution Reference* regarding the s. 2(b) violation to foreclose the trial judge from carrying out a separate s. 1 analysis, based on the *Bedford* record, with regard to the s. 7 violation.

***Bedford_CA*, para. 374**

***Bedford v. Canada (Attorney General)* (2010), 327 D.L.R. (4th) 52, 2010 ONSC 4264 [*Bedford_ONSC*], paras. 440-41**

35. Notably, the three justices who disagreed that the communication provision resulted in a s. 7 violation, did not disapprove of this part of the minority decision, notwithstanding their reasons given on the doctrine of *stare decisis* with regard to s. 1 analysis and the s. 2(b) violation. Further, to the extent that these three justices carried out an analysis of whether the communication provision breached s. 7, they were presumably prepared to engage in a s. 1 analysis specific to that s. 7 violation, as otherwise the existence of any s. 7 violation would have been moot in light of *Prostitution Reference*.

36. If this Court decides that there is a violation of s. 7, then there is no binding precedent from *Rodriguez* on the issue of s. 1 and it falls to this Court to carry out a s. 1 analysis specific to

that violation. That s. 1 analysis must be based on the current legal framework for s. 1 analysis (see below), but it must also be based on the record before the Court in the present case.

37. If this Court finds a violation of s. 15 alone, then it should still revisit the s. 1 analysis conducted by the majority in *Rodriguez* both because there has been a change in the law under s. 1 since *Rodriguez* was decided and, as outlined in the second half of this argument, because of the radically different evidentiary record available here as compared to that before the court in *Rodriguez*.

Evolution of the Section 1 Analysis

38. As noted above with respect to s. 7, in *Bedford_CA,* the Ontario Court of Appeal recognized that a change in legal framework entitles (and we would say, obliges) a trial court to provide a decision applying the new framework.

39. The Plaintiffs say that a further and most significant development in the law under s. 1 is with regard to the final step of the proportionality arm of the *Oakes* test. This significant change in the law was not raised in argument in *Bedford*.

***Bedford_CA*, para. 52**

40. The development of the law on this point was expressly recognized in *Hutterian Brethren*. The Court's statements in that case built upon earlier statements in *Dagenais v. Canadian Broadcasting Corporation*, where the Court said:

> **92** … Nonetheless, even if the importance of the **objective itself** (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual **salutary effects** of the legislation will not be sufficient to justify these negative effects.
>
> …
>
> **95** In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied, and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would, therefore, rephrase the third part of the *Oakes* test as

> follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, **and there must be a proportionality between the deleterious and the salutary effects of the measures**.
>
> ***Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, paras. 92, 95 (per Lamer C.J.) (bold emphasis in original, underline emphasis added)**

41. In *Hutterian Brethren*, the Supreme Court noted that notwithstanding the distinctive role and importance of the third step of the proportionality arm, it was often not used or regarded as redundant:

> **75** Despite the importance Dickson C.J. accorded to this stage of the justification analysis, it has not often been used. Indeed, Peter W. Hogg argues that the fourth branch of *Oakes* is actually redundant: *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.12. He finds confirmation of this view in the fact that he is unable to locate any case in which this stage of the analysis has been decisive to the outcome. In his opinion, this is because it essentially duplicates the analysis undertaken at the first stage, pressing and substantial objective. If a law has an objective deemed sufficiently important to override a *Charter* right and has been found to do so in a way which is rationally connected to the objective and minimally impairing of the right, Hogg asks rhetorically, how can the law's effects nonetheless be disproportionate to its objective? In his view, a finding that a law's objective is "pressing and substantial" at the first stage of *Oakes* will *always* produce a conclusion that its effects are proportionate. The real balancing must be done under the heading of minimal impairment and, to a much more limited extent, rational connection.
>
> **76** It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis - pressing goal, rational connection, and minimum impairment - could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak explains:
>
> > Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right.... It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]
>
> In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing

> between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.
>
> **77** The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:
>
> > The third stage of the proportionality analysis performs a fundamentally distinct role.... The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as possible **given the validity of the legislative purpose**. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]
>
> ***Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37 [*Hutterian Brethren*], paras. 75-77 (bold emphasis in original, underline emphasis added)**

42. In light of the Supreme Court's recognition that courts had failed to recognize the final step as a stand-alone measure of proportionality in the past, it is of assistance to look at the *Rodriguez* majority's reasoning on the point:

> **188** The foregoing is also the answer to the submission that the impugned legislation is overbroad. There is no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose; first, because the purpose extends to the protection of the life of the terminally ill. Part of this purpose, as I have explained above, is to discourage the terminally ill from choosing death over life. Secondly, even if the latter consideration can be stripped from the legislative purpose, we have no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death.
>
> **189** I wholeheartedly agree with the Chief Justice that in dealing with this "contentious" and "morally laden" issue, Parliament must be accorded some flexibility. In these circumstances, the question to be answered is, to repeat the words of La Forest J., quoted by the Chief Justice, from *Tétreault-Gadoury v.*

> *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, whether the government can "show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment". In light of the significant support for the type of legislation under attack in this case and the contentious and complex nature of the issues, I find that the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. This satisfies this branch of the proportionality test and it is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable.
>
> **190** It follows from the above that I am satisfied that the final aspect of the proportionality test, balance between the restriction and the government objective, is also met. I conclude, therefore, that any infringement of s. 15 is clearly justified under s. 1 of the *Charter*.

