Court of Appeal File No. CA040079

COURT OF APPEAL

ON APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE SMITH OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED JUNE 15, 2012

BETWEEN:

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

RESPONDENTS/APPELLANTS ON CROSS APPEAL
(Plaintiffs)

AND:

ATTORNEY GENERAL OF CANADA

APPELLANT/RESPONDENT ON CROSS APPEAL
(Defendant)

RESPONDENTS' FACTUM

Counsel for the Appellant

Donnaree Nygard, BJ Wray and Melissa Nicolls
Department of Justice Canada
900 – 840 Howe Street
Vancouver BC V6Z 2S9
Tel: 604.666.3049 Fax: 604.775.5942

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

Joseph J. Arvay, Q.C. and Alison M. Latimer
Arvay Finlay
1320 - 355 Burrard Street
Vancouver BC V6C 2G8
Tel: 604.689.4421 Fax: 1.888.575.3281
-and -
Sheila M. Tucker
Davis LLP
Suite 2800 Park Place
666 Burrard Street
Vancouver BC V6C 2Z7
Tel: 604.643.2980 Fax: 604.605.3781

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666 Burrard Street
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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

May 20, 1993	A majority of the SCC in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 finds that Ms. Rodriguez's rights to liberty and security of the person are infringed by the criminal prohibition on assisted dying but the infringement accords with the principle of fundamental justice that laws not be arbitrary. The majority assumes her equality rights are infringed, but finds any s. 15 infringement is justified under s. 1 of the *Charter*.
November 3, 1993	Attorney General of British Columbia ("AGBC") states its *Crown Counsel Policy with respect to Assisted Suicide* which provides: "Given the complex nature of the legal issues and the evolution of palliative care, charging decisions will be made on a case-by-case basis following an examination of the facts and circumstances of each case." Crown counsel are directed to consider a list of factors, said to be consistent with the overall policy on charge assessment, reflecting two requirements for prosecution: (1) a substantial likelihood of conviction; and (2) that a prosecution is required in the public interest.
1994	Sue Rodriguez reportedly takes her own life with the assistance of an anonymous physician.
1997	Oregon voters affirm the right to physician-assisted suicide and the *Oregon Death with Dignity Act* is enacted, allowing terminally ill persons to obtain a lethal prescription.
1997	The Colombian Constitutional Court decriminalizes active euthanasia where performed by a physician.
2001	The Netherlands enacts laws expressly permitting and regulating euthanasia and assisted suicide. (Prior to this the Netherlands recognized a duty-based criminal defence of necessity invoked by physicians where patients experienced unbearable suffering).
2001-2002	On October 25, 2001, the Belgian Senate votes to legalize and regulate euthanasia followed by Chamber of Representatives on May 16, 2002. The Belgian *Law on Euthanasia 2002* is enacted.
2008	Washington voters pass the *Washington Death with Dignity Act* (virtually identical to the *Oregon Death with Dignity Act*).
December 5, 2008	Montana's District Court holds that under the Montana Constitution a competent, terminally ill patient has the right to physician assistance in dying and no limit is justified.

December 2, 2009	The Supreme Court of Montana affirms the decision below on statutory interpretation basis and without engaging the Montana Constitution.
2009	The Luxembourg *Law on Euthanasia and Assisted Suicide 2009* comes into force (closely based on the Belgian statute).
July 29, 2009-January 15, 2011	Lee Carter and Hollis Johnson assist Kay Carter to have an assisted death at Dignitas in Switzerland.
April 26, 2011	Respondents file Notice of Civil Claim and Notice of Constitutional Question.
May 11, 2011	AGBC files Notice of Interest.
June 22, 2011	Attorney General of Canada ("AGC") files Response to Civil Claim.
June 28, 2011	AGs are notified that Respondents will seek a summary trial and of Respondents' proposed timelines for evidence.
June 29, 2011	AGBC files Response to Civil Claim.
August 2, 2011	Smith J. advised that all parties consent to Ms. Taylor being added as a plaintiff. Respondents request a summary trial in Nov/ Dec 2011 given the urgency of Ms. Taylor's condition.
August 3, 2011	Smith J. holds she is satisfied of the urgency and sets a four week summary trial to commence November 14, 2011, with Respondents' to deliver materials, as completed, by August 30; AGs to deliver materials, as completed, by September 30; cross-examinations to be completed by October 31; and Respondents' reply materials, if any, delivered by October 30.
August 12, 2011	Respondents file Consent Order adding Ms. Taylor as a plaintiff.
August 15, 2011	Respondents file Amended Notice of Civil Claim.
August 26-September 2, 2011	Respondents deliver their evidence.
September 1, 2011	Plaintiffs file Notice of Application to have the matter heard pursuant to Rule 9-7.
September 2, 2011	AGC files Notice of Application for Leave to Appeal re Case Plan Order of August 3, 2012.
September 6, 2011	AGC files Notice of Abandonment of Appeal.

September 15, 2011	AGBC files Amended Response to Amended Notice of Civil Claim.
September 16, 2011	AGC files Amended Response to Amended Notice of Civil Claim.
September 19 -- October 17, 2011	AGC delivers its evidence.
September 19 – October 20, 2011	AGBC delivers its evidence.
October 5, 2011	Smith J. gives AGC until October 12 to complete delivery of its evidence, with leave to seek leave to file materials after that. AGC raises cross-examination as a concern. Subsequently, all counsel identify the witnesses considered necessary for cross-examination. Respondents consent to cross-examination of all Respondent witnesses requested by the AGs. Respondents agree that the first two weeks of the scheduled trial time will be used for cross-examination before the Court. The trial is extended through to December 16.
October 13, 2011	AGC advises the Court that its evidence has been delivered with the exception of one report. Respondents consent to accept that report on October 17. (Respondents still manage to deliver their reply materials by November 2.)
October 17, 2011	Witness Peter Fenker dies from his underlying condition, ALS.
November 2-11, 2011	Cross-examinations of various witnesses outside of court.
November 8, 2011	AGs each bring an application objecting to proceeding by summary trial and seeking a full trial. AGC asserts that a full trial will enable it to get "additional evidence they would like an opportunity to get" in regard to elder abuse. AGC also indicates it is considering whether to have an expert in chief do a response report. AGC also asserts that a full trial will allow the Court to hear its witnesses in chief. Oral Reasons for Judgment of Smith J. dismissing the Rule 9-7(11)(b) applications holding that the matter should proceed "by way of summary trial with the fairly extensive modifications to the ordinary summary process that have been adopted." Smith J.

	further orders that AGs will be allowed time prior to cross-examination to introduce their witnesses and evidence in chief.
November 2011	Expert Panel of the Royal Society of Canada issues *End-of-Life Decision Making* report unanimously recommending the *Criminal Code* prohibitions on assisted suicide and voluntary euthanasia be modified to allow these practices in carefully circumscribed and monitored circumstances.
November 14-18, 21-25, 28, December 1-2, 5-9, 12-14, and 16, 2011 and April 16, 2012	The hearing of the matter proceeds. (Direct examinations and cross-examinations take place before the Court between November 14-25, 2011.)
March 2012	Select Committee of the Assemblée Nationale of Québec on "Dying with Dignity, *Mourir dans la Dignité*" issues its report recommending amendments to the relevant legislation to recognize medical aid in dying as appropriate end-of-life care under certain conditions.
April 22, 2012	Witness Nagui Morcos, who suffered from Huntington's disease, ends his life.
May 15, 2012	Witness Ian Petrie dies of his underlying condition, ALS.
June 15, 2012	Reasons for Judgment of Smith J. holding that the Impugned Laws unjustifiably infringe Respondents rights to life, liberty and security of the person and equality. The Impugned Laws are declared invalid to the extent that they unjustifiably infringe the *Charter*, with the declaratory relief suspended for one year. Smith J. grants Ms. Taylor a constitutional exemption.
July 13, 2012	AGC files Notice of Appeal and Motion for Stay.
July 25, 2012	Smith J. hears submissions on costs.
July 27, 2012	Plaintiffs file Notice of Cross-Appeal.
August 3, 2012	Hearing before Prowse JA.
	Respondents consent to an order staying the declarations of invalidity and the running of the suspension of those declarations from August 3, 2012 to the date of decision of this Court and Prowse JA. so orders.
	Respondents oppose AGC's application for a stay of Ms. Taylor's constitutional exemption.

August 10, 2012	Reasons for Judgment of Prowse JA. refusing stay of Ms. Taylor's constitutional exemption.
August 17, 2012	AGC files Notice of Application to Vary an Order of a Justice.
August 22, 2012	Witness Anthony Nicklinson who suffered from Locked-in Syndrome contracts pneumonia and dies after refusing food.
October 4, 2012	Respondent Gloria Taylor dies suddenly of a perforated colon (unrelated to ALS).
October 11, 2012	The parties adjourn the Application to Vary an Order of a Justice generally by consent on the basis of mootness.
November 1, 2012	Reasons for Judgment of Smith J. granting Respondents an order for special costs.
November 21, 2012	AGC amends Notice of Appeal to include order granting special costs.

OPENING STATEMENT

This case involves a distinct but significant group: those so unfortunate as to have irremediable conditions that cause intolerable suffering. It is about the suffering who know there are states of being literally worse than death and wish to embrace the latter in the time and manner of their choosing. It is about those who are - because their disability prevents them from acting alone - denied the autonomy and respect accorded to the able-bodied and, instead, categorically labelled incapable of judging their own best interests and either driven to end their lives pre-emptively while able or abandoned to their suffering. And it is for everyone who needs and deserves the peace of mind and improved quality of life that comes with knowing that if their suffering becomes intolerable, the option of a peaceful and dignified death will be available to them.

Currently, Canadians, able and disabled alike, are entitled to make medical decisions for themselves - e.g., to direct withdrawal of a ventilator and undergo palliative sedation - under the informed consent standard used in medical decision-making, even though the result may be death or hastened death. The ethics of these permitted end of life practices are undisputed. As found below, there are leading ethicists and medical practitioners who consider assisted dying to be ethical medical care on the same basis. Notwithstanding these facts, and the clear findings below that it is possible to identify rational, voluntary, informed and committed requests to die as such, AGC asserts that people cannot, under any regime, be permitted to make decisions for themselves about assisted dying. The inconsistency and unfairness of AGC's position is patent.

Smith J. found the impugned laws unjustly deny the suffering their rights of life, liberty and security of the person, and deny the materially physically disabled equality by criminalizing for them a decision and choice - to die to end suffering - legally allowed to others. As Smith J. found, these *Charter* violations are unjustifiable: the prohibition imposed is overbroad and thus suffering is imposed unnecessarily; the bargain struck by the law is disproportionate: the benefits are speculative and limited; the costs are concrete, extreme and imposed on the intolerably suffering. The decision below should be confirmed and its reasoning extended to allow the cross-appeal.

PART I. STATEMENT OF FACTS

1. Following two weeks of out-of-court cross-examinations and a five week hearing including two weeks of in-court direct and cross-examination, Smith J. set out comprehensive findings of adjudicative, social and legislative fact. Smith J.'s findings attract deference. Many facts were uncontested, other findings were based on Smith J.'s careful review and assessment of the reliability, credibility, objectivity and usefulness of the evidence.[1] No error has been shown in Smith J.'s consideration of the evidence or her findings.

A. ETHICS

2. Smith J. noted the competing opinions of ethicists tendered and preferred those of the Respondents': in particular, of Professors Battin and Sumner and of Dr. Angell.[2]

3. It was uncontested that autonomy, compassion and non-abandonment play a central role in medical ethics, and that physicians are ethically required, within the law, to act in their patients' best interests.[3]

4. Ethicists and practitioners widely concur that current legal end-of-life practices are ethically acceptable.[4] Some of these are similar to physician-assisted death.[5]

5. It is fairly widely accepted that when a patient is close to the end of life, and is experiencing symptoms that are severe and refractory, it is ethical practice to sedate her and maintain her in a state of deep, continuous unconsciousness to the time of death, with or without providing artificial hydration ("palliative sedation").[6]

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[1] See, e.g., Reasons, paras. 117, 309-10, 312, 344, 800, 817-8, and 1100, A.R., v. 2, 143, 204, 215; v. 3, 333, 336-7
[2] Reasons, paras. 233, 335, 339, A.R., v. 2, 179-81
[3] Reasons, paras. 310-1, A.R., v. 2, 204
[4] Reasons, paras. 312, 340, 357, A.R., v. 2, 204, 214, 218
[5] Reasons, para. 5, A.R., v. 2, 116
[6] Reasons, paras. 200, 312, A.R., v. 2, 170, 203

6. The preponderance of evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death.[7]

7. Some physicians doubt the existence of a valid ethical distinction.[8] Some of the Appellants' own witnesses doubted the existence of such a distinction.[9]

8. There are experienced, reputable and respected Canadian physicians who support legal change and state that providing physician-assisted death in defined cases, with safeguards, would be consistent with their ethical views.[10]

9. Since 1972 there has been no criminal prohibition against suicide or attempted suicide. Persons physically able to commit suicide may do so or attempt to do so; however, the amendments left the prohibition against assisted suicide in place.[11]

10. Where the patient is rational, autonomous, informed and suffering intolerably, there is no ethical distinction between suicide and assisted suicide.[12]

B. SAFEGUARDS IN OTHER JURISDICTIONS

11. As to the effectiveness of safeguards in other jurisdictions, Smith J. was rightly reticent to accept the evidence of some AGC witnesses.[13] In contrast, she found the Respondents' experts to be impressive, respected, careful, fair and objective and found their experience and areas of expertise more relevant.[14]

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[7] Reasons, paras. 234-41, 335, 1369, A.R., v. 2, 179-82, 213; v. 3, 487
[8] Reasons, paras. 257-62, 336-7, 1369, A.R., v. 2, 187-90, 213; v. 3, 487
[9] Reasons, para. 337, A.R., v. 2, 213. See e.g. Bereza #1, paras. 28-36, A.B., v. 23, 7840-3; Downing Cross, pp. 34-43, A.B., v. 40, 13600-9; McGregor Cross, Transcripts, v. 1, 104-5
[10] Reasons, paras. 6, 309-2, 344, A.R., v. 2, 116-7, 204, 215
[11] Reasons, paras. 1011, A.R. 391 The prohibition against euthanasia was also left in place under ss. 14 and 222 of the *Code*.
[12] Reasons, para. 339, A.R., v. 3, 339
[13] Reasons, paras. 377, 504, 653, 664, A.R., v. 2, 223, 260, 298, 300
[14] Reasons, paras. 415, 470, 651, 652, A.R., v. 2, 235-6, 251, 297-8

12. Smith J.'s findings regarding the safeguards in other jurisdictions are detailed below. For now, the key point is that Smith J. ultimately found that the risks involved in permitting physician-assisted death can be identified and very substantially minimized.[15]

C. DECISIONAL VULNERABILITY

13. Again, in the areas of decisional capacity and decisional vulnerability,[16] Smith J. rightly approached AGC's evidence with caution and preferred Respondents' experts.[17]

14. Smith J.'s findings are more extensively discussed below. For now, it is noteworthy that she found that, even taking into account the possibility of cognitive impairment or depression in patients and the possibility that physicians may be influenced by inaccurate assumptions about their patients, it is feasible to assess decisional capacity with high reliability.[18] Coercion and undue influence can be detected in a capacity assessment.[19] Just as physicians routinely assess the requirements for informed consent in patients seeking or refusing medical treatment, it would be feasible to apply and use informed consent for purposes of physician-assisted death.[20]

15. She held that risks relating to a patients' ability to make well-informed decisions, to assessing for presence/absence of coercion or undue influence, and to physicians' ability to assess patients' capacity and voluntariness can be very largely avoided through carefully-designed, well-monitored safeguards.[21]

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[15] Reasons, para. 883, A.R., v. 3, 357
[16] The terms "decisional capacity" and "decisional vulnerability" are detailed and defined later on in Respondents' Factum: see, para. 48
[17] As to competence, see Reasons, para. 769, A.R., v. 3, 325-6 and Reasons, paras. 795-7, A.R., v. 3, 331-2. See also para. 845 re: depression; paras. 814-5 re: voluntariness; para. 827 re: informed consent; paras. 837, 843 re: ambivalence, A.R., v. 3, 336, 338, 341-3
[18] Reasons, para. 795, 798 see also 762-4, 775, 778-790, 793, A.R., v. 3, 323-4, 327-32
[19] Reasons, para. 815, A.R., v. 3, 336
[20] Reasons, para. 831, A.R., v. 3, 339
[21] Reasons, para. 10, A.R., v. 2, 117

D. CONCLUSIONS ON FACTS

16. Respondents rely on the facts as set out by Smith J. in the Reasons. As the findings of fact below are extensive, Respondents will more specifically list the critical findings they rely upon in the context of the issues they most directly pertain to and so address their import and reliability in context.

