APPLICANTS' MEMORANDUM OF ARGUMENT

PART I. OVERVIEW AND STATEMENT OF FACTS

1. Twenty years ago, a narrow majority of this Court upheld the absolute prohibition against physician-assisted dying in *Rodriguez*.[1] Today, on the basis of a new social and legal landscape, the time has come for this Court to consider the matter anew and reach a different outcome.

2. Leave to appeal is sought from the 2:1 decision of the British Columbia Court of Appeal (the "BCCA") overturning the trial judge's orders of June 15, 2012 and November 1, 2012 which declared that ss. 14, 21, 22, 222 and 241 of the *Criminal Code*[2] (the "impugned provisions") unjustifiably infringe ss. 7 and 15 of the *Charter*,[3] and are of no force and effect to the extent of that infringement in relation to physician-assisted dying and granted special costs to the Applicants.

3. The majority of the BCCA dismissed the claim on the basis of *stare decisis* in light of this Court's decision in *Rodriguez*, finding that it was the exclusive right of this Court to revisit the constitutional validity of the impugned provisions in light of legal and social developments. The present constitutional validity of the impugned provisions is a question of great public and national importance.

4. The majority's overly broad and restrictive approach to *stare decisis* is in error and at odds with that taken recently by the Ontario Court of Appeal (the "ONCA") in *Bedford*.[4] This was no simple error of law as it precluded a determination by BC's highest court of substantive issues of such overwhelming public importance that it is in the interests of justice that this Court grant leave and determine those issues.

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[1] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*]
[2] *Criminal Code*, R.S.C., 1985, c. C-46
[3] *Canadian Charter of Rights and Freedoms* [*Charter*], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*]
[4] *Carter v. Canada (Attorney General)*, 2013 BCCA 435 [CA Reasons], paras. 241-42, 316; *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 [*Bedford_CA*]

5. However, whatever the proper interpretation and application of the doctrine of (vertical) *stare decisis*, there is no question of this Court's right and authority to come to a different conclusion than it did in *Rodriguez*.

6. In *Fraser*, this Court in both its majority and dissenting opinions outlined a number of criteria which may, depending on the circumstances of each case, be relevant in deciding whether departure from precedent is appropriate.[5] Many of those criteria favour revisiting *Rodriguez*: (a) the significant and material change in social and legislative facts has robbed the precedent of justification;[6] (b) the constitutional arguments in this case include ones neither advanced nor considered in *Rodriguez*;[7] (c) a contemporary application of the relevant legal principles demands a different conclusion, undermining the validity of *Rodriguez* as precedent and demonstrating that *Rodriguez* was wrongly decided;[8] and (d) the evidence in this case demonstrates that the absolute ban upheld in *Rodriguez* fails to reflect *Charter* values,[9] creates unfairness,[10] and defies workability.[11] Fundamentally, the rationales of certainty, consistency, predictability and institutional legitimacy simply do not outweigh the need to overturn *Rodriguez* as a precedent.[12] This is particularly the case when the effect of reversing *Rodriguez* would be to enhance, not diminish, *Charter* protection.[13] Life itself is at stake here and, as the Alberta Court of Appeal has remarked adopting the sage words of Lord Atkin in *Ras Behari Lal v. King Emperor*: "Finality is a good thing… but justice is a better."[14]

7. It is especially noteworthy that the justices who did not find *stare decisis* to apply in this case - the trial judge and the Chief Justice on appeal - agreed that there have not only been significant jurisprudential changes since *Rodriguez*, but there has been a significant and material change in the social and legislative facts. Further, both found the impugned provisions

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[5] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [*Fraser*], paras. 130-39
[6] *Fraser*, paras. 136-37
[7] *Fraser*, paras. 134, 137
[8] *Fraser*, paras. 134, 137
[9] *Fraser*, para. 134
[10] *Fraser*, para. 135
[11] *Fraser*, para. 136
[12] *Fraser*, para. 139
[13] Fraser, para. 58
[14] *R. v. Lee*, 2012 ABCA 17, para. 46, citing *Ras Behari Lal v. King Emperor*, [1933] All E.R. Rep. 723 at 726

unconstitutional when assessed on the present record and against current law. It is incumbent on this Court to give the nation authoritative guidance on the issues in these circumstances.