***Rodriguez*, paras. 188-90 (emphasis added)**

43. With respect, it is patent that the majority in *Rodriguez* did not apply the final step of the proportionality analysis in the manner subsequently recognized as correct by the Supreme Court of Canada. The reasons given in *Rodriguez* expressly indicate that the majority considered its finding on the third step to flow *inevitably* from its conclusions on the first and second steps (making the third step redundant - an approach specifically disapproved of in *Hutterian Brethren*). It is also clear that the *Rodriguez* majority's analysis on this third step involved absolutely no consideration of "whether the benefits which accrue from the limitation are proportional to its deleterious effects."

44. The Plaintiffs submit that the *Rodriguez* majority clearly did not carry out the final step of the proportionality analysis in accordance with the approach subsequently mandated by the Supreme Court of Canada in *Hutterian Brethren*. Thus, notwithstanding that a s. 1 analysis was conducted in *Rodriguez* with regard to s. 15, that analysis cannot be considered definitive and the doctrine of *stare decisis* does not preclude this Court from conducting its own analysis at least with respect to the final step of s. 1. In the event that this Court concludes that there is s. 15 violation, the Court will then be obliged to carry out a s. 1 analysis for the final step of the proportionality analysis and to do so on the basis of the factual record before the Court.

II. *Bedford* was Wrongly Decided on the Issue of *Stare Decisis*

45. This Court is, of course, not bound by the decision of the Ontario Court of Appeal. Whether this Court does or does not follow that Court's decision depends upon how persuasive it is.

46. In *Bedford_CA*, the Ontario Court of Appeal held that the application judge erred in reconsidering whether or not the communicating provision was an unjustified infringement of s. 2(b) of the *Charter*. The reason for this conclusion was that the Supreme Court of Canada had decided this issue in the *Prostitution Reference*, and the Ontario Court of Appeal found that the application judge erred in considering that an evolution in legislative facts was sufficient to trigger a reconsideration of constitutional issues (in that case a reconsideration of whether the communicating provision of the *Code* infringes s. 2(b) of the *Charter* and whether that infringement was saved by s. 1 of the *Charter*) by lower courts.

***Bedford_CA*, paras. 52, 83**

47. The Plaintiffs respectfully submit that the Court of Appeal's decision in *Bedford_CA* regarding the legal significance of a change in legislative facts is incorrect. It both ignores the overriding significance of s. 52 of the *Constitution Act, 1982*, the significance of the factual matrix to a *Charter* analysis, and misapplies the doctrine of *stare decisis* and a proper understanding of *the ratio decidendi* of a case.

48. Section 52 of the *Constitution Act, 1982* provides:

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

49. The significance of this provision is that courts that have jurisdiction to interpret and apply a law *must* determine whether such a law is unconstitutional. Any law that is inconsistent with the *Constitution* is, to the extent of the inconsistency, of no force and effect. No government actor – including the judiciary – can apply an unconstitutional law, and, subject to an express contrary intention, any tribunal with authority to consider questions of law is presumed to have the jurisdiction to assess related constitutional questions. In *Conway* the Supreme Court of Canada made this point about constitutional supremacy: "administrative

tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority - and duty - to consider and apply the Constitution, including the *Charter*, when answering those legal questions."

***R. v. Conway*, [2010] 1 S.C.R. 765, 2010 SCC 22, paras. 49-77 (emphasis added)**

50. This does not mean that the doctrine of *stare decisis* has no role at all to play in constitutional cases. It does, however, mean that constitutional cases are not exactly the same as non-constitutional cases. Further, the point at which constitutional cases are most different from others is in the *Charter* context and, within that context, at the s. 1 stage of analysis.

51. *Charter* cases and particularly those decided under s. 1 are different from other kinds of litigation in the following respects: they are never determined on adjudicative facts alone and they are never limited in impact to their immediate parties.