17. AGC's factum casts as "facts" their own - very selective - account of the evidence. These assertions do *not* represent findings below, are misleading and are rejected. Respondents will address these in detail in the course of their argument below.

PART II. ISSUES ON APPEAL

18. Smith J. was correct that: (a) the doctrine of *stare decisis* does not foreclose the claims in this case; (b) the Impugned Laws[22] deprive individuals of the s. 7 right to life under the *Charter*,[23] as well as liberty and security of the person; (c) these deprivations do not accord with principles of fundamental justice; (d) the Impugned Laws violate s. 15 of the *Charter*; (e) neither the s. 7 nor s. 15 violation is or could be justified under s. 1; (f) Ms. Taylor was entitled to a constitutional exemption (this issue is now moot); and (g) the timelines and reply submissions were appropriate.

PART III. ARGUMENT

A. STARE DECISIS

19. Smith J. found some issues foreclosed by *stare decisis*, correctly found others open for determination, and declined to address certain *stare decisis* arguments as her findings on the open issues were determinative.

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[22] Respondents challenge ss. 14, 21, 22, 222, 241 of the *Criminal Code*, R.S.C., 1985, c. C-46 (collectively the "**Impugned Laws**"); A.R., v. 1, 49, 60-61

[23] *Canadian Charter Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [***Charter***]

20. Respondents submit that *none* of the constitutional questions raised by this case are foreclosed by *stare decisis* and *Rodriguez*.[24] Smith J. was: (1) in finding the life interest engaged, entitled to determine whether that particular deprivation comported with any principle of fundamental justice; (2) in finding s. 7 breached, entitled to conduct a s. 1 analysis *specific to s. 7* on the record before her, and (3) in finding the social and legislative facts were materially different from those in *Rodriguez*, entitled to conduct a s. 1 analysis for all *Charter* violations on the record before her.

i) *Stare Decisis*: Determining Issues Actually Decided

21. *Stare decisis* is founded on the *ratio decidendi*, which is "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".[25] As Smith J. held, before applying *stare decisis* it is necessary to ask: what, on the substantive reasoning, did *Rodriguez* actually decide?[26]

22. Applying this approach, Smith J. correctly concluded it is too broad to say the *Rodriguez* majority found that s. 241(b) of the *Code*[27] was consistent with s. 7 of the *Charter*[28] and that issues not decided in *Rodriguez* are not foreclosed by *stare decisis*.[29]

23. AGC incorrectly asserts that Smith J. "overruled" *Rodriguez*. Smith J. did not hold that *Rodriguez* was wrongly decided nor did she "reconsider" points decided in *Rodriguez*; rather she was *obliged* to determine those legal issues that were only recognized as such after *Rodriguez* (thus not previously determined). This approach is

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[24] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [***Rodriguez***]
[25] *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 [***Bedford_CA***], para. 57, citing *Halsbury's Laws of Canada, Civil Procedure I*, 1st ed. (Markham: LexisNexis Canada, 2008), at p. 282
[26] Reasons, para. 911, A.R., v. 3, 365. This approach was endorsed by the ONCA in *Bedford_CA*, paras. 56-60 and by the FCA in *Air Canada Pilots Association v. Kelly*, 2012 FCA 209, 100 C.C.E.L. (3d) 1 [***ACPA***], paras. 53-7 and is guided by *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 [***Henry***], paras. 53-7.
[27] *Criminal Code*, R.S.C. 1985, c. C-46 [***Code***]
[28] Reasons, para. 911-936, A.R., v. 3, 365-72; *Bedford_CA*, paras. 57-63
[29] E.g. whether: (a) the right to life is infringed; (b) any s. 7 deprivation is overbroad or grossly disproportionate; (c) s. 15 is violated; and (d) these infringements are justifiable under a complete s. 1 analysis: Reasons, para. 936, A.R., v. 3, 372.

consistent with the role of a trial court and enhances the values underlying *stare decisis* - consistency, certainty, predictability in the law and sound judicial administration.[30]

ii) The Later Recognized Section 7 Principles

24. At AGC Factum para. 25, it asserts that though the principles of overbreadth and gross disproportionality were not developed until after *Rodriguez*,[31] the majority addressed these in its s. 1 analysis for an assumed s. 15 violation. It says any difference is mere form; Respondents say the difference is substantive and significant.

a) *Charter* Analysis is Specific to the *Charter* Rights in Question

25. The *Rodriguez* majority's s. 1 analysis for an assumed s. 15 infringement does not determine whether the Impugned Laws are overbroad or grossly disproportionate under s. 7, nor whether any s. 7 breach is justifiable under s. 1.[32]

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[30] *Bedford_CA*, para. 56. *Canada v. Craig*, 2012 SCC 43 [***Craig***] is distinguishable; it addresses what a court should do where it disagrees with a higher court's reasoning on decided law. To same effect, in *ACPA* the FC held the federal provision authorizing mandatory retirement was not justified under s. 1 of the *Charter*. The issue on appeal was whether the SCC decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122 [***McKinney***] (in which a similar Ontario provision was justified under s. 1) bound the FC to the same conclusion as to the federal provision. *McKinney* and *ACPA* involved the same *Charter* provisions (s. 15 and s. 1) and thus the FCA held that *McKinney* was binding on the s. 1 issue. As s. 7 was not invoked, the intervening recognition of new principles of fundamental justice was not considered. The impact of *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, [***Hutterian***] was not raised. Like *Craig*, *ACPA* involved legal issues earlier decided.

[31] Overbreadth was recognized in *R. v. Heywood*, [1994] 3 S.C.R. 761 [***Heywood***] and gross disproportionality in *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 [***Malmo-Levine***]. At AGC Factum para. 26, it asserts overbreadth was recognized in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67. That case dealt with vagueness and discussed U.S. doctrines of vagueness and overbreadth. At paras. 32-41, the SCC held there was no "doctrine of overbreadth" in Canada, but that it could be used in balancing under the *Charter* and was relevant to minimal impairment. Thus, while overbreadth was considered as a general concept, not until 1994 was it recognized as a principle of fundamental justice and an analytical framework for assessing consistency with the principle established.

[32] Smith J. correctly carried out a s. 1 analysis specific to the s. 15 violation: Reasons, paras. 1165-1285, see esp.,1256, 1264, 1277 and 1279, A.R., v. 3, 438-68. She further held the same result would obtain under a separate s. 1 analysis conducted in respect

26. While minimal impairment and deleterious/salutary effects under s. 1 are relevant to overbreadth and gross disproportionality under s. 7, they are not mere replications.[33] The former derive their essence from the justificatory nature of s. 1 and fall to be considered in the wide evidentiary wake of social and legislative facts. Section 7, on the other hand, obliges a court to measure the law itself, in terms of its objective and in its application to the claimants, against the more precise principles of overbreadth and gross disproportionality within analytical frameworks specific to these principles.[34]

27. *Charter* analysis is contextual. Even if overbreadth and gross disproportionality merely replicated the minimal impairment and salutary/deleterious steps in the s. 1 analysis (and we say they do not), these concepts could still only be interchangeable if the s. 1 analysis in question in *Rodriguez* was conducted regarding s. 7. It was not.

28. The vitality of the correspondence between a particular violation and its justification under s. 1 is evident in the *Oakes* description of proportionality. The SCC noted "the nature of the proportionality test will vary depending on the circumstances" and in particular the measures adopted should impair as little as possible "the right or freedom in question".[35] It is also well-illustrated by the recognized proposition that not all *Charter* rights violations are equally capable of being justified under s. 1. In particular, s. 7 violations will be nearly impossible to justify absent emergency situations.[36]

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of the s. 7 violations (also noting it was questionable whether any s. 7 violation could ever be justified under s. 1): Reasons, paras. 1379-83, A.R., v. 3, 489-90

[33] At para. 28 of its factum, AGC cites *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 [***Sharpe***] for authority to the contrary. Both judgments in *Sharpe* held there was replication in that case only because of the nature of the specific breaches: ie., a s. 2(b) violation (freedom of expression/thought) and a s. 7 liberty interest in free thought: see. paras. 18 and 131. The overlap in these breaches was discussed in greater detail below by MacEachern C.J.: see, 1999 BCCA 416, [1999] B.C.J. No. 1555, paras. 245-6.

[34] *Malmo-Levine*, para. 97

[35] *R. v. Oakes*, [1986] 1 S.C.R. 103 [***Oakes***], para. 70; and *Hutterian*, para. 134 (Abella J., dissenting, but not on this point)

[36] *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, [1985] 2 S.C.R. 486, para. 83 [***Motor Vehicle Reference***]; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, para. 99 [***G.(J.)***]; *Suresh v. Canada (Minister of Citizenship and Immigration)*, , 2002 SCC 1, [2002] 1 S.C.R. 3, para. 78; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, [***Charkaoui***], para. 66

29. A provision may be justified under s. 1 with respect to its violation of one *Charter* right, while the same provision's violation of a different *Charter* right is not justifiable.[37]

b) Nature of Analysis - Issues Not Addressed in *Rodriguez*

30. The nature of the interests and the analytical frameworks established by the SCC mandate that constitutional analysis be conducted in a rigorous and exacting manner. Smith J. properly rejected the idea, raised again in this Court, that touching on a concept, however tangentially, can substitute for such analysis.

31. AGC argues the SCC addressed overbreadth and gross disproportionality in the course of its reasoning in *Rodriguez*. This argument does not withstand scrutiny.[38]

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[37] See e.g. *Reference re: Criminal Code of Canada*, 2011 BCSC 1588, paras. 1329-57 where s. 293 of the *Code* was found to violate both s. 2(a) and s. 7 of the *Charter*. The s. 2(a) violation was justified under s. 1 and the s. 7 violation was not. Even though s. 293 was minimally impairing of s. 2(a), it was overbroad for s. 7, and that overbreadth was unjustifiable under s. 1. Similarly, in *Bedford_CA*, the ONCA unanimously held that *stare decisis* applied to the s. 1 analysis justifying the communication provision's s. 2(b) violation in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [***Prostitution Reference***]. Yet the ONCA agreed with Himel J.'s conclusion that because "*Charter* interpretation is contextual", the *Prostitution Reference*'s s. 2(b)/s. 1 analysis did not foreclose consideration of whether the communication provision was consistent with s. 7 and the principles of overbreadth and gross disproportionality: *Bedford v. Canada*, 2010 ONSC 4264 [***Bedford_SC***], paras. 403, 408-10, and 426, 432-34, 441; *Bedford_CA*, paras. 290-324. Both judgments carried out their own gross disproportionality analysis as to the communication provision: *Bedford_CA*, paras. 292-324, 332-74. There would be no point in doing this if a breach of the impugned law was necessarily saved by s. 1 and *stare decisis*. The dissent found the law "unconstitutional" (para. 374) – ie. not saved by s. 1.

[38] See e.g. AGC Factum, para. 27. *Rodriguez* indicates that Ms. Rodriguez asserted the law was "over-inclusive" (para. 140); however, what is relevant is what the majority actually addressed. As Smith J. noted, the reference to over-inclusiveness was subsumed in the concept of arbitrariness: Reasons, para. 983, A.R., v. 3, 384. AGC cites *Rodriguez*, para. 62 to argue that overbreadth was considered; para. 62 is not a judicial finding or analysis. It describes reasons said to underlie opinions expressed by the House of Lords and the Law Reform Commission respectively. As to gross disproportionality, AGC asserts (para. 30) that the majority concluded the prohibition was proportionate to its objectives, citing *Rodriguez*, paras. 137, 140 and 167. None of these paragraphs demonstrate consideration of proportionality, let alone engagement in the analysis subsequently established for gross disproportionality under s. 7. AGC also cites para. 190, which does not address gross disproportionality, nor salutary and

32. Further, the sole principle of fundamental justice considered by the *Rodriguez* majority was whether the law was "arbitrary or unfair" in the sense of a facial challenge to the law's validity in every application.[39] This facial arbitrariness was the form of arbitrariness recognized in 1993. However, the Court has since recognized a second principle of fundamental justice of arbitrariness which can be fairly described as "arbitrariness as applied".[40] As developed below, this second arbitrariness principle was not considered by the *Rodriguez* majority and it was open to Smith J. to consider it.

33. Respondents also argue that equality[41] and parity[42] are principles of fundamental justice under s. 7. No such principles were advanced in *Rodriguez*.

iii) Section 7 Right to Life

34. Section 7 interests are to be treated as distinct claims and a judgment dealing with s. 7 is only binding to the extent that the particular s. 7 right was considered.[43] Silence on an independent interest cannot preclude future s. 7 consideration of that interest, or the justice of its deprivation, by a court of first instance.

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deleterious effects. As Smith J. concluded, the *Rodriguez* majority failed to perform the final *Oakes* step, instead indicating a conclusion flowed irresistibly from the preceding steps; this cannot determine the outcome under s. 7 and gross disproportionality.

[39] *Rodriguez*, para. 175; see also *Washington, et al. v. Glucksberg, et al.* (1997), 521 U.S. 702, [***Glucksberg***] pp. 28-29, Stevens J. concurring

[40] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 [***A.C.***], paras. 104-8, Abella J., 123, Binnie J., dissenting; *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15 [***PHS_CA***], para. 69

[41] Argued below but not determined by Smith J.: Reasons, para. 1290, A.R., v. 3, 469

[42] Although parity was not advanced as a principle below, the disparity in treatment between other end-of-life health care and assisted dying was squarely raised and fully argued. No injustice is likely to result should this Court consider the parity argument and the evidentiary record and findings of fact are sufficient for its consideration: *Prince George (City) v. Columbus Hotel Company (1991) Ltd.*, 2011 BCCA 218, paras. 12-4.

[43] Reasons, paras. 911, 921, 923 and 924, A.R., v. 3, 365, 368, 369; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [***Morgentaler***], para. 13, Beetz J.; *Bedford_CA*, paras. 64-66

35. The *Rodriguez* majority considered "life" an animating value in considering security of the person; it did not address the question of whether the *right* to life was engaged.[44] The use of the word "life" cannot substitute for a rigorous rights analysis.[45]

iv) *Hutterian* and the Final Step of s. 1: Salutary and Deleterious Effects

36. Smith J. correctly concluded that *Hutterian* amounted to a significant and substantive change in the s. 1 analysis.[46] In *Hutterian*, the Court noted that this final step "has not often been used" and that a leading constitutional scholar had (wrongly) opined that it was redundant.[47] Nothing in *Hutterian* supports the AGC's assertion that the SCC meant only that lower courts had failed to give meaning to the final step.