8. With respect to changes in the law since *Rodriguez*, both the trial judge and Chief Justice Finch, dissenting, concluded that the principles of fundamental justice of overbreadth and gross disproportionality were each recognized after this Court's decision in *Rodriguez*, and as such, warranted determination in this case. In upholding the trial judge's conclusions that the impugned provisions deprived the Applicants of their life, liberty and security of the person interests in a manner that offended both of these principles, Chief Justice Finch said:

> [164] ... Having reviewed the evidence it was open to the judge to find that protections for vulnerable individuals can be achieved through carefully tailored safeguards rather than an absolute prohibition. A prohibition which allows for no exceptions, regardless of competency, voluntariness, autonomy, or freedom from coercion, is broader than is necessary to achieve the objective of protecting vulnerable individuals.
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> [165] Similarly, the prohibition is unnecessary, and likely counter-productive, to sending a message about the value of life. Parliament can surely adopt more effective methods that would not cause the deprivation at issue in this case. For these reasons, the prohibition is overbroad.
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> [166] For similar reasons, I would conclude that the deprivation is grossly disproportionate to the objectives advanced. As discussed, the effect of the prohibition is to cause premature deaths. This is grossly disproportionate to the objective of sending a message about the value of life, and grossly disproportionate to the goal of protecting the vulnerable when such protections can be achieved through the regulation of physician-assisted dying.
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> [167] I conclude that the legislative means in this case are overbroad and that their impact is grossly disproportionate to their objectives. Accordingly, the deprivations of the rights protected by s. 7 are not in accordance with the principles of fundamental justice.[15]

9. The trial judge also concluded that in light of the significantly and materially different legislative and social facts, the rigour this Court put into the final stage of the *Oakes* analysis in *Hutterian* was a sufficient change in legal principle to warrant a fresh s. 1 analysis for the s. 15 breach.[16]

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[15] CA Reasons, paras. 164-67

[16] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian*]

10. With respect to the social and legislative facts, it is fair to say that the two most significant factors given by Sopinka J., for the majority of this Court in *Rodriguez*, when upholding the assisted suicide prohibition were that, based on the record at that time: (1) there was not just a legal but a moral (or ethical) distinction between what he characterized as passive and active euthanasia;[17] and, (2) there was proportionality or balance between an assumed breach of s. 15 and the law's salutary effects in part because there was no "halfway measure" that could be relied on to protect the vulnerable.[18]

11. The trial judge came to different conclusions on each of these issues based on a thorough and encompassing record that markedly differed from that before this Court in *Rodriguez*. With respect to the ethical debate, the trial judge explained:

> [317] The overarching reason why the ethical debate is relevant is that both legal and constitutional principles are derived from and shaped by societal values.
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> [318] Additionally, the ethical debate bears on these questions: (1) Would Canadian physicians be willing to assist patients with hastening death if it were legal to do so? (2) Does current medical practice with respect to end-of-life care make distinctions that are ethically defensible, and is the distinction between suicide and assisted suicide ethically defensible? (3) Does the law attempt to uphold a conception of morality inconsistent with the consensus in Canadian society?[19]

12. The trial judge concluded that:

a. "there are experienced and reputable Canadian physicians who, in some circumstances, would find it consistent with their ethical principles to assist patients with hastening death if it were legal to do so";[20]

b. "[t]he preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death;"[21] a number of practitioners doubt the

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[17] *Rodriguez*, paras. 168-75
[18] *Rodriguez*, para. 188, see also paras. 186-90
[19] *Carter v. Canada (Attorney General)*, 2012 BCSC 886 [TJ Reasons], paras. 317-18
[20] TJ Reasons, para. 319
[21] TJ Reasons, para. 335

existence of a valid ethical distinction;[22] in an individual case, a bright-line ethical distinction is elusive;[23] and that there is no ethical distinction between suicide and assisted suicide in circumstances where the patient's decision for suicide is entirely rational and autonomous, it is in the patient's best interest, and the patient has made an informed request for assistance;[24]

c. current legal end-of-life practices are considered ethical,[25] human life is of extremely high value, and society should never, or only in very exceptional circumstances, permit the intentional taking of human life,[26] and, while, there is no clear societal consensus either in favour or against physician assisted dying, there is consensus that if it is ethical, it is only so where it is clearly consistent with the patient's wishes and best interests, and done to relieve suffering.[27]

13. Chief Justice Finch, in dissent, rightly described the trial judge's reasons as "extensive, thorough, and carefully drafted."[28] Finch C.J. noted the trial judge's findings in respect of ethics and made no finding of error.[29]

14. The trial judge's proportionality analysis in this case was informed by the record which includes evidence regarding the eight permissive jurisdictions that came into existence post-*Rodriguez*, including detailed studies and expert evidence from primary researchers regarding the structure, operation and experience under those with regulatory structures.[30] It also includes evidence demonstrating that the psychological health establishment now firmly accepts that it is possible to have a rational wish to die and this is considered distinct and distinguishable from the reasoning that informs traditional suicide.[31] The record includes detailed evidence regarding the kinds of medical decision-making that are currently allowed in Canada, how these