52. The Supreme Court of Canada would not have repeatedly emphasized the importance of putting forward a full factual matrix and appropriate context in *Charter* litigation, if it was not a driving consideration in every decision made under the *Charter*. The central importance of this factual and contextual matrix is also the reason why *Charter* cases can only be binding to the extent they are based on what is fundamentally the same factual matrix

see e.g. *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, paras. 9-11

***British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21, para. 28**

***Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9, paras. 193-94**

***Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, paras. 17-19, 47**

53. In the result, *Charter* decisions have unique characteristics relevant to the issue of *stare decisis*. A s. 1 analysis, in particular, will always have built-in potential for obsolescence. As a result they can be undermined by material and significant changes in surrounding legislative and social facts relevant to their legal analysis. Second, constitutional law affects people - the people of Canada, not merely the parties to the litigation - in a *fundamental* manner. There can be no better illustration than this case: the *Charter* can touch upon matters of life and death. There can be no better illustration of the fact that constitutional justice delayed, is justice denied.

54. Accordingly, and in light of s. 52 of the *Constitution*, the Plaintiffs submit that the approach taken by the trial judge in *Bedford_ONSC* was correct. In circumstances where a breach of the *Charter* has been previously found, but upheld as justified under s. 1, and a trial court is satisfied that the relevant legislative and social facts underpinning the present case are materially and significantly different from those that were relied upon by an earlier but higher court to justify the law, the trial court has an obligation to determine whether the law is still constitutional. Appellate courts can then weigh in. This is the only approach that can reconcile s. 52 with the doctrine of *stare decisis*.

55. The Ontario Court of Appeal came to exactly the opposite conclusion when it held that "the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation." With respect, we do not understand why this is so since that seems to have the tail of *stare decisis* wagging the dog of s. 52.

56. The doctrine of *stare decisis* and the determination of what is the *ratio decidendi* is respected by the approach we advance here since that principle not only describes "*the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision*" but it "is generally rooted in the facts."

***Bedford_CA*, paras. 57-58**

57. If the process of judicial reasoning is fundamentally different because of different jurisprudential developments such that the doctrine of *stare decisis* does not apply, how could it be that it applies when the process of judicial reasoning is fundamentally different because of fundamentally different facts - especially when the process of judicial reasoning is "rooted in the facts"? If this is not the case in general, then we submit that it must certainly be the case when the earlier decision turned on a s. 1 justification.

58. Yet the Ontario Court of Appeal has come to a very different conclusion which we submit on close scrutiny is simply not persuasive.

> **83** In our view… Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.

> **84** If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. It would be particularly problematic in the criminal law, where citizens and law enforcement have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court. Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.
>
> ***Bedford_CA*, paras. 83-84**

59. We agree that a lower court should not be entitled to ignore "authoritative holdings from the Supreme Court on the very points in issue," but that begs the question of when and in what circumstances a Supreme Court decision can be regarded as authoritative. Where the Supreme Court's s. 1 analysis was based on a factual matrix, and a trial court is in a position to make a *finding* that the relevant factual matrix is now significantly and materially different, it makes no juridical sense to bar the trial court from proceeding to a decision based on the new facts.

60. We also agree that a lower court cannot refuse to follow a Supreme Court precedent "every time a litigant came upon new evidence or a fresh perspective from which to view the problem…". We are not proposing that this Court should consider such a step. However, if a plaintiff has succeeded in putting evidence before the court that is not merely "new" or "fresh", but rather evidence that demonstrably establishes, to a trial court's satisfaction, that the material facts from the earlier decision are no longer the facts, it is a mockery of justice and the *Constitution* to propose that the trial court simply close its eyes and push the matter up to appeal without making a decision based on the facts before it.

61. We appreciate that constitutional litigation should not "yield a garden of **annuals** to be regularly uprooted and replaced," but that would not be the appropriate metaphor were this court refuse to be bound by the Supreme Court of Canada's application of s. 1 in *Rodriguez* in this case.

62. It has been nearly **20 years** since the *Rodriguez* decision. This court made a specific finding that there was a serious issue to be tried notwithstanding *Rodriguez* before the matter proceeded to an evidentiary hearing. (Actually made in the context of the Farewell Foundation's

application for public interest standing, but we know that is why the motion was not renewed at the outset of this case.) Following that, a truly substantial evidentiary record was amassed in the hearing process. If, following consideration of that evidence, this Court is in a position to say that the evidence adduced demonstrates that the factual matrix supporting the s. 1 analysis in *Rodriguez* no longer exists, and that materially different facts now exist, this Court should be entitled to enter into that adjudicative process (and the Plaintiffs entitled to an answer to *their* case). That is hardly a process amenable to being described as the "gardening of annuals".