37. AGC's para. 37 conflates and mis-states Smith J.'s basis for departing from *Rodriguez*. Smith J. did not depart from *Rodriguez* on the basis of a change in social and legislative facts (though we develop below that she could have); she concluded that given that a full s. 1 analysis was not carried out in *Rodriguez*, justification under s. 1 fell outside the scope of what had been decided for purposes of *stare decisis*.

38. As observed by Smith J., each step in a s. 1 analysis provides critical context for the next.[48] It is impossible to perform the final step in isolation from the remainder.[49] Accordingly, Smith J. correctly determined that, as a result of *Hutterian*, a new s. 1 analysis was required and should be conducted on the record before her.[50] Given she

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[44] *Rodriguez*, paras. 128-37

[45] Smith J. properly noted that "life" was largely considered in the context of "sanctity of life": Reasons, paras. 921-4, A.R., v. 3, 368-9. We develop below that Smith J. correctly concluded that the right to life was engaged. That conclusion is significant for both the s. 7 and the s. 1 analysis regarding the s. 7 violation. Because the three s. 7 interests have a natural hierarchy, with life being the most critical, whether a deprivation is consistent with fundamental justice must include consideration of the interest affected.

[46] Reasons, paras. 994-5 and 997, A.R., v. 3, 388

[47] *Hutterian*, paras. 75-6

[48] Reasons, para. 1168, A.R., v. 3, 438

[49] See e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 [***Thomson Newspapers***], para. 125, Bastarache J.

[50] Reasons, paras. 997, 998 and 1168, A.R., v. 3, 388-9, 438. With respect to AGC's unfounded and surprising assertion at para. 38 that there would be a flood of cases seeking a new s. 1 analysis in accordance with *Hutterian* and this would "undermine"

was conducting a new s. 1 analysis, Smith J. was entitled to conduct her own minimal impairment and proportionality analyses (as she did).

39. Smith J. declined to consider whether, on this record, the law was rational.[51] We argue below that Smith J.'s order can also be upheld on the basis that it was not.

v) No *Stare Decisis* Where Material Change in Social and Legislative Facts

40. Finally, *stare decisis* does not apply where facts are materially different from earlier cases.[52] Often only adjudicative facts are material. However, under s. 1, social and legislative facts are material as adjudicative facts are in non-*Charter* cases. Whether the social and legislative facts are material, and the level of change that makes them sufficiently different to displace *stare decisis*, will be guided by the nature of the inquiry under s. 1.[53]

41. Section 52 of the *Constitution Act, 1982* expresses the principle of constitutional supremacy; courts must determine whether a law is unconstitutional *before* applying it.[54] This does not mean *stare decisis* has no role in constitutional cases. However, it requires careful consideration of the nature of constitutional analyses, especially under s. 1. The SCC has emphasized the import of the factual matrix in *Charter* litigation.[55]

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past *Charter* decisions, an unconstitutional law earlier upheld only because it was not subjected to a full constitutional review, ought not to be shielded from scrutiny. Revisiting a truncated analysis does not undermine that analysis; it completes it.

[51] Reasons, para. 1209 (compare para. 1204), A.R., v. 3, 440 (compare 439)

[52] It is founded on the *ratio decidendi,* which is "rooted in the facts": *Henry*, para. 57.

[53] In *Bedford_CA*, the ONCA held that Himel J. erred in reconsidering whether the communicating provision justifiably infringed s. 2(b) of the *Charter: Bedford_CA*, paras. 52, 83. This issue had been decided in the *Prostitution Reference*, and the ONCA held that an evolution in legislative and social facts was insufficient to warrant reconsideration of the s. 2(b)/s. 1 issue. (Recently followed by the FCA in *ACPA* with regard to a s. 1 analysis: *ACPA*, paras. 43-8.) With respect, *Bedford_CA* incorrectly disregards the legal significance of a change in social and legislative facts in light of s. 52 of the *Constitution Act, 1982* and the factual matrix in a s. 1 analysis.

[54] *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, paras. 49-77

[55] See e.g. *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, paras. 9-11; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, para. 28; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222, paras. 193-4;

Charter cases involving s. 1 are not determined on adjudicative facts alone. Thus, a s. 1 analysis has built-in potential for obsolescence. The binding nature of a s. 1 analysis can, accordingly, be undermined by material changes in legislative and social facts.[56].

42. An appellate court can, showing appropriate deference, review the trial court's finding of material change. If the finding is upheld, the appeal court can then review the s. 1 analysis in the usual manner. This approach reconciles s. 52 with *stare decisis* and maintains the proper role of a trial court, both constitutionally and institutionally, as a finder of facts. As Smith J. noted, it would be unusual to create a s. 1 factual record without conducting a s. 1 analysis; it is a fact and law intensive endeavour and relevance is not determined in a legal vacuum.[57] The doctrine of *stare decisis* is respected by this approach, as it is "generally rooted in the facts."[58]

Gosselin v. Quebec (Attorney General), 2002 SCC 84, [2002] 4 S.C.R. 429, paras. 17-9, 47

[56] Thus, Himel J.'s approach in *Bedford_SC* was correct. Where a *Charter* breach has been previously upheld under s. 1, and a subsequent trial court is satisfied that the legislative and social facts are now materially different, it has an obligation under s. 52 to determine whether the law is still constitutional. The ONCA held that the rule of law would be undermined if re-litigation followed changes in such facts: *Bedford_CA*, paras. 83-4. However, the imposition of a requirement for material change addresses this concern. Here, Smith J. identified evidence of material change sufficient to go to hearing: *Ogden v. Registrar of Companies*, 2011 BCSC 1151, paras. 59-63. Following that hearing, she found there had been a material change in social and legislative facts: Reasons, paras. 941-4, A.R., v. 3, 373-4. This is not an easy threshold to reach. Revisiting the few cases that meet it will not throw the system into disorder or disrepute.

[57] Reasons, para. 997, A.R., v. 3, 388. However, ultimately Smith J. found it unnecessary to decide whether a change in legislative and social facts "on its own" could justify a fresh s. 1 inquiry because she found that "significantly and materially different legislative facts, *along with a change in the legal principles to be applied*, can.": Reasons, para. 998 (emphasis added), A.R., v. 3, 388.

[58] *Bedford_CA*, paras. 57-8

B. SECTION 7

i) The Impugned Laws Deprive People of their Right to Life

43. Smith J. correctly concluded that the right to life is engaged by the effect of the Impugned Laws in forcing an earlier decision and possibly an earlier death on persons in Ms. Taylor's situation.[59] This finding was supported by unchallenged evidence.[60]

44. There is no merit to AGC's argument, raised for the first time in this Court, that there is an insufficient causal connection between the state action and the proven deprivation of life.[61] The grievously and irremediably ill may suffer and may wish to end their lives as a result. However, here the evidence established that the Impugned Laws *cause* some such people to end their lives before they otherwise would have because they would later be unable to act without the assistance the law prohibits.

45. AGC suggests that because Canada attempts to discourage and prevent suicide in general it is unfair to assert that these effects are caused by the Impugned Laws. Canada attempts to discourage and prevent drug use and addiction (*PHS*) as well; however, courts cannot ignore the actual effects of laws no matter how unintended. The *Charter* protects deprivations that occur by purpose *or effect*.

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[59] Reasons, para. 1322, A.R., v. 3, 476. AGC has not appealed Smith J.'s findings that the Impugned Laws impair Respondents' rights to liberty (including the right to non-interference with fundamentally important, personal medical decision-making) and security of the person: Reasons, paras. 1291-305, 1320-1, A.R., v. 3, 469-73, 476.

[60] Pellizzari #1, para. 7, A.B., v. 1, 329; Shapray #1, paras. 16-8, A.B., v. 1, 338; LaForest #1, paras. 39-45, A.B., v. 1, 146-147; Bracken #1, para. 18, A.B., v. 5, 1427; P. Fenker #1, para. 20, A.B., v. 6, 2101

[61] AGC Factum, para. 78-82. A similar argument was made by the Crown and rejected by this Court in *Victoria (City) v. Adams*, 2009 BCCA 563, paras. 86-9 and *PHS_CA*, paras. 255-69 and by the SCC in both *Rodriguez*, para. 128 and *Morgentaler,* paras. 22-35. Just as in each of these cases, the evidence is clear that the Impugned Laws themselves cause the deprivation in question.

ii) Principles of Fundamental Justice

46. The analysis for consistency with the principles of fundamental justice regarding arbitrariness, overbreadth and gross disproportionality centres on the measure of the law in terms of legislative objective. Thus, we begin with identification of that objective.

a) Smith J. Correctly Identified the Impugned Laws' Objective

47. Smith J. correctly found that the objective of s. 241(b) is "to protect vulnerable persons from being induced to commit suicide at a time of weakness."[62] This objective applies to the prohibition against consensual euthanasia subsumed within the Impugned Laws relating to homicide[63] and is the objective of the Impugned Laws collectively.

48. "Vulnerability" for purposes of the objective must reflect the evil the law addresses - the possibility that assistance in dying may induce someone to die against their true wishes. The relevant vulnerability is "**decisional vulnerability**".[64] Decisional vulnerability encompasses cognitive impairment, competence, voluntariness, informed consent, and ambivalence (collectively "**decisional capacity**").[65]

49. Smith J. and the parties also address "**social vulnerabilities**". These include age, sex, race, ethnicity, socio-economic status, and disability. These characteristics are relevant due to the oft-made assertion (disproved here on the evidence) that assistance will selectively disfavour patients with social vulnerabilities. In other words, the concern is that social vulnerability will increase the risk of decisional vulnerability.

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[62] Reasons, paras. 1184-90, A.R., v. 3, 443-6. This was the objective posited by both Respondents and AGBC in the Court below.
[63] In particular, to the intersection between s. 14 of the *Code* and the culpable homicide and related substantive provisions.
[64] Under AGC's argument, the term "vulnerable" is expanded to encompass everyone who might ever suffer a "wrongful death", including anyone who "regrets" the choice of death after their death: AGC Factum, para. 129; Reasons, paras. 755-8, A.R., v. 2, 322-3. Respondents disagree with this remarkable proposition.
[65] Given Respondents' position that the presence of Major Depressive Disorder (MDD) can itself be a disqualifying condition for assisted dying, Respondents' place MDD in the category of decisional vulnerability.

50. AGC wrongly attempts to broaden the objective to include: (a) reflecting state policy that the value of life should not be depreciated by allowing anyone to take another's life; (b) discouraging everyone, even the terminally ill, from choosing death; (c) guarding against negative social messaging resulting from state condoned suicide in some circumstances; (d) preventing sending the message that the lives of some are less valuable, and less worthy of protection, than others.[66]

51. The SCC has directed courts to characterize the objective of the "infringing measure" itself, noting that if the objective is stated "too broadly, its importance may be exaggerated and the analysis compromised."[67] AGC is not entitled to characterize the objective of all homicide provisions as reflecting "the value of all human life". The objective of the Impugned Laws must be framed in light of the entire *Code* and they must be given a specific objective aside from the other homicide provisions.[68]

52. Further, if AGC's proposed objectives were accepted, the Impugned Laws would improperly impose, by state force, a moral point of view not shared by all Canadians.[69] Such an objective is discordant with the principles integral to a free and democratic society.[70] AGC's proposed objectives also militate against the objective being characterized as pressing or substantial. The absolute protection of life is inconsistent with other provisions of the *Code* which justify and hence condone the taking of life.[71]

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[66] AGC Factum, paras. 41, 69

[67] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [***RJR-MacDonald***], para. 144

[68] See e.g. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 [***Vaillancourt***], paras. 9, 40. At issue was the constitutionality of the offence of constructive murder. The SCC considered how each murder provision fit into the *Code*. It did not characterize the objective of the law as AGC has here. Such a characterization would have been too general and would obviate the need to consider the provision in its larger scheme. It held: "Parliament intended to deter the use or carrying of a weapon in the commission of certain offences, because of the increased risk of death" (para. 105). This was an important objective but the infringement was still unjustified because it was not minimally impairing.

[69] Because, e.g., not all Canadians agree that the value of life is depreciated by allowing assisted death. As to the proper place of morality in criminal law: see *R. v. Butler*, [1992] 1 S.C.R. 452 **[*Butler*]**, paras. 80-5; *Malmo-Levine*, 77, 116, 121; and *Morgentaler*, para. 251-4 (Wilson J.).

[70] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [***Big M***], paras. 81-5;

[71] See e.g. *Code*, ss. 25, 33(2), 34(2)-35, 37, 39-41

53. AGC's additional so-called objectives are better characterized as rationales or "explanations", not objectives of the legislation. These fall to be considered at s. 1.[72]

b) The Impugned Laws are Arbitrary

54. In considering arbitrariness, the first step is to identify the law's objectives.[73] The "second step is to identify the relationship between the state interest and the Impugned Law."[74] There is no relationship between the objective and the Impugned Law for purposes of the second principle of arbitrariness (arbitrariness in application). The law not only effectively prohibits a capable adult from seeking medical assistance with death, it does not allow anyone to try to persuade a court or other competent body that death is in his or her best interest. In its application to Ms. Taylor, the law is arbitrary because it bears no relationship to the protection of the vulnerable.[75]

c) The Impugned Laws are Overbroad

Burden of Proof: Not Reasonable Apprehension of Harm

55. *Charkaoui* explains that claimants bear the burden, on a balance of probabilities, of showing that s. 7 right(s) are engaged *and* that the deprivation fails to accord with the principles of fundamental justice.[76] Smith J. applied the correct burden of proof and correctly rejected that Respondents must establish there is no reasonable apprehension that even one person will be harmed by anything less than a blanket prohibition.[77]

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[72] Reasons, para. 1191, A.R., v. 3, 447; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 113-14. The "evidence" AGC relies on in support of these objectives are debates concerning a bill that was not enacted. Respondents continue to object to the use to which AGC puts the recent Parliamentary debates: *Vander Zalm v. British Columbia (Minister of Finance)* (2010), 324 D.L.R. (4th) 43, 2010 BCSC 1320, para. 48.

[73] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [***PHS_SCC***], para. 129

[74] *PHS_SCC*, para. 130

[75] *A.C.*, paras. 24-25, 104-8, 165-6, 187, 223; *PHS_CA*, para. 69; *Glucksberg,* 521 U.S. 702, pp. 28-29, per Stevens J. concurring.

[76] *Charkaoui*, para. 12

[77] Reasons, paras. 1349-61, A.R., v. 3, 483-6; AGC Factum, para. 44

56. AGC misapplies the "apprehension of harm" standard. The case law makes clear that the "apprehension of harm" standard of proof applies only with respect to the existence of harm and the causal relationship between a harm and impugned law and may *only* be resorted to where the nature of the harm is such that the traditional forms of evidence of harm are not available. Here, traditional forms of evidence are available and were placed before the Court.[78]

57. Respondents concede there was evidence that harm may result from completely unregulated physician-assisted dying.[79] However, that concession does not mean that a blanket prohibition is: rationally connected, not arbitrary, necessary and proportionate. These further questions each require adjudicative and legislative facts and the burden of proof is on the appropriate party on the balance of probabilities. To the extent the legislative objective makes the reference point for these questions the harm of persons being induced to commit suicide in the absence of a genuine desire, the reference point is actual harm not the apprehension of such harm.