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[22] TJ Reasons, paras. 336-38
[23] TJ Reasons, para. 338
[24] TJ Reasons, para. 339
[25] TJ Reasons, para. 340
[26] TJ Reasons, para. 357
[27] TJ Reasons, para. 342
[28] CA Reasons, para. 11
[29] CA Reasons, para. 14
[30] TJ Reasons, paras. 359-747
[31] TJ Reasons, paras. 813-14

are regulated, and the ethics of same.[32] It also includes extensive expert evidence regarding competence, voluntariness, ambivalence and the assessment of informed consent (collectively "decisional vulnerability") for medical decision-making.[33] There was also evidence about the impacts of the current law. Nothing comparable to this record was before the Court in *Rodriguez* - most of the evidence could not have been before this Court as it did not exist at the time, some simply was not provided. All of it is material and critical to the question of whether the impugned provisions are constitutionally valid today.

15. The trial judge's careful and comprehensive findings of fact, which properly drive the proportionality analysis, included:

16. *Experience of other Jurisdictions*: A number of jurisdictions now either permit or do not criminalize physician-assisted dying or assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana and Colombia.[34] Permissive jurisdictions that regulate assisted dying have safeguards to ensure only defined categories of patients are involved and protocols are followed.[35] There is no evidence that persons with disabilities are at a heightened risk of accessing physician-assisted dying in permissive jurisdictions.[36] The evidence in other jurisdictions shows that apprehended risks have not materialized and, rather than demonstrating, serves to allay fears of the slippery slope.[37]

17. *Currently Available Medical End of Life Practices*: Patients are not required to submit to medical interventions, even where that refusal will hasten their deaths. A decision to refuse such an intervention may either be made at the time, in advance, or by a substitute decision-maker in the case of incompetent patients.[38] Physicians may legally administer medications even though they know the doses may hasten death, so long as the intention is to provide palliative care by easing the patient's pain.[39] Palliative sedation, where a patient who is near death is sedated, and

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[32] TJ Reasons, paras. 185-231
[33] TJ Reasons, paras. 748-884
[34] TJ Reasons, paras. 9, 363, 389-403, 455-69, 505-17, 589-93, 605-20
[35] TJ Reasons, para. 9
[36] TJ Reasons, para. 853
[37] TJ Reasons, para. 1241
[38] TJ Reasons, paras. 207, 231
[39] TJ Reasons, paras. 225, 231

may or may not be provided with artificial hydration or nutrition while sedated, is considered ethical and legal. Palliative sedation occurs in Canada, and is not currently regulated.[40]

18. *Decisional Vulnerability*: 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.[41] Coercion and undue influence can be detected in a capacity assessment.[42] 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.[43] It is feasible to screen out patients who are ambivalent.[44] 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.[45]

19. The risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced.[46] Any risks to disabled individuals connected to prejudice and stereotyping about the reduced value of their lives can be effectively addressed through these safeguards.[47] The trial judge concluded:

> I have found that the evidence supports the conclusion that a system with properly designed and administered safeguards could, with a *very high degree of certainty*, prevent vulnerable persons from being induced to commit suicide while permitting exceptions for competent, fully-informed persons acting voluntarily to receive physician-assisted death.[48]

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[40] TJ Reasons, paras. 200-01, 357
[41] TJ Reasons, paras. 795, 798; see also paras. 762-64, 775, 778-90, 793
[42] TJ Reasons, para. 815
[43] TJ Reasons, para. 831
[44] TJ Reasons, para. 843
[45] TJ Reasons, para. 10
[46] TJ Reasons, para. 883
[47] TJ Reasons, paras. 853, 1129
[48] TJ Reasons, para. 1367 (emphasis added)

Impacts of the Current Law

20. A few physicians in Canada provide assistance in suicide or euthanasia despite the prohibition. Some Canadians travel to other jurisdictions to receive assisted suicide.[49]

21. Some impacts of the law are countervailing: it sends positive[50] and negative[51] messages about people with disabilities; it prevents[52] and causes[53] deaths; it causes lengthened life which can be good[54] or bad;[55] it has positive[56] and negative[57] effects on the role of the physician; it has positive[58] and negative[59] effects on palliative care.