***Ogden v. Registrar of Companies*, 2011 BCSC 1151, paras. 59-63**

63. The Plaintiffs do not propose that a Supreme Court of Canada decision be disregarded lightly, nor, as illustrated in the paragraph above, do they suggest a process or invoke a standard that would often meet success. The Plaintiffs do, however, propose that in its effort to avoid gardening annuals, the court not fail in its duty to prune and tend the living tree that is the *Constitution.* Trial courts should not be expected to ignore dead branches, and citizens invoking their fundamental rights should not be asked to stand by patiently while trial courts willfully ignore them. Gloria, for one, does not have the time.

64. While not directly on point, the following passage from the judgment of Madam Justice Southin for the Court of Appeal in *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General),* 2000 BCCA 166, approaches the mark:

> **7** … I think it fair to say that in constitutional cases, whatever may be said about other cases, the judgment of Mr. Justice Wilson, in *Hansard Spruce Mills Limited* (1954), W.W.R. N.S. Vol. 13, is not as compelling as it would otherwise be.

65. The Plaintiffs submit that this Court can and should depart from the Supreme Court of Canada's decision in *Rodriguez* for all of the reasons set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

"Joseph J. Arvay QC"

Dated: 16 Apr 2012

Signature of
☒ lawyer for party, name
JOSEPH J. ARVAY, Q.C.
SHEILA M. TUCKER and ALISON M. LATIMER

List of Authorities

Tab	Description

Cases

1 *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181, 2009 SCC 30 **[Plaintiff's Rule 9-7 Authorities, Tab 1]**

2 *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, 2009 SCC 37 **[Plaintiff's Rule 9-7 Authorities, Tab 2]**

3 *Baker v. The Queen*, Privy Council Appeal No. 22 of 1975

4 *Bedford v. Canada (Attorney General*) (2010), 327 D.L.R. (4th) 52, 2010 ONSC 4264 **[Plaintiff's Rule 9-7 Authorities, Tab 4]**

5 *Bedford v. Canada (Attorney General)*, 2012 ONCA 186

6 *British Columbia (Attorney General) v. Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21

7 *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 **[Plaintiff's Rule 9-7 Authorities, Tab 40]**

8 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 **[Plaintiff's Rule 9-7 Authorities, Tab 41]**

9 *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222, 2009 SCC 9

10 *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 **[AGC's Rule 9-7 Authorities, Tab 10]**

11 *MacKay v. Manitoba*, [1989] 2 S.C.R. 357

12 *Nanaimo Community Bingo Assn. v. British Columbia (Attorney General)*, 2000 BCCA 166

13 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 **[Plaintiff's Rule 9-7 Authorities, Tab 45]**

14 *Ogden v British Columbia (Registrar of Companies)*, 2011 BCSC 1151 **[AGBC's Rule 9-7 Authorities, Tab 6]**

15 *PHS Community Services Society v. Canada (Attorney General)* (2008), 293 D.L.R. (4th) 392, 2008 BCSC 661; upheld on appeal (2010), 314 D.L.R. (4th) 209, 2010 BCCA 15; appeal at SCC dismissed (2011), 336 D.L.R. (4th) 385, 2011 SCC 44 **[Plaintiff's Rule 9-7 Authorities, Tab 14]**

16 *R. v. Conway*, [2010] 1 S.C.R. 765, 2010 SCC 22

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17	*R. v. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46 **[Plaintiff's Rule 9-7 Authorities, Tab 16]**
18	*Regina v. Dennis and Dennis* (1974), 56 D.L.R. (3d) 379 (BC Prov.Ct.)
19	*R. v. Henry*, [2005] 3 S.C.R. 609, 2005 SCC 76 **[AGBC's Rule 9-7 Authorities, Tab 8]**
20	*R. v. Heywood*, [1994] 3 S.C.R. 761 **[Plaintiff's Rule 9-7 Authorities, Tab 17]**
21	*R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74 **[Plaintiff's Rule 9-7 Authorities, Tab 19]**
22	*R. v. Morgentaler*, [1988] 1 S.C.R. 30 **[Plaintiff's Rule 9-7 Authorities, Tab 20]**
23	*R. v. Oakes*, [1986] 1 S.C.R. 103 **[AGC's Rule 9-7 Authorities, Tab 29]**
24	*Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486 **[AGC's Rule 9-7 Authorities, Tab 38]**
25	*Reference re: Criminal Code of Canada*, 2011 BCSC 1588 **[Plaintiff's Rule 9-7 Authorities, Tab 21]**
26	*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 **[Plaintiff's Rule 9-7 Authorities, Tab 24]**
27	*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 **[AGBC's Rule 9-7 Authorities, Tab 12]**

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28	*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 **[Plaintiff's Rule 9-7 Authorities, Tab 27]**
29	*Constitution Act, 1982*, s. 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 **[Plaintiff's Rule 9-7 Authorities, Tab 36]**
30	*Criminal Code*, R.S.C. 1985, c. C-46, s. 241(b) **[AGBC's Rule 9-7 Authorities, Tab 15]**