58. AGC uses "reasonable apprehension of harm" to impose a burden on Respondents to show something short of an absolute prohibition will avert the risk of even one death in circumstances where the individual is decisionally vulnerable.[80] This was properly rejected by Smith J. as "unrealistically exacting or precise" and as a

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[78] *Butler*, paras. 82-83, 103-08; *Sharpe,* para. 89; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, paras. 79, 81; *Malmo-Levine,* para. 136; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, paras. 10, 16, 20, 28. Respondents reject, in particular, the idea that an apprehension of pressure too subtle to be perceived would be sufficient to ground the Impugned Laws. Drs. Ganzini and Donnelly both testified that the presence of undue influence could be detected as part of the capacity assessment. Both disagreed with the suggestion that a person should be disqualified from medical decision-making based on the supposition that there may be influences so subtle as to be undetectable. As stated by Dr. Ganzini, medicine is ultimately an evidence-based endeavour. The adoption of AGC's standard in this or any other medical decision-making context would effect a dramatic shift towards paternalism in modern medicine and would fly in the face of the factual findings made by Smith J. (who accepted the evidence of Drs. Ganzini and Donnelly on this point): Reasons, paras. 803-6, 815, A.R., v. 3, 333-4, 336.

[79] However, regulation through the criminal law is not the only means of regulation. Regulation could, for example, be put in place by the medical profession itself.

[80] AGC Factum, paras. 51-52

formulation that "would effectively immunize the law from scrutiny".[81] If zero tolerance is the bar a claimant must overcome many meritorious *Charter* claims would fail.[82] It is also an inappropriate standard for health care, as was acknowledged by AGC's own witness.[83]

59. Even where apprehension of harm is an acceptable standard of proof, courts are not obliged to blindly accept, in whole or part, the state's asserted apprehension; rather, the court is obliged to consider whether the asserted apprehended risk is capable of supporting the law.[84] The state's assertion of apprehended harm is not determinative of the analysis and does not truncate the *Charter* inquiry.[85]

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[81] Reasons, paras. 1349-61, A.R., v. 3, 483-6. See e.g. *Charkaoui,* paras. 67-87. The SCC accepted that the security of Canada and the protection of intelligence sources were pressing and compelling objectives, but the Court found that alternative measures might give sufficient protection to confidential information. The less restrictive measures were not required to realize the legislative objective absolutely and perfectly in order to constitute reasonable alternatives. See also *Hutterian*, para. 55, McLachlin C.J.

[82] See e.g. *PHS* where Canada attributed to Parliament a zero tolerance for drug use. The law was saved though there was evidence of some inappropriate users of Insite. See also *Rodriguez*, para. 167 where Sopinka J. said a "blanket prohibition is preferable to a law which might not adequately prevent abuse"; "adequately" is a far cry from "absolutely". See also *Heywood*, paras. 55-6. The law was overbroad not because it extended to areas where *no children* would be, but rather to areas where children were not "likely" to be. See also *A.C.,* para. 187; risk of death or serious damage was patent in *A.C.*, yet there was no recourse to a zero tolerance approach.

[83] Pereira Cross, Transcripts, v. 3, 417:37-419:7 and Trial Exhibit 36, A.B., v. 41, 14311

[84] Respondents reject the AGC's characterization of the *Sharpe* decision, both in general and at AGC Factum paras. 44-9 in particular. In *Sharpe,* apprehension of harm was accepted as a standard of proof and the law was found to be rational: paras. 85 and 89. However, under minimal impairment the majority found the law captured two categories of material that raised "little or no risk of harm to children", indicating overbreadth: paras. 75, 99 and 101. Thus, various aspects of the asserted apprehension were found incapable of supporting the law. The overbreadth finding was made notwithstanding that Canada asserted that it considered the risk posed by the particular categories unacceptable: "the government's argument on this point is, in effect, that it is necessary to prohibit possession of a large amount of harmless expressive material in order to combat the small risk that some material in this class may cause harm to children": para. 101. The overbreadth was not found to be justified, but rather was saved by the "reading in" of exceptions: para. 110, 114 and 120.

[85] In *Butler*, *Irwin Toy* and *Clay*, the asserted apprehension was capable of supporting the law. That it was so in these particular cases, does not mean it will invariably be so, as is well-illustrated by *Sharpe*. As to AGC Factum para. 50, here a permissive regime

60. Accordingly, even if apprehension of harm is the appropriate standard of proof here (which is denied), AGC's assertion[86] that Smith J. was not entitled, in considering overbreadth, gross disproportionality, minimal impairment and proportionality, to assess the state's asserted apprehension and consider the risk actually involved, is incorrect. Smith J. was obliged to do this. Doing so, she concluded the evidence demonstrated that stringent permissive regulation could achieve the legislative objective "with a very high degree of certainty"[87] and to a degree accepted in other medical contexts.[88]

Test for Overbreadth

61. Smith J. articulated the correct approach to overbreadth.[89] She also recognized that "the legislative means chosen are entitled to a measure of deference".[90]

62. Citing s. 1 jurisprudence, AGC argues at para. 65 that the correct test for overbreadth under s. 7 is whether the prohibition "falls within a range of reasonable alternatives". AGC seizes on Smith J.'s articulation of the test later in the Reasons to argue she applied an overly exacting standard, but cites only part of the relevant passage which provides in full:

> [1361] In summary with respect to the burden on the plaintiffs, they must establish a deprivation of their life, liberty or security of the person in a manner not in accordance with principles of fundamental justice. 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.[91]

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predicated on eligibility as outlined in the Reasons would necessitate individual patient assessments; the concern in *Clay* about being unable to identify the vulnerable in advance is addressed by the timing and nature of the assessments required.

[86] See AGC paras. 45, 47, 49, 61 and 63.

[87] Reasons, para. 1367, A.R., v. 3, 486

[88] Reasons, paras. 1198-9, 1237 and 1240, A.R. v. 3, 448 and 457-7

[89] Reasons, para. 1339,1348, A.R., v. 3, 480, 482; *Heywood*, para. 49

[90] Reasons, para. 1343, A.R., v. 3, 481

[91] Reasons, para. 1361 (emphasis added), A.R., v. 3, 485-6

This is a correct articulation using language drawn directly from *Demers*.[92]

Impugned Laws Framed More Broadly than Necessary to Achieve Objective

63. As Smith J. held, the Impugned Laws are framed more broadly than necessary to achieve the state's objective.[93]

64. Where a law is overbroad, the principles of fundamental justice are violated because "individual's rights will have been limited for no reason".[94] AGC conceded below that the Impugned Laws have this effect when it stated: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives. Ms. Taylor may be such a person…".[95] In this Court, Canada concedes that the decision to commit suicide – even for grievous and irremediably ill people – is a "free and voluntary choice" provided the individual is able to act alone.[96]

65. While the government is entitled to a measure of deference, the more serious the impingement on life, liberty and security, the less will be accorded.[97] Where, as here, infringement of the rights to *life*, liberty *and* security of the person are made out, the range of reasonable alternatives open to Parliament is necessarily more limited.

66. In this case, Smith J. noted:

> [1365] An absolute prohibition would seem necessary if the evidence showed that physicians are unable reliably to assess competence, voluntariness and non-ambivalence in patients, or that physicians fail to understand or apply the informed consent requirement for medical treatment.[98]

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[92] Reasons, paras. 1344-6, A.R., v. 3, 481-2; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, [***Demers***], para. 43
[93] Reasons, paras. 1364-71, A.R., v. 3, 486-7
[94] Reasons, para. 1341 (citing *Heywood*), A.R., v. 3, 480
[95] Reasons, para. 1136 (quoting AGC's written submissions at trial), A.R., v. 3, 431-2
[96] AGC Factum, para. 82
[97] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, para. 131
[98] Reasons, para. 1365, A.R., v. 3, 468

67. AGC says, citing no evidence (and in contradiction to its concessions), that the wish to die and the circumstances that may make an individual vulnerable are "transitory" and that it is "difficult if not impossible, to identify in advance who requires protection and when they require it." AGC says the effectiveness of a regulated regime would be out of Parliament's control because competency assessment and the ability of physicians to overcome unconscious bias are out of Parliament's control.[99]

68. However, on extensive evidence, Smith J. found that:

a. Even taking into account possibilities of cognitive impairment or depression in patients, and that physicians may be influenced by inaccurate assumptions about patients, it is feasible for physicians to assess competence with high reliability.[100]

b. Coercion and undue influence can be detected in a capacity assessment.[101]

c. Just as physicians routinely assess the requirements for informed consent in patients seeking or refusing medical treatment, it would be feasible to require informed consent for physician-assisted death.[102]

d. It is feasible to screen out patients who are ambivalent.[103]

e. Risks relating to a patients' ability to make well-informed decisions and their freedom from coercion or undue influence and to physicians' ability to assess capacity and voluntariness can be very largely avoided through safeguards.[104]

f. There is a risk of unconscious bias about the quality of life of a disabled person; however such risk can be avoided through practices of careful and well-informed capacity assessments by qualified physicians who are alert to those risks.[105]

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[99] AGC Factum, paras. 6, 12, 51, 100-105
[100] Reasons, paras. 795, 798 see also paras. 762-4, 775, 778-790, 793; A.R., v. 3, 323-4, 327-330, 331-332
[101] Reasons, para. 815, A.R., v. 3, 336
[102] Reasons, para. 831, A.R., v. 3, 339
[103] Reasons, para. 843, A.R., v. 3, 342
[104] Reasons, para. 10, A.R., v. 2, 117

g. There is little evidence that physicians and other care-givers would, even unconsciously, respond differently to requests for assisted death from physically disabled persons as opposed to others. Even if that were the case, it is wrong to assume that even the most independent-minded, clearest thinking person with physical disabilities needs protection from the bias of doctors and caregivers.[106]

h. The risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system.[107]

69. AGC is unable to identify any flaws in these careful, well-considered and amply supported findings of fact.

70. Smith J. noted:

> [1366] 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.[108]

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[105] Reasons, para. 853, A.R., v. 3, 345. In particular, in response to AGC Factum, para. 67, there is no "logical impossibility" of overcoming unconscious bias by being alerted to the possibility of it. Smith J. did not rely on an unrealistic notion of a "perfect doctor"; she relied on evidence that established that the degree of scrutiny applied in assessing capacity for purposes of informed consent will be commensurate with the circumstances and that Canadian physicians are already in the practice of applying a high level of scrutiny to medical decisions in the context of other decisions that involve the potential to hasten death: Donnelly Affidavit #1, paras. 10-6, A.B., v. 6, 1983-5 Donnelly Affidavit #2, paras. 4-10, A.B., v. 38, 13020-22. Further, Dr. Donnelly (who, as a professor, teaches consent assessment) provided expert evidence that Canadian physicians are very diligent assessors and, in her opinion, would be especially so in relation to assisted dying and that, if a specific standard for assessing capacity was set by law for assisted dying, Canadian physicians would adhere to that standard: Donnelly Affidavit #2, paras. 26, 29 and 31, A.B., v. 38, 13024-6.

[106] Reasons, para. 1129, A.R., v. 3, 429. Smith J. found Ms. Taylor was herself such a person and allowed her to seek a physician-assisted death as a result: Reasons, paras. 15-6, 19, A.R., v. 2, 118-20. This point appears to be conceded in AGC Factum, para. 82 if the disabled person is able to act without assistance.

[107] Reasons, para. 883, A.R., v. 3, 357

[108] Reasons, para. 1366, A.R., v. 3, 486

71. AGC asserts[109] that numerous expert opinions demonstrating harms associated with physician-assisted suicide were before Smith J.[110] However, Smith J. found:

a. A number of jurisdictions either permit or do not criminalize physician-assisted dying or assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia.[111]

b. Permissive jurisdictions that regulate assisted dying have safeguards to ensure only defined categories of patients are involved and protocols are followed.[112]

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[109] AGC's Factum, paras. 53-6 illustrate Respondents' objection to AGC's assertions of "fact". AGC selects bits of evidence (incomplete and out of context) and sets these out as the basis for its argument, disregarding Smith J.'s lengthy discussion and consideration of the evidence (paras. 359-747, A.R., v. 2, 219-321) and the conclusions she reached. For e.g., AGC Factum para. 56 sets out assorted information regarding LAWER without acknowledging Smith J.'s finding that this practice is founded on cultural and historical practices that have no analogue in Canada: Reasons, paras. 679-80, 683; or her finding that LAWER *lessened* in Belgium and the Netherlands post-legalization: Reasons, para. 1241. The evidence and arguments regarding LAWER were fully canvassed below and resulted in *findings*. As AGC alleges no reviewable error in the findings, Respondents are not obliged to revisit these matters on appeal.

[110] AGC Factum, para. 54. Respondents reject that the Notice to Admit constitutes an "expert opinion". Drs. Bereza, Gallagher and Professors Frazee, Heisel and Mishara have no expertise in the efficacy of the safeguards used in foreign jurisdictions: Reasons, para. 160, A.R, v. 2, 150-61. They are not positioned to opine on the "harms associated with physician-assisted suicide" and at best can speak to the *risks* of such harms. Dr. Bereza was qualified on the issue of ethics and the passage cited arises from a question about whether assisted suicide was sometimes a response to physician helplessness for doctors who feel they have exhausted available treatment options. He noted that he had "not personally witnessed such a scenario". Further, Professors Heisel and Mishara study suicidology and suicide prevention and Smith J. found "it is problematic to conflate decision making by grievously and irremediably ill individuals about the timing of their deaths, with decision-making about suicide": Reasons, para. 814, A.R., v. 3, 336. As explained above, the evidence of Drs. Finlay, Gallagher, Hendin and Professors Heisel and Mishara was given less weight than Respondents' witnesses on issues of decisional capacity. The evidence of Baroness Finlay and Dr. Hendin, the only two witnesses cited who were at all qualified to speak to the harms associated with physician-assisted dying in other jurisdictions, was given less weight than that of Respondents' experts as explained above.

[111] Reasons, paras. 9, 363, 389-403, 455-69, 505-17, 589-93, 605-12, 613-20, A.R. 117, 220, 225-32, 247-51, 260-4, 282-3, 286-90

[112] Reasons, para. 9, A.R., v. 2, 117

c. There is no evidence from permissive jurisdictions of inordinate impact on socially vulnerable populations.[113] The empirical evidence from the Netherlands and Oregon does not support the hypothesis that physician-assisted death poses a particular risk to socially vulnerable populations.[114] Rather, it supports the proposition that a system can be designed that both permits some individuals to access physician-assisted death and protects the socially vulnerable.[115]

d. There is no evidence that health insurers in Oregon or Washington refuse to fund palliative care now that assisted death is available.[116]

e. There is no evidence that those obtaining prescriptions under the Oregon legislation are ambivalent about assisted dying.[117]

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[113] Reasons, paras. 9, 847, 1113-4, A.R., v. 2, 117; v. 3, 343, 425. Smith J. considered critiques to this research and preferred Respondents' evidence because AGC's witnesses had not themselves conducted any empirical research and Smith J. doubted Dr. Hendin's impartiality: Reasons, para. 664, A.R., v. 2, 300-1

[114] AGC erroneously states it was not possible to draw conclusions regarding the impact of assisted suicide and euthanasia on disabled individuals as such data is not collected. The accepted evidence demonstrates that while physicians were not specifically surveyed about disabled patients in the very large "death certificate" studies done in Belgium, the death certificates themselves are coded using an international coding system ("ICD 10 Codes") which allowed researchers to code what kind of diseases the patients had prior to their deaths, and that disabilities could be deduced by reference to those codes to see whether there are people with disabilities: Reasons, para. 852, A.R., v. 3, 345; Deliens Cross, Transcripts, v. 3, 489:23-490:22. The large scale death certificate studies done in the Netherlands (on which the Belgian studies were modeled) would have made the same information available to the Dutch researchers: Deliens #1, Exhibit C, p. 51 [Introduction], Exhibit J, p. 112 [Study Design], A.B., v. 13, 4351, 4412. See also Reasons, paras. 621-45, 650-2, 662- 7, A.R., v. 2, 290-298 ,300-1. The AGs chose not to cross-examine Dr. van Delden who deposed there was no evidence of higher frequency of assisted dying for socially vulnerable groups: van Delden #1, para. 18, A.B., v. 10, 3516. The AGs chose not to cross examine a number of witnesses who testified that in their own observation of the system in Oregon and Washington, there was no such disproportion: Renaud #1, paras. 3, 5, A.B., v. 1, 332; Eighmey #1, paras. 4-5, A.B., v. 6, 2092; Miller #1, paras. 3, 5; A.B., v. 9, 2889.

[115] Reasons, paras. 667, 847, 852, 1242, A.R., v. 2, 301; v. 3, 343, 345, 457-8

[116] Reasons, para. 735, A.R., v. 2, 317

[117] Reasons, paras. 834-7, A.R., v. 3, 340-1

f. In Oregon the process is working fairly well but could be improved, including with respect to oversight.[118]

g. The permissive legislation in the Netherlands and Belgium was motivated by the desire to better understand and regulate practices already prevalent and embedded in their medical cultures. (Unlike in Canada where with very few exceptions, *physicians* are compliant with the current absolute legal prohibition of assisted death.) The law reforms in the Netherlands and Belgium have made considerable progress in achieving these goals.[119]

h. The evidence regarding Oregon and the Netherlands does not support the conclusion that pressure or coercion is at all wide-spread or readily escapes detection. It is unlikely that many patients obtain a physician assisted death because of outside pressure. Any such incidents are highly isolated.[120]

i. Legalization in Oregon, the Netherlands and Belgium has not undermined palliative care; by some measures palliative care improved post-legalization.[121]

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[118] Reasons, para. 653, A.R., v. 2, 298. At para. 56, AGC says three people with MDD obtained lethal prescriptions in Oregon and it is difficult to determine *the influence of depression* on decision-making. First, MDD is not a disqualifying characteristic in Oregon. A patient is disqualified if their judgment *is influenced* by a mental disorder or depression: Ganzini #1, para. 10, A.B. v. 7, 2109. Dr. Ganzini's study showed that 95% of psychiatrists were somewhat or very confident that they could determine, in a long term relationship, whether a mental disorder *was influencing the decision* for assisted death. The study was not about diagnosing depression, that being something psychiatrists are specifically trained for and well capable of doing: Ganzini #2, para. 9, A.B., v. 39, 13318. Given that no one suggests importing the requirement of determining the extent to which a patient is *influenced* by MDD, this issue is beside the point. However, if the Oregon regime were imported, this risk could be addressed by requiring systemic use of depression screening tools: Ganzini #1, para. 29, A.B., v. 7, 2123. Second, no medical practice is without risk: Reasons, para. 435, A.R. v. 2, 241. Zero tolerance is an inappropriate standard for health care as AGC's witness acknowledged: Pereira Cross, Transcripts, v. 3, 417:37-419:7 and Trial Exhibit 36, A.B., v. 41, 14311

[119] Reasons, paras. 660, 1241, A.R., v. 2, 299; v. 3, 457

[120] Reasons, paras. 671, 685, A.R., v. 2, 302, 305

[121] Reasons, para. 731, A.R., v. 2, 317

j. The research does not clearly show either a negative or a positive impact in permissive jurisdictions on the physician-patient relationship.[122] However, evidence from permissive jurisdictions suggests that physicians are able to provide better overall end-of-life treatment to patients at the end of their lives once the topic of assisted death is openly put on the table.[123]

72. AGC has not identified any errors in the findings above but rather says that because no scientific study can be infallible, this Court should simply ignore the findings of fact made by Smith J. and hold Respondents to a "zero tolerance" approach to harm.

73. AGC says Smith J. erred in her consideration of the ethical debate because it is irrelevant to arbitrariness.[124] This assertion is incorrect and also ignores Smith J.'s consideration of the debate for various inter-related reasons, including overbreadth.[125]

74. Smith J.'s findings with respect to the ethics of physician assisted dying are set out above at paragraphs 1-10.

75. Smith J. considered that assisted death already occurs in Canada. Her findings on this point were, contrary to the AGC's assertions, entirely consistent. She found:

a. Some assisted death occurs in Canada contrary to the law.[126] Moving to a system of physician-assisted death under strict regulation would probably greatly reduce or eliminate the assisted deaths by *non-physicians* occurring and enhance the likelihood that only competent, fully-informed, voluntary and non-ambivalent patients receive assistance.[127]

b. Although a few *physicians* in Canada, as in other countries, provide assisted death despite the criminal prohibition against doing so[128] with very few

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[122] Reasons, paras. 9, 746, 1269, A.R., v. 2, 117; v. 3, 320-1
[123] Reasons, para. 1271, A.R., v. 3, 464
[124] AGC Factum, paras. 72-6
[125] Reasons, para. 1369.
[126] Reasons, paras. 205, 206, 1282, 1330, 1370, A.R. 171-2, 468, 477, 487
[127] Reasons, para. 1370, A.R. 487
[128] Reasons, para. 204, A.R. 171

exceptions, Canadian physicians are compliant with the current prohibition of assisted death, suggesting they would be compliant with a regulated regime.[129]

76. AGC's reliance on *JTI-Macdonald* is misplaced.[130] There, the SCC relied on international jurisprudence in considering whether protecting the public from second-hand smoke was a "legitimate policy objective"[131] and measuring whether restrictions were reasonable given Canada's ratification of an international convention mandating same.[132] Here, the legitimacy of the objective articulated by Smith J. is undisputed and there is no relevant international convention. While courts may look to international law and convention to provide a *floor* for the interpretation of *Charter* rights,[133] such sources have rarely, if ever been used to restrict the meaning to be given to *Charter* rights.[134]

No Regulatory Regime Required

77. AGC incorrectly asserts that the Reasons "implicitly require Parliament to create a complex comprehensive regulatory regime, and to allocate resources to its monitoring and enforcement in order to mitigate the risks" in the absence of a blanket prohibition.[135]

78. Respondents agree that it would be logical for Canada to regulate physician-assisted dying given its stated concerns about risk, but the Respondents have sought only to have Parliament leave them alone to make their fundamental health care choices. The Reasons do not *require* Canada to do anything; the effect of the decision

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[129] Reasons, paras. 680, 683, A.R. 304, 305
[130] AGC Factum, para. 59
[131] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, [***JTI-Macdonald***], para. 10
[132] *JTI-Macdonald*, para. 66, 138
[133] As was done, for e.g., in the context of collective bargaining under s. 2(d) in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, paras. 69-79. The fact that there are effective permissive regulatory regimes operating elsewhere is relevant to whether Canada's prohibition is more restrictive than necessary to achieve its objective or has disproportionate effects.
[134] See e.g. *Malmo-Levine*, para. 271, Arbour J. dissenting but not on this point; *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 661, para. 149
[135] AGC Factum, para. 66.

is that either the law will be struck down or, *if it wants to cure the constitutional defect in the Impugned Laws*, Parliament may make exceptions from the absolute prohibition.[136]

79. The uncontested findings of facts about current end-of-life care practices - about which Parliament has, in fact, opted to do nothing - are relevant. Smith J. found:

a. When it comes to persons with grievous and irremediable illness, the risk of diagnostic error is very low. Prognosis, however, is an inexact science.[137]

b. Elder abuse exists and the assessment of voluntariness in elders must incorporate an understanding of that reality.[138]

c. Palliative care is not universally available in Canada and even the best palliative care cannot alleviate all suffering.[139]

d. Patients' experience within the medical system, including palliative care, may be affected by factors such as their age and disability.[140]

e. Palliative sedation may include deep, continuous sedation to the time of death, with or without artificial hydration or nutrition. There are no legislated standards for palliative sedation in Canada.[141]

f. Currently accepted and legal end-of-life practices in Canada allow physicians to follow patients' or substitute decision-makers' instructions to withhold or withdraw life-sustaining treatment from patients. Accepted practices also allow physicians to

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[136] Nor does narrowing the scope of the relevant criminal offences oblige Canada to create a regulatory scheme. Canada could redraft the criminal law so that assisted dying remains a crime unless done in accordance with specific criteria. Alternatively, Canada could make a general exception from the criminal law and refrain from regulating the now permissible health service, as it has done with abortion, leaving assisted dying a matter for regulation under provincial powers.
[137] Reasons, paras. 817-8, A.R., v. 3, 336-7
[138] Reasons, para. 847, A.R., v. 3, 343. Notwithstanding its knowledge of this fact, there is no evidence that Canada has taken any steps to address elder abuse.
[139] Reasons, paras. 4, 188, 190, 192, 309, 823, A.R., v. 2, 116, 167-8, 204, 337-8
[140] Reasons, para. 194, A.R., v. 2, 168
[141] Reasons, paras. 200-1, A.R. 170

administer medications in dosages that may hasten death, and to administer palliative sedation which may also hasten death.[142]

g. Approximately 90% of deaths among critically ill patients in Canada occur following the withdrawal of some form of life support, most commonly the withdrawal of medical ventilation, dialysis or inotrope medications.[143]

80. Thus similar risks arise in the context of currently accepted end-of-life care and Parliament has not been obliged to intervene; however if Parliament wishes to act to reduce these risks in the context of physician-assisted dying, the Reasons inform how Parliament may address these risks.

Effectiveness of a Regulatory Regime

81. AGC argues an effective regime is unrealistic as there is no way to control competency assessments or ensure physicians overcome unconscious bias.[144] AGC's position is hypocritical in light of current end-of-life care practices in Canada. The concerns noted by AGC in relation to competency assessment and physician bias apply with equal force in both contexts. Yet Canada has left end-of-life care unregulated and unmonitored.[145] Despite this, and presumably due to the professionalism of doctors,

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[142] Reasons, paras. 5, 185, 195-8, 202, 226, 309, A.R., v. 2, 116, 166-71, 177 204

[143] Reasons, para. 185, A.R., v. 2, 166-7

[144] AGC Factum, para. 67. AGC also suggests that it is not possible to accurately assess competence and physicians are unable to overcome unconscious bias: AGC Factum, paras. 6, 12, 51, 100-5. This submission simply ignores the findings above.

[145] E.g., the timing of withdrawal of life support is not uniform and is informed by factors related to the patient, the family, the clinicians and the institution. There is a paucity of policies and guidelines to guide these decisions and there is variability among the few policies there are: Cook #1, paras. 21-25, 28-30 Exhibits D, G-I, A.B., v. 11, 3611-3, 3614-5, 3799-806, 3825-55. Almost all cases of withholding and withdrawal of treatment, symptom management and terminal sedation in the critical care setting involve incompetent patients. Health care providers look to advance directives, family and friends to make these decisions. Their needs and wishes are important considerations in appropriate high quality services for end-of-life care. Health care providers rarely receive explicit requests for these treatments: Cook #1, paras. 26-7, A.B., v. 11, 3613-4; G. Fenker #1, paras. 15, 19, 21-2, A.B., v. 39, 13373-5; Downing Cross, p. 32, ll. 7-28, A.B., v. 40, 13598; Davidson #1, paras. 4, 7, 23, 33, 44, 52, A.B.,

there is no evidence to suggest that many wrongful deaths occur. Regulating assisted dying would likely reduce the risk even further. Many of the safeguards implemented in other jurisdictions to safeguard assisted dying are equally relevant to Canada's existing end-of-life practices, but few of these are in place. Further, as disclosed by the evidence, liberalization does not lead to routinization of the practice; physicians struggle with requests for assistance in dying under permissive regimes.[146]

d) The Impugned Laws are Grossly Disproportionate

82. AGC cites the same authorities as did Smith J. and in so doing concedes that Smith J. articulated the correct test for gross disproportionality.[147]

83. AGC concedes that the effects of the blanket prohibition on some individuals are serious;[148] a concession amply supported in the evidence. Indeed, Smith J. found the effects to be "very severe" - even after having considered salutary effects.[149]

84. Yet without citing any evidence or finding of fact in support of its position, AGC asks this Court to overturn Smith J. on the basis of "the risk of death not genuinely desired for other individuals not before the court...." AGC asserts no error of law or fact to permit this Court to interfere with Smith J.'s assessment of gross disproportionality. As Smith J. correctly found, the benefits are speculative whereas the costs are both certain and very severe.[150] AGC's argument must be dismissed.

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v. 19, 6529, 6530, 6534, 6536, 6538-40, 6542; Pereira Cross (Nov. 23), p. 564, l. 43 to p. 165, l. 2, Transcript, v. 3, 564-5

[146] Ganzini #1, paras. 21, 25, Exhibits Q, U, A.B., v. 7, 2118, 2120, 2329-40, 2373-84; Starks #2, paras. 25-6, A.B. v. 38, 13042; Kimsma #1, paras. 27(b)-(d), 41(a), Exhibit D, pp. 37-8, A.B., v. 10, 3410-1, 3415-6, 3455-6.

[147] AGC Factum, para. 70; Reasons, paras. 1372-6, A.R., v. 3, 487

[148] AGC Factum, para. 71

[149] Reasons, paras. 1377-8. Smith J.'s reasons on gross disproportionality are so framed as she had already done a proportionality analysis under s. 1 for the s. 15 violation, thus she was in a position to hold that, even having earlier considered salutary effects as well, the effects were *still grossly* disproportionate.

[150] Reasons, paras. 1275-6 and 1378, A.R., v. 3, 465 and 489

e) The Impugned Laws Offend the Principle of Equality

85. The principle that laws be equal in their effects is recognized as a principle of fundamental justice and is offended in this case.[151] If there is doubt that equality is a settled principle of fundamental justice, it meets the established test.[152]

86. Recognizing equality as a principle of fundamental justice also resonates with the dissenting judgments in *Rodriguez*.[153]

87. Respondents submit that once a litigant invoking equality has proven a s. 7 interest is engaged on an enumerated or analogous ground (i.e., the first step of s. 15), then it is the state's burden to justify the unequal deprivation under s. 1. Section 1 may do more here than it normally does under s. 7 violations. The state will have to meet the second stage of s. 15. It must demonstrate the law has a pressing substantial purpose and that the means are not based on prejudice and stereotyping and actually correspond to the needs of the group treated unequally. Any purported ameliorative effect would likely fall to be considered at the final proportionality phase of s. 1.[154]

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[151] Reasons, para. 1290, A.R., v. 3, 469. *Philippines (Republic) v. Pacificador* (1993), 14 O.R. (3d) 321 (Ont. C.A.), pp. 13-4 (QL). See also *G. (J.)*, para. 115, L'Heureux-Dubé J, concurring.

[152] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 [***Canadian Foundation***], para. 8. Specifically: (1) it is a legal principle; (2) there is sufficient consensus that it is "vital or fundamental to our societal notion of justice"; and (3) it is capable of being identified with precision and applied to provide predictable results.

[153] See e.g. *Rodriguez,* para. 233, Cory J., dissenting; See also paras. 194, 196 198, 204, 206, 209 McLachlin J., dissenting. Though McLachlin J. identified the principle at issue as arbitrariness, she approached it through the lens of equality. However, she also stated: "this is not at base a case about discrimination under s. 15 of the [*Charter*] and that to treat it as such may deflect the equality jurisprudence from the true focus of s. 15..." Respondents submit that while McLachlin J. saw the primary evil of the law as its interference with security of the person, her arbitrariness analysis recognized that the law was unequal in its effect and this inequality stemmed from the enumerated ground of disability and offended her sense of justice.

[154] For the reasons AGC fails under s. 1 regarding the breach of s. 15 and other breaches of s. 7, it fails with regard to this breach. The appropriate remedy is the same as under s. 15 - a declaration of invalidity to the extent of the infringement.

e) The Impugned Laws Offend the Principle of Parity

88. The principle of proportionality, which requires criminal punishment to be proportional to moral blameworthiness, is a long-standing tenet of sentencing, codified in 1996.[155] It is foundational to the integrity and moral authority of the criminal law.[156] The SCC recognizes one aspect of this principle, gross disproportionality, as a principle of fundamental justice,[157] and has applied it to assess the validity of substantive criminal provisions under s. 7.[158]

89. The principle of parity has been recognized as an integral component of the principle of proportionality.[159] Parity mandates comparable punishment for acts of comparable moral blameworthiness. It has been codified both as an aspect of the principle of proportionality and as a specified secondary principle.[160] Parity readily meets the established test for a principle of fundamental justice,[161] and has been previously recognized as an independent principle of fundamental justice under s. 7.[162]

90. Parity does not measure arbitrariness,[163] but rather fairness in terms of relative treatment of sames. As with proportionality, as a principle of fundamental justice parity is measured against a gross differential: gross disparity.[164]

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[155] *R. v. C.A.M.*, [1996] 1 S.C.R. 500, paras. 40-1 and 78-9; *R. v. Nasogaluak,* 2010 SCC 6, [2010] 1 S.C.R. 206, [***Nasogaluak***], paras. 39-45; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433 [***Ipeelee***], paras. 36-7; *Code*, ss. 718.1 and 718.2

[156] *Motor Vehicle Reference*, at para. 158 (Wilson J., concurring); *Ipeelee*, para. 37

[157] *Malmo-Levine*, paras. 141-3. The SCC also noted that *Charter* s. 12 did not exhaust the application of sentencing principles under the *Charter*: *Malmo-Levine*, para. 169.

[158] In *R. v. Martineau*, [1990] 2 S.C.R. 633 [***Martineau***], paras. 11-2.

[159] *R. v. Arcand*, 2010 ABCA 363, [2010] A.J. No. 1383 [***Arcand***], paras. 45-70, see esp. paras. 50, 59 and 62; von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), pp. 137-43

[160] *Code*, ss. 718.1 and 718.2(b)

[161] *Canadian Foundation*, para. 8

[162] *R. v. Johnson*, 2011 ONCJ 77, [2011] O.J. No. 822 [***Johnson***], paras. 141-2

[163] In *Malmo-Levine*, at paras. 135-40, the SCC rejected that failure to criminalize alcohol and tobacco rendered criminalization of marijuana arbitrary. The SCC effectively held Parliament need not do *everything* possible in order to do *anything* rationally.

[164] *Malmo-Levine*, para. 169

91. The principle of parity extends to the criminalization versus non-criminalization of similar conduct of similar moral blameworthiness undertaken in similar circumstances. It cannot be limited to sentencing, as it is a foundational principle that goes to the larger moral and social authority of our criminal system as a "just" one.

92. Current accepted end of life care practices include withdrawal of life sustaining equipment where death inevitably follows and palliative sedation which may shorten life.[165] Moreover, as AGC conceded, the criminal law "does not appear to recognize a distinction between intentionally bringing about a prohibited consequence and doing something knowing that the prohibited consequence is virtually certain to result."[166]

93. AGC asserts *causation* of death is a "valid and important ethical distinction" and that other end of life care that shortens life differs from assisted dying because in the former death is due to the underlying medical condition.[167] However, causation is not an ethical question; it is factual and legal question.[168] The standard for causation in homicide is that the conduct was a "not insignificant contributing cause" to the death.[169] Withdrawing equipment and administering palliative sedation easily meet this standard.

94. Providing a fatal prescription or injection to a suffering person as health care is assisted suicide or murder; the materially and morally equivalent conduct described above is perfectly lawful. This disparity is as gross as can be: for one, the highest possible criminal sanction: murder; for the other: nothing. Respondents submit this

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[165] Bereza #1, paras. 28-9, A.B., v. 23, 7840; Downing Cross, p. 21, ll. 4-20, A.B., v. 40, 13587; McGregor Cross, Transcripts, v. 1, 89:26-89:39; Pereira Cross, Transcripts, v. 3, 416:40- 417:3, 580-1; Boisvert #1, para. 19, A.B., v. 4, 1242. Smith J.'s findings on the ethics of these practices were summarized earlier: Respondents' Factum, paras. 2-10.
[166] Reasons, paras. 327-8; A.R., v. 2, 212. See, e.g., Manning, Mewett & Sankoff, *Criminal Law* (4th ed.) (Markham: Lexis Nexis Canada Inc., 2009), pp. 739-42.
[167] AGC, para. 76
[168] *R. v. Nettie*, 2001 SCC 78, [2001] 3 S.C.R. 488, [***Nettie***], paras. 43-8. Under *Code*, s. 222 when a person "directly or indirectly, by any means" causes death it is homicide. When a person causes a bodily injury resulting in death, under s. 226 "he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause."
[169] *Nettie*, para. 71; *R. v. Smithers*, [1978] 1 S.C.R. 506, [1977] S.C.J. No. 58, pp. 7-9 (QL).

disparity violates parity as a s. 7 principle of fundamental justice, as it offends the core sense of fair play and decency necessary to sustain the criminal law system.[170]

C. Section 15

95. Smith J. reviewed the s. 15 caselaw and applied the proper legal test: (a) Does the law create a distinction based on an enumerated or an analogous ground?; and, (b) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[171] Her conclusions under each step of the analysis were reasonable and correct[172]

i) Distinction: The Law Creates a Distinction by Imposing a Burden[173]

96. Generally, laws that impact individuals either bestow a benefit (e.g., a pension or medical service) or impose a burden[174] (e.g., a restriction on liberty). They are subject to s. 15 review accordingly. The first step is to identify which kind of effect the law has and whether, in having this effect, it creates a distinction on an enumerated or analogous ground. As Smith J. recognized the Impugned Laws create a distinction ***by imposing a burden*** on disabled individuals that is not imposed on others.[175]

97. AGC incorrectly asserts a claim must relate to the *absence* of a burden emanating from the law.[176] But a law which creates the *absence* of a burden does so by bestowing a benefit. Thus AGC's argument conflates benefits and burdens and fails to recognize that burdens imposed by law attract independent scrutiny under s. 15.[177]

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[170] *Johnson*, paras. 144-51; Reasons, para. 317; A.R., v. 2, 210
[171] Reasons, para. 1026, A.R., v. 3, 396; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [***Withler***], para. 30
[172] *Withler v. Canada (Attorney General)*, 2008 BCCA 539, para. 145
[173] The following discussion regarding distinctions and the imposition of burdens is a core aspect of Respondents' argument on cross-appeal. However, as a matter of structure and in order to better assist the Court, the discussion is set out here and then continued with respect to ss. 14 and 222 in particular under the heading "Cross-Appeal".
[174] All criminal offences impose burdens as all restrict the individual's liberty to act.
[175] Reasons, paras. 1063-4, A.R., v. 3, 408-9
[176] AGC Factum, para. 87
[177] Many points advanced in AGC's Factum are predicated on its misconception that the claimants seek benefits of the law: see, e.g., paras. 84-90

98. The s. 15 discrimination argument (in contrast to our s. 7 equality argument) is not predicated on the interest affected being a constitutionally recognized "right" or "freedom". It is sufficient for s. 15 that the law denies the option of suicide to one group while leaving it available to others, thereby imposing a very significant burden on the former. Even prior to the *Charter*, this kind of burden was recognized as prohibited discrimination. In *Drybones*, the SCC explained that "without attempting any exhaustive definition of 'equality before the law' I think that s. 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law".[178]

99. In *Simpsons-Sears*, the SCC considered whether a rule requiring employees to work on Friday evenings and Saturdays amounted to religious discrimination. Although there is no "right" to having particular days off work and the rule was facially neutral in that it applied equally to all, it was discriminatory because of the burden it imposed on Seventh-Day-Adventists who were not free under this rule to observe their Sabbath.[179]

100. This protection from burdens of the law was maintained with the enactment of the *Charter*. In *Andrews*, McIntyre J. made clear that the principles developed in these early human rights cases are equally applicable in s. 15(1) cases.[180] McIntyre J. continued to hold the view that s. 15(1) protects against burdens of the law.[181]

101. In *Eldridge*, the SCC considered the equality analysis undertaken by the Chief Justice in *Rodriguez* and endorsed his general approach.[182] The Court noted that "[u]nlike in *Simpson-Sears* and *Rodriguez*" the issues in *Eldridge* "stem not from the

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[178] *R. v. Drybones*, [1970] S.C.R. 282, [1969] S.C.J. No. 83, p. 11 (QL) (emphasis added)
[179] *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 [***Simpson-Sears***], paras. 3, 18, McIntyre J., for the Court
[180] *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, para. 37 [***Andrews***], see also endorsement by the Court in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [***Eldridge***], para. 63
[181] *Andrews*, paras. 26, 37
[182] *Eldridge*, para. 64 see also *Rodriguez*, para. 48, 56-7, 59, 61-2

imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that they benefit equally from a service offered to everyone."[183]

102. Since 1972 there has been no criminal sanction for suicide or attempted suicide. Persons physically able to commit suicide are free to do so; however, the *Code* amendments in 1972 left the prohibition against assisted suicide in place.[184]

103. Assuming the assisted person is informed, rational, autonomous and suffering intolerably, there is no ethical distinction between suicide and assisted suicide.[185]

104. The effect of the Impugned Laws is that suicide is criminalized only for the materially physically disabled. The laws are thus more burdensome for the disabled than the able-bodied. This burden is felt acutely by persons who are grievously and irremediably ill, materially physically disabled or soon to become so, mentally competent, and who wish to have control over their circumstances at end of life.[186]

105. The Impugned Laws disproportionately burden disabled individuals by: a) standing between them and a timely end to suffering, leaving them the choice of either suffering longer than they wish or, in order to be autonomous, acting to die earlier than they otherwise would have; b) robbing them of the quality of their remaining life; and c) subjecting them to psychological suffering related to imperilling others.[187]

106. Disabled individuals can unquestionably seek court relief from this disproportionate burden. This has been repeatedly recognized in s. 15 jurisprudence.[188]

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[183] *Eldridge*, paras. 66. See also para. 77 noting that s. 15 "makes no distinction between laws that impose unequal burdens and those that deny equal benefits."
[184] Reasons, para. 1011, A.R. 391. AGC notes suicide intervention programs were put in place as a mental health approach. However, competent able-bodied persons are free to disregard those programs and make and carry out their own decisions.
[185] Reasons, para. 339, A.R. 339
[186] Reasons, paras. 15, 1077, 11401, A.R. 118-9, 412, 432
[187] Reasons, paras. 1041-8, A.R., v. 3, 401-3
[188] Reasons, para. 1064, A.R., v. 3, 408-9; see also, for e.g., *Drybones*, p. 11 (QL); *Andrews*, para. 26; *Eldridge*, para. 77; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 **[*Law*]**, paras. 26, 48; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, para. 27; *R. v. Kapp*, 2008 SCC 4, [2008] 2 S.C.R. 483, [***Kapp***], para. 15; *Withler* , para. 29; *Nova*

ii) The Impugned Laws are Discriminatory

107. The second step is: does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[189] Smith J. correctly considered the factors articulated in *Law* and applied in most s. 15 cases - pre-existing disadvantage, correspondence with actual characteristics, ameliorative purpose and nature of the interest affected.[190]

a) Pre-Existing Disadvantage

108. AGC properly concedes that disabled individuals, including persons like Ms. Taylor who have acquired physically disabling conditions through illness but have not lived with such disabilities throughout their lives, are subject to disadvantage.[191]

b) No Correspondence Between Law and Claimant's Circumstances

109. As Smith J. found, the law does not correspond to Respondents' circumstances.

110. With respect to Ms. Taylor,[192] Smith J. found that she had always been a strong and independent person and continued to be so despite her illness,[193] and that she experienced having strangers assist her with very personal matters as an assault on her privacy, dignity and self-esteem.[194] Smith J. held that Ms. Taylor faced the prospect of becoming unable, due to her illness, to end her life at the time of her choosing[195] and that her quality of life was impaired by the fact that she would be unable to seek assistance when her life ceased to be worthwhile to her. She lived in apprehension that

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Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 S.C.R. 504, para. 84; *Rodriguez*, para. 48

[189] *Withler*, paras. 65-66; Reasons for Judgment, paras. 1079-84, A.R., v. 3, 413-5

[190] *Law*, paras. 62-75; Reasons, paras. 1085-6, 1096 A.R., v. 3, 415-6, 419

[191] Reasons, para. 1102, A.R., v. 3, 420-1

[192] Reasons, paras. 46-56, A.R., v. 2, 127-30

[193] Reasons, para. 51, A.R., v. 2, 128

[194] Reasons, para. 50, A.R., v. 2, 127

[195] Reasons, para. 1041, A.R., v. 3, 401

her death would be slow, difficult, unpleasant, painful, undignified and inconsistent with her values and principles.[196] She was neither depressed nor vulnerable.[197]

111. AGC does not argue that Smith J. made any reversible errors of fact. Yet its argument rests on a number of assertions which are incompatible with Smith J'.s findings (and with its own concessions). For example, AGC says: (a) all people, with or without physical disability, considering suicide are potentially vulnerable and need to be protected from the assistance of others;[198] (b) it is impossible to reliably differentiate individuals who may be vulnerable at a particular time from those who may not;[199] (c) there is a risk (which cannot be addressed) that physicians will unconsciously respond differently to assistance requests from those with physical disabilities;[200] and (d) the wish to die may be transitory (and it is impossible to identify when this is so).[201]

112. The focus of the law is decisional vulnerability and the merits of points (b) - (d) were addressed above under "Overbreadth". Point (a) is inconsistent with AGC's own concessions. Further, Smith J. found it was important to distinguish decision-making by the grievously and irremediably ill about the timing of their deaths from decision-making about suicide by the mentally ill or those whose thinking processes are affected by substance abuse, trauma or other such factors.[202] Finally, Smith J.'s unimpeached finding is that Ms. Taylor was not herself vulnerable. Thus point (a) is without merit.[203]

113. AGC fails to address the disproportionate impact on the physically disabled.[204]

114. AGC says the fact the "disability rights community" is divided on assisted dying demonstrates the law corresponds to the actual circumstances of disabled people.[205]

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[196] Reasons, para. 1044, A.R., v. 3, 402
[197] Reasons, paras. 1112, 1130, A.R., v. 3, 425, 429. These findings were consistent with the concessions made by AGC: Reasons, para. 1136, A.R., v. 3, 431.
[198] AGC Factum, para. 97
[199] AGC Factum, paras. 98, 104
[200] AGC Factum, paras. 100-3
[201] AGC Factum, para. 105
[202] Reasons, para. 814, A.R., v. 3, 336
[203] See also McLean #1, Exhibit B, paras. 14-24, A.B., v. 39, 13408-11.

This must be rejected. The views of an advocacy group are not *evidence* of a law's correspondence with the needs and circumstances of the disabled.[206]

c) Ameliorative Purpose or Effect is Not Relevant

115. Smith J. correctly concluded that the ameliorative purpose *or* effect factor has no application here.[207] AGC's suggestion, made in reliance on *Kapp* and *Withler*, that a law with an ameliorative *purpose* should be analysed under s. 15(2), whereas a law with an ameliorative *effect* should be analysed under s. 15(1), is not supported in the caselaw and in any event does not assist its case.

116. AGC quite properly does not argue that the Impugned Laws are saved under s. 15(2).[208] However, the caselaw regarding s. 15(2) assists here as *Kapp* and *Withler* demonstrate how the third *Law* factor closely relates to issues arising under s. 15(2).

117. In *Kapp*, an aboriginal fisheries program was found protected by s. 15(2). Before addressing s. 15(2), the SCC discussed the s. 15(1) caselaw, noting that: "The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2)."[209] In *Withler*, the SCC upheld a death benefits scheme. In reviewing the s. 15(1) jurisprudence, including *Law*, it noted that the third factor relates to "the ameliorative purpose or effects of the impugned law *on a more disadvantaged person or group*".[210]

118. In *Cunningham*, the SCC considered s. 15 as a whole, noting that its goal is to enhance substantive equality and that it does so in two ways. Under s. 15(1) it prevents

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[204] Reasons, para. 1130, A.R., v. 3, 429. Here where individual rights are severely and certainly affected the correspondence must be closer than in, for e.g., a benefit scheme.
[205] AGC Factum, para. 106
[206] Nor even reliable evidence of the *community's* views: McLean #1, Exhibit B, para. 20, A.B., v. 39, 13410.
[207] Reasons, paras. 1131-41, A.R., v. 3, 430-2
[208] *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670 [***Cunningham***], paras. 41-6
[209] *Kapp*, para. 23 The Court also suggested, without deciding, that this factor may also be relevant to the first *Law* factor, perpetuating disadvantage.
[210] *Withler*, paras. 382, 385

discrimination on enumerated and analogous grounds and under s. 15(2) it allows the state to improve the situation of members of groups that have suffered discrimination by affirming ameliorative programs and protecting them from the charge of "reverse discrimination".[211] Thus even if ameliorative effects (absent ameliorative purposes) are relevant under s. 15(1), they must be ameliorative in the sense contemplated by s. 15(2): i.e., effects that might otherwise be challenged as "reverse discrimination".[212]

119. The analysis developed under s. 15(2) is also instructive regarding ameliorative effects under s. 15(1). A government relying on s. 15(2) must point to a distinction based on an enumerated or analogous ground.[213] AGC cannot do so here unless "vulnerability to the prejudices and biases within our society" is an analogous ground, which it is not.[214] AGC would also have to show the distinction was genuinely ameliorative in that it had the purpose (or in this case the effect) of improving the group's situation.[215] Even if this criterion was met (which is denied), in order to give this factor any weight, AGC would also have to show that the distinction was *necessary* for the ameliorative effect.[216] It could not, for all the reasons discussed in "Overbreadth."

d) The Nature of the Interests Affected is Fundamental

120. Smith J. summarized the severity of the deprivation of these interests.[217] This was made on a solid evidentiary foundation.[218] That s. 7 protects a *right* to life, liberty

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[211] *Cunningham*, para. 41
[212] *Cunningham*, para. 41
[213] *Cunningham*, paras. 43 and 45
[214] It cannot be given that the very vaguely described group is not characterized by "fundamental attributes, such as those enumerated in s. 15, that are generally considered to be essential to our popular conception of 'personhood' or 'humanness'": *Egan v. Canada,* [1995] 2 S.C.R. 513, para. 59; see also *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 13.
[215] *Cunningham*, para. 44
[216] *Cunningham*, para. 45
[217] Reasons, paras. 1142-1157, 1325-30 A.R., v. 3, 433-6, 477
[218] A non-exhaustive list of supporting evidence is: *Shortened lifespan* – see above under "Life"; *Denied opportunity to make choice important to sense of dignity, personal integrity and consistent with lifelong values and experiences* –Taylor #2, paras. 4, 5, 10, 19, 43-5, A.B. v. 10, 3386; Carter #1, paras. 14-5, A.B. v. 5, 1582-3; Johnson #1, paras. 12-3 A.B. V.8, 2506; LaForest #1, paras. 5, 28-37, 50-2, A.B. v.1, 139, 144-5,

and security of the person underlines the *importance* of the private, decision-making zone at issue - one protected by the highest law. The freedom to choose the time and manner of one's death is a fundamental one (liberty); the right to bring an end to suffering at the point it becomes intolerable (security to the person), and not beforehand in order to have self-determination at all (life), even more so.[219] Thus, the arguments about the interests at stake under s. 15 intersect with those made above regarding s. 7.

121. The law has extreme consequences, sharply localized on the materially physically disabled. By ignoring these burdens, AGC fails to recognize this group and

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148; Cordover #1, paras. 46-8, A.B. v. 6, 1899, 1907-8; Leeking #1, paras. 24-7, 30, A.B. v. 1, 156-7; Ganzini #2, para. 43, A.B. v. 39, 13326-7; *Impaired ability to discuss and receive support from physicians* – Cordover #1, paras. 11-3, 35, 44, 63, A.B. v. 6, 1900-1, 1906, 1907, 1911-2; Petrie #1, paras. 14, 17 A.B. v. 9, 2935-6; Morris #1, paras. 38, 47, A.B., v. 9, 2912, 2914; Starks #1, Exhibit C, pp. 43-5, A.B. v. 9, 3108-10; *Deprivation of self-worth of physically disabled* – Taylor #2, paras. 24, A.B., v. 10, 3382; Nicklinson #1, Exhibit F, paras. 13-4, A.B. v. 1, 324; Shapray #1, paras. 11-2, A.B. 337; *Unavailability of palliative care due to nature of illness* –Shapray #1, para 21, A.B. v. 1, 339; Nicklinson #1, Exhibit C, pp. 24-5, A.B., v. 1, 310-1; *Unacceptability of palliative care due to personal values and worries* – Taylor #2, para. 37-9, A.B., v. 10, 3385-6; LaForest #1, paras. 51-2, A.B., v. 1, 148; Cordover #1, paras. 51-2, A.B., v. 1, 1909; G. Fenker #1, paras. 5, 13, A.B., v. 39, 13371, 13373; Shoichet #1, para. 6, A.B., v. 1, 342; Rasmussen #1, paras. 16-7, A.B., v. 38, 13002-3; Boisvert #1, para. 15, A.B., v. 4, 1241; Battin #1, para. 26, A.B., v. 3, 917; Battin #2, paras. 32-5, A.B., v. 39, 13275-6; Downing Cross, p. 2:43-3:17; 21:38-22:32; 39:16-39:34, A.B., v. 40, 13568-9, 13587-8, 13605 also Downing #1, Exhibits H, I, A.B., v. 18, 6236-67; Pereira Cross (Nov. 22), Transcript, p. 432:47-4:34-30; *Physical pain, psychological suffering, fear of what is to come* – Taylor #2, paras. 26-29, 36, A.B. v. 10, 3383, 3385; Carter #1, paras. 9-12, A.B., v. 5, 1581-2; LaForest #1, paras. 22-27, A.B. v. 1, 142-4; Shapray #1, paras. 11, 13-17, A.B., v. 1, 337-338; P. Fenker #1, paras. 7-15, 17, A.B. v.6, 2098-100; *Stress from non availability of peace of mind* – Morcos Examination, QQ. 31-32, Supp A.B., 13-5; Syme #1, paras. 6(l)-(m), 13, A.B. v. 2, 352, 355 Nicklinson #1, Exhibit F, para. 12, A.B., v. 1, 321; Cordover #1, paras. 24-5, 57, A.B., v. 6, 1904, 1910; Bracken #1, para. 18, A.B., v. 5, 1427; Jackson #1, paras. 14-8, A.B., v. 8, 2463-4; Petrie #1, paras. 14, 16-7, A.B., v. 9, 2935-6; Morris #1, para. 43, A.B., v. 9, 2913; Kimsma #1, Exhibit D, p. 37, A.B., v. 10, 3455; *Risk of prosecution* – this fact was admitted by AGC, A.R., v. 1, 100

[219] If suicide was not decriminalized pre-*Charter*, the prohibition would be contrary to s. 7. It is unnecessary to decide this point but if that law were re-enacted now, it would be unconstitutional in its application to grievously and irremediably ill persons suffering intolerably. Even if, *arguendo*, the case were otherwise, it would be a choice of unparalleled significance: *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, [***Lavoie***], para. 45.

the impacts the law has on them.[220] The prohibition against assisted dying undermines the fundamental promise of s. 15. It feeds rather than starves discriminatory attitudes, and confines the disabled to the stereotyped role society has unfairly consigned them.[221] It indelibly impresses all disabled with the label of "vulnerable". Whereas the able-bodied are entitled to make life and death medical decisions under the individualized assessment built into informed consent and non-medical decisions to commit suicide, the Impugned Laws stereotype the disabled as neither worthy of nor susceptible to individual assessment, as incapable of demonstrating rationality and autonomy in pursuit of control over their lives.

D. Section 1

122. As above, a separate s. 1 justification must be carried out with respect to each independent *Charter* violation.[222] That said, if the Impugned Laws violate s. 7, then the need for a full s. 1 analysis to be carried out for the breach is questionable, there being no emergency circumstances signalling possible justification.[223] However, if it is adjudged necessary to carry out a s. 1 analysis, the s. 7 violation could not be justified,[224] as Canada is unable to justify even the s. 15 infringement in this case (as set out below) and the burden of justifying a s. 7 violation is heavier.

i) There is No Rational Connection

123. As above, Smith J. was not bound by *stare decisis* with respect to her analysis of whether the law was rationally connected to the state's objective.[225]

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[220] *Law*, para. 74
[221] McLean #1, Exhibit B, para. 16, A.B., v. 39, 13409.
[222] That is, all s. 1 *stare decisis* arguments aside, a separate s. 7/s. 1 analysis is required in any event of a s. 7 violation as no s. 7 violation was found in *Rodriguez*.
[223] *PHS_SCC*, para. 137
[224] *Motor Vehicle Reference*, para. 85; Reasons, paras. 1379-83
[225] See *Oakes*, p. 139; *see also Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989, para. 124, Cory J., dissenting. AGC's position that *Rodriguez* bound Smith J. is inconsistent with its position that the law's objective includes the broader considerations outlined in its factum at para. 41. There has been remarkable unanimity among the judges who have considered the issue as to the purpose and object of the

124. *Oakes* involved the validity the *Narcotic Control Act* which created a presumption, on proof of possession, that possession was for purposes of trafficking. The law was not saved by s. 1. There was no rational connection between the basic fact (possession) and the presumed fact (possession for the purpose of trafficking).[226]

125. The Impugned Laws equally fail this test. There is no rational connection between the basic fact (seeking assistance) and the presumed fact (weakness and susceptibility). It is irrational to infer that a suffering person is weak and susceptible because they seek an assisted death if they are otherwise competent, independent, informed and resolved. If the presumption is irrational in some circumstances then, a *fortiori,* it is irrational to make it *irrebuttable* as it is under the Impugned Laws.[227] Such a presumption creates an unjustified, erroneous interference with autonomous choice.[228]

Impugned Laws: *Rodriguez*, para. 149, Sopinka J.; para. 72, Lamer C.J., dissenting; para. 214, McLachlin J., dissenting; para. 229, Cory J., dissenting.

[226] *Oakes*, paras. 77-8. *Oakes* is one of the few cases determined at this stage.

[227] The irrationality of an irrebuttable presumption was effectively conceded by AGC below: Reasons, para. 1136, A.R., v. 3, 431. No such concession was made in *Rodriguez*. Further, the evidence demonstrates that a desire for physician-assisted death can be rational, strong-willed and independent: Pellizzari #1, paras. 4-5, A.B., v. 1, 328; Leeking #1, paras. 21-23, A.B., v. 1, 155-6; LaForest #1, paras. 5-12, 46-50, A.B., v. 1, 139-40, 147-8; Carter #1, paras. 14-5, A.B., v. 5, 1582-3; Carter #2, paras. 4-7, 10, A.B., v. 38, 13047-9; Cordover #1, paras. 15, 47-8, A.B., v. 6, 1901, 1907-8,; Johnson #1, paras. 4-8, 12-3, A.B., v. 8, 2504-6; Reisler #1, paras. 4-5, 10, A.B., v. 9, 2940-1; Bracken #1, paras. 9, 19, 21, A.B., v. 5, 1425, 1427-8; Taylor #2, paras. 4-10, 19, 21, 35-6, 43-5, A.B., v. 10, 3377-9, 3381-2, 3384-7; P. Fenker #1, para. 19, A.B., v. 6, 2101; Zwart #1, paras. 9-10, 14-5, 17, 19, 27, A.B., v. 10, 3395-9 ; Ganzini #1, paras. 27, 37, A.B., v. 7, 2121-2, 2128-9; Bell #1, para. 7, A.B., v. 4, 1071; Starks #1, paras. 20-1, 23-4, 26, 31, 35, 38, Exhibit C, p. 42, Exhibit D, pp. 53, 56-9 and Tables 2 and 3, Exhibit F, pp. 70-1, 75-6, Exhibit I, p. 120, A.B., v. 9, 3056-60, 3062-3, 3107, 3118, 3120-4, 3135-6, 3140-1, 3185; Cohen #1, paras. 13, 14, 19, A.B., v. 5, 1714-6; Rasmussen #1, para. 31, , A.B., v. 38, 13007; Werth #1, paras. 55(a), 57, , A.B., v. 38, 13105, 13107; Ganzini #2, paras. 9, 43, 49, A.B., v. 39, 13318, 13326, 13328. This is unlike "traditional" suicide. See Reasons, para. 814, A.R., v. 3, 336. See also Ashby #1, Exhibit E, p. 75, A.B., v. 3, 880; Battin #1, paras. 28, 38, A.B., v. 3, 918; Battin #2, paras. 11-14, 20, 28-29, Exhibit B, A.B., v. 39, 13269-70, 13272, 13274, 13287-96; Smith #1, para. 25, A.B., v. 9, 2950, Kimsma #1, para. 41(b), A.B., v. 10, 3416-7; Starks #2, paras. 5-6, 9-11, A.B., v. 38, 13032-5; Werth #1, paras. 20-33, 38-39, 40(d), 41, 47-49, 59-60, Exhibits B, C, A.B., v. 38, 13095-104, 13107; Ganzini #2, para. 20, A.B., v. 39, 13321. With regard to Professor Werth's evidence, it is

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

ii) The Laws are Not Minimally Impairing

127. Smith J. had the benefit of extensive evidence regarding alternative, less drastic means of achieving the legislative objective in a real and substantial manner, as demonstrated by the evidence from regulatory jurisdictions. This evidence was not available when *Rodriguez* was decided and has been addressed under Overbreadth.

128. In assessing this evidence under s. 1, the onus lies with the state. AGC cannot discharge its onus by demanding proof that something less than an absolute prohibition will pose absolutely no risk of harm. Such a standard is unreasonable in light of the medical context and the accepted approach to harm in that context.[229] It is also inconsistent with *Hutterian.*[230] Rather, AGC must prove that only an absolute prohibition can meet the legislation's objective in a "real and substantial manner", and it has not.

iii) Proportionality of Effects: The Deleterious Outweigh the Salutary

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

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noteworthy that these studies and association recognitions of the rationality of decision-making in assisted dying post-date *Rodriguez.*

[228] *A.C.*, para. 223, Binnie J., dissenting, also paras. 107-8 where the majority found the law was not arbitrary because it did not set up an irrebuttable presumption.

[229] *A.C.*, para. 235

[230] *Hutterian*, para. 55

130. The law sends positive[231] and negative[232] messages about people with disabilities; it prevents[233] and causes[234] deaths; it causes lengthened life which can be good[235] or bad;[236] it has positive[237] and negative[238] effects on the role of the physician; it has positive[239] and negative[240] effects on palliative care. If the balancing stopped there,

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[231] Reasons, para. 1265, A.R., v. 3, 463. As is set out below, Smith J. did not weigh this salutary effect against "a particular individual's desire" for a physician assisted death. Her analysis was more detailed and thoughtful than AGC Factum, para. 127 admits.

[232] Reasons, para. 1266, A.R., v. 3, 463. AGC's statement about negative social messaging at para. 128 is equally applicable to this side of the balance because an absolute prohibition sends a negative message that disabled people are incapable of making self-determining decisions (McLean #1, Exhibit B, para. 14, A.B., v. 39, 13409) and that their wishes and their suffering are not as important as other considerations (Reasons, para. 1266, A.R., v. 3, 463). Further AGC has all the machinery it needs to send the right message about assisted dying's intended impacts to the elderly and the disabled: i.e., to empower and enable them by allowing them autonomous choice.

[233] Reasons, para. 1267, A.R., v. 3, 463. The ineffectiveness of the law is a relevant consideration under this test: *PHS_CA*, para. 70; *PHS_SCC*, para. 131. Smith J. *did not* find that the Impugned Laws prevent *all* wrongful deaths and abuse. In *Hutterian*, both the majority and dissenting reasons indicate the state has an evidentiary burden to prove the impugned law actually achieves the asserted benefits. This issue of fact may not require scientific proof, but it does require some proof, which in some cases can be supplemented by logic and reason: *Hutterian*, paras. 81-3, 85, 101, 150, 154. Where the state claims it needs an absolute prohibition because one wrongful death is "one too many" and is faced with evidence that there are many wrongful deaths in spite of the law, the state's claim that the law has a salutary effect rings hollow: see e.g. Bereza #1, paras. 21-2, A.B., v. 23, 7837-8; Librach #1, para. 15, A.B., v. 1, 162; Morcos Examination, Q. 30, Supp. A.B., 12-3; Von Fuchs #1, paras. 2-11, A.B., v. 3, 704-6; LaForest #1, para. 45, A.B., v. 1, 147; Cordover #1, para. 13, A.B., v. 6, 1900-1; Bracken #1, paras. 17-8, A.B., v. 5, 1427; Morris #1, paras. 7, 15, 17-9, 24, 29-37, 40, 44, 50, A.B., v. 9, 2905-15; Carter #1, paras. 3, 16-9, 22-7, 30-2, 34-40, 42-3, 45, A.B., v. 5, 1580, 1583-90; Luley #1, paras. 3-4, A.B., v. 1, 262

[234] Reasons, para. 1277, A.R., v. 3, 465. See also Reasons, para. 1267, A.R., v. 3, 463. AGC disputes Smith J.'s description of the back alley as unregulated, stating it is prohibited. AGC's focus on the state's *intended* rather than *actual* effect is misplaced.

[235] Reasons, para. 1268, A.R., v. 3, 463 This was a generous reading given that there is no reason to believe that Canada's two "grateful survivor" witnesses would have qualified for assisted death under a regulated regime: Davis #1, A.B., v. 19, 6809-14;

[236] Reasons, para. 1268, A.R., v. 3, 463; G. Fenker #1, A.B., v. 39, 13370-6

[237] Reasons, para. 1270, A.R., v. 3, 464

[238] Reasons, para. 1271, A.R., v. 3, 464

[239] Reasons, paras. 1273-4, A.R., v. 3, 464-5

[240] Reasons, para. 1273, A.R., v. 3, 464-5. See e.g. van Delden #1, para. 31, A.B., v. 10, 3522

the salutary and deleterious effects might be, at best, equal and AGC would have failed to establish its case on a balance of probabilities. Yet, in addition to these countervailing considerations, Smith J. found the law imposes extreme costs on the grievously and irremediably ill, and these are without any counter balance:

a. Using the law to keep pressure on funding palliative care uses the intolerable suffering of some as leverage for improving the provision of such care;[241]

b. Because palliative care may be unavailable or unacceptable to an individual, some will be required to continue with physical pain and/or psychological suffering, possibly exacerbated by terrible fear of what is yet to come.[242]

c. It denies individuals autonomy in decision-making about their own bodies, lives and suffering that may be very important to their dignity and personal integrity and involve their lifelong values and life experience.[243]

d. The law deprives individuals of peace of mind;[244]

e. The law has a deleterious effect on the care that some patients receive.[245]

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

a. For some longer life and enjoyment of life.[246]

b. More open physician-patient relationships and intellectual honesty.[247]

c. It may do more to improve palliative care than the absolute prohibition.[248]

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[241] Reasons, para. 1275; A.R., v. 3, 465
[242] Reasons, para. 1278, 1328, A.R., v. 3, 466, 477
[243] Reasons, para. 1279, 1326, A.R., v. 3, 466-7
[244] Reasons, para. 1280, A.R., v. 3, 467
[245] Reasons, para. 1281, A.R., v. 3, 467-8
[246] Reasons, paras. 1042, 1280, A.R., v. 3, 401, 467
[247] Reasons, para. 1271, A.R., v. 3, 464
[248] Reasons, para. 1273, A.R., v. 3, 464-465

132. An absolute prohibition, compared to a prohibition with stringently limited exceptions, does not prevent wrongful deaths or abuse of the vulnerable.[249]

133. The Crown's failure to justify the Impugned Laws under s. 1 is stark.

E. ALLEGED PROCEDURAL ERRORS

134. Smith J. made no procedural errors. A new civil trial will only be ordered where the interests of justice plainly require it because a "substantial wrong or miscarriage" has occurred. [250] AGC's assertions, even as alleged, do not approach this threshold.

i) Hearing Timelines were Reasonable

135. Respondents' evidence was delivered by September 2 by a pro bono team of four.[251] AGs had vast staff and resources and allocated responsibility between them.[252]

136. No cited authority supports, and there is no merit to, the submission that timelines set constitute a procedural error justifying overturning the decision.[253]

137. AGC has not established that the evidence it "might" have tendered was critical. No evidentiary gap capable of engaging the interests of justice has been established.[254]

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[249] Reasons, para. 1267, 1282 A.R., v. 3, 463, 468. Emily Jackson and John Keown, *Debating Euthanasia* (Hart Publishing Limited, 2011), p. 35

[250] *Knauf v. Chao*, 2009 BCCA 605, [2009] B.C.J. No. 2612, para. 19

[251] See, Case Planning Conferences: June 28, 2011, A.B., v. 3, p. 726; August 2, 2011, A.B., v. 1, pp. 4-8, and 13; August 3, 2011 A.B., v. 1, pp. 24. A small number of "straggler" affidavits were accepted by AGC by consent.

[252] A.B., v. 3, pp. 723-4; *Carter v. Canada (Attorney General)*, 2012 BCSC 1587, paras. 15-6, 92-3, 96,100

[253] AGC's complaint is that Smith J. did not accept, as a basis for concluding that a trial should not proceed at the time and in the manner set, its assertion that it "might" tender additional evidence if the timelines were pushed back: A.B., v. 39, p. 13428, lines 21-41; p. 13471, lines 17-74, p. 13472, lines 1-5; p. 13473, lines 8-34. Smith J. did not rule on admissibility; she dismissed a Rule 9-7(11)(b) application: See e.g. Case Planning Conferences: Supp. A.B., 50-3, 56, 69-70; A.B., v. 39, p. 13426, ll. 1-12, p. 13427-8; p. 13469, ll. 26-45; October, 13, 2011, Supp. A.B., 90, A.B., v. 39, p. 13470, ll. 1-21 and November 8, 2011, A.B., v. 39, p. 13245, ll. 17-39, p. 13429, ll. 7-20, p. 13452, ll. 33-47 and p. 13453, ll. 1-5; p. 13493-4.

138. Smith J. repeatedly extended deadlines and customized the process to accommodate AGC's expressed concerns,[255] while also remaining properly cognizant of the urgency of Ms. Taylor's condition.[256]

ii) Reply Submissions Were Proper

139. AGC filed a 17 page submission objecting to Respondents' reply. Smith J. gave detailed reasons for concluding these reply submissions were proper.[257]

RESPONDENT'S CROSS-APPEAL FACTUM[258]

140. Smith J. erred in law when she held that "the legislative infringement of s. 15 stems from its prohibition of physician-assisted suicide, and the declaratory relief with respect to that infringement should be limited accordingly."[259]

141. The s. 15 declaration struck down the Impugned Laws "to the extent that they prohibit physician-assisted suicide by a medical practitioner"[260] and not to the extent that they prohibit consensual physician-assisted death. The s. 15 remedy granted addresses discrimination against the physically disabled that require a limited level of assistance to kill themselves,[261] but does not extend relief to those so physically disabled that they require assistance of a kind that would render the act euthanasia.[262]

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[254] AGC merely asserts what is always true: that more evidence "might" be entered had timelines been extended. Failing to provide infinite time is not judicial error.
[255] E.g. AGC's time to deliver evidence was extended (to October 12) and some accepted later by consent.
[256] A.B., v. 39, 13480 (lines 30-47); 13481 (lines 1-5), 13485
[257] Reasons, paras. 148-59, A.R., v. 2, 148-50
[258] As noted at footnote 186, Respondents' submissions on cross-appeal are predicated on and build upon its earlier s. 15 argument about distinction and burden.
[259] Reasons, para. 1392, A.R., v. 3, 492
[260] Reasons, para. 1393(a), A.R., v. 3, 492-3
[261] Reasons, para. 37, 1389, A.R., v. 2, 124; v. 3, 492
[262] Reasons, paras. 38-9, A.R., v. 2, 124-5

142. This remedy ignores the disproportionate burden that ss. 14 and 222 of the *Code* have on extremely materially physically disabled individuals.[263]

143. Sections 14 and 222 prohibit causing anyone's death, even in response to a competent, informed, voluntary and resolved request by a patient to a physician to so act in order to relieve intolerable suffering. On their face, these provisions apply to everyone. Yet these provisions have a disproportionate impact on those whose disability is severe enough to render them unable to act on their own – even with the assistance of a medical practitioner – to carry out their decision to die. In other words, these provisions impose a disproportionate burden on the extremely materially physically disabled. This burden is discriminatory for the same reasons set out above in our discussion under s. 15.

144. The reference point for the discrimination claim is the autonomy to decide to die in the face of intolerable suffering, not the degree to which the suffering person may need their physician's assistance due to their particular disability.One person with ALS may find themselves intolerably suffering while still able to swallow; another not until later on, when the window for oral ingestion has closed, making it necessary for a physician to provide drugs by injection. The patient who can swallow could obtain medication for self-ingestion but for s. 241; the patient who cannot suffers the same burden under ss. 14 and 222, which prohibit an injection on request. The burden and discrimination are the same; the impact is the same; only the *Code* sections differ.

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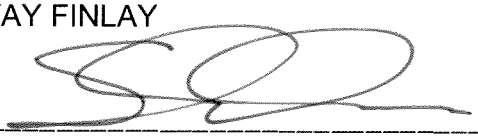
[263] Smith J.'s s. 15 declaration struck down these provisions "to the extent they prohibit physician-assisted suicide": Reasons, para. 1393(a), A.R., v. 3, 492. Respondents' position is that ss. 14 and 222 do not prohibit physician-assisted suicide.

PART IV. NATURE OF ORDER SOUGHT

145. The appeal be dismissed, the order of Smith J. (subject to cross-appeal) be upheld, and the cross appeal be allowed, with special costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ARVAY FINLAY

Per: 

Dated: December 10, 2012

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

Appendix A

Constitution Act, 1982 being Schedule B to the *Canada Act 1982* (U. K.), 1982, c. 11, ss. 1, 7, 15, 52

http://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

Equality Rights

Equality before and under law and equal protection and benefit of law

15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Primacy of Constitution of Canada

52(1). The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Appendix B

Criminal Code, R.S.C., 1985 c. C46, ss. 14, 21, 25, 22, 33(2), 34(2)-35, 37, 39-41, 222, 226, 241

http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html

Consent to death

14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

R.S., c. C-34, s. 14.

Parties to offence

21. (1) Every one is a party to an offence who

(*a*) actually commits it;

(*b*) does or omits to do anything for the purpose of aiding any person to commit it; or

(*c*) abets any person in committing it.

Common intention

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

R.S., c. C-34, s. 21.

Person counselling offence

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

Idem

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

Definition of "counsel"

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

R.S., 1985, c. C-46, s. 22;

R.S., 1985, c. 27 (1st Supp.), s. 7.

...

Protection of persons acting under authority

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

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

Idem

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

When not protected

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous

bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

When protected

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

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

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

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

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

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

Power in case of escape from penitentiary

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

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

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

R.S., 1985, c. C-46, s. 25;

1994, c. 12, s. 1.

...

Protection of officers

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

...

Self-defence against unprovoked assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

> (*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

R.S., 1985, c. C-46, s. 34;

1992, c. 1, s. 60(F).

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

> (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

R.S., c. C-34, s. 35.

...

Preventing assault

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

Extent of justification

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

R.S., c. C-34, s. 37.

...

Defence with claim of right

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

Defence without claim of right

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

R.S., c. C-34, s. 39.

Defence of dwelling

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

R.S., c. C-34, s. 40.

Defence of house or real property

41. (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

Assault by trespasser

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

R.S., c. C-34, s. 41.

...

Homicide

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

Kinds of homicide

(2) Homicide is culpable or not culpable.

Non culpable homicide

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

Culpable homicide

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

Idem

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

(*a*) by means of an unlawful act;

(*b*) by criminal negligence;

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

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

Exception

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

R.S., c. C-34, s. 205.

...

Acceleration of death

226. Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

R.S., c. C-34, s. 209.

...

SUICIDE

Counselling or aiding suicide

241. Every one who

(*a*) counsels a person to commit suicide, or

(*b*) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

R.S., 1985, c. C-46, s. 241;

R.S., 1985, c. 27 (1st Supp.), s. 7.

...

PURPOSE AND PRINCIPLES OF SENTENCING

...

Fundamental principle

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

R.S., 1985, c. 27 (1st Supp.), s. 156;

1995, c. 22, s. 6.

Other sentencing principles

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

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

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

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

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

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

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

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

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

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

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

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

1995, c. 22, s. 6;

1997, c. 23, s. 17;

2000, c. 12, s. 95;

2001, c. 32, s. 44(F), c. 41, s. 20;

2005, c. 32, s. 25.

LIST OF AUTHORITIES

Other

Statutes