22. However, the law also imposes extreme costs on the grievously and irremediably ill that are without counter balance. *Inter alia*: the law denies individuals autonomy in decision-making with regard to their bodies, lives and suffering in ways that critically intersect with their dignity and personal integrity, lifelong values and life experience.[60] Where palliative care is unhelpful, unavailable or unacceptable to an individual, people are abandoned to their physical pain and/or psychological suffering, and the terrible fear of worse to come.[61] It deprives individuals of peace of mind.[62] It has a deleterious effect on the care that some patients receive.[63] It leverages the intolerable suffering of some for improvements in general palliative care.[64]

23. The following benefits are likely to inure from the prohibition's removal: for some longer life and enjoyment of life;[65] more open physician-patient relationships and intellectual

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[49] TJ Reasons paras. 204-05
[50] TJ Reasons, para. 1265
[51] TJ Reasons, para. 1266
[52] TJ Reasons, para. 1267
[53] TJ Reasons, para. 1277; see also para. 1267
[54] TJ Reasons, para. 1268
[55] TJ Reasons, para. 1268
[56] TJ Reasons, para. 1270
[57] TJ Reasons, para. 1271
[58] TJ Reasons, paras. 1273-74
[59] TJ Reasons, para. 1273
[60] TJ Reasons, paras. 1279, 1326
[61] TJ Reasons, paras. 1278, 1328
[62] TJ Reasons, para. 1280
[63] TJ Reasons, para. 1281
[64] TJ Reasons, para. 1275
[65] TJ Reasons, paras. 1042, 1280

honesty;[66] and it may do more to improve palliative care than the absolute prohibition.[67] An absolute prohibition, compared to a prohibition with stringently limited exceptions, does not prevent wrongful deaths or abuse of the vulnerable.[68] 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.[69]

24. The Chief Justice declined to revisit the s. 1 analysis under s. 15 in light of this Court's judgment in *Rodriguez*; however, it is noteworthy that on the record, he found that breaches of s. 7 were not in accordance with the principles of fundamental justice and not proportional under the s. 1 analysis for the s. 7 breach,[70] and in so doing upheld the trial judge's findings of fact.

PART II. STATEMENT OF QUESTIONS IN ISSUE

25. This application for leave to appeal raises issues of national or public importance. Profound legal and ethical issues concerning equality, compassion, autonomy and the limits of the state's power to define the value and meaning of life and death are central to this case.

26. The case addresses the constitutionality of the provisions of the *Criminal Code* that impose a blanket prohibition against physician assistance in dying and as a result:

a. directly impact the rights to equality, life, liberty and security of the person of a distinct but significant group: those so unfortunate as to have irremediable conditions that cause intolerable suffering - suffering the patient experiences as literally worse than death;

b. directly impact those physically disabled persons whose disability prevents them from acting alone, categorically labelling them incapable of judging their own best interests and leaving them with the options of pre-emptive suicide while still able, or simply suffering; and

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[66] TJ Reasons, para. 1271
[67] TJ Reasons, para. 1273
[68] TJ Reasons, paras. 1267, 1282
[69] TJ Reasons, para. 1370
[70] CA Reasons, para. 74

c. directly impact all Canadians who may find themselves seriously ill and deprived of the peace of mind and quality of life that comes with the legal right to seek physician-assisted death.

27. This Court recognized the public and national importance of these issues when it granted leave in *Rodriguez*. If anything, the public importance of the issues has increased since that time given demographic shifts and the continuing march of medical advancements. All of the justices who have considered the issues have recognized, in various ways, the profound public importance of this case. The significant public importance of the case was conceded by the Attorneys General in the courts below. The public importance of the case is also clear from the intense public interest in the case.

28. Two British Columbia justices, including the Chief Justice of the Province, have now measured the impugned provisions against the *Charter* using current jurisprudence and current social and legislative facts. Both held that the law came up short. Notably, there is no decision to the contrary on the merits, the two other BCCA justices having held that the substantive merits of the issues raised are for this Court alone to decide.

29. In light of the extensive record assembled in these proceedings, which reveals a sea change in legislative and social facts since *Rodriguez*, as well as developments in the jurisprudence, this case presents the ideal opportunity for this Court to consider the issues under ss. 1, 7 and 15 of the *Charter* anew, and in doing so, to clarify the law in respect of ss. 7, s. 1 and remedies under the *Charter*. As outlined above, many of the factors outlined by this Court in *Fraser* which augur in favour of this Court reconsidering its past decisions are at play and demand such an outcome in this case in the interests of justice.

30. The case also provides this Court the opportunity to revisit provincial interjurisdictional immunity and consider the extent to which the federal criminal law power may trench on core provincial powers with respect to health care in the specific context of physician-assisted dying.

31. The appeal raises the important question of when special costs should be available in public interest litigation in order to foster access to justice.

PART III. STATEMENT OF ARGUMENT

A. Issues of Broad and Fundamental Importance

32. The question at the heart of this case is whether Parliament can have a blanket or absolute prohibition against assisted dying that applies even where an informed and fully competent person, suffering intolerably from a grievous and irremediable illness, makes a determined and fully voluntary request for her physician's assistance. The trial judge found it could not. Her finding was supported by evidence showing that a blanket prohibition is not necessary to achieve Parliament's objective of protecting the vulnerable and is grossly disproportionate in its effect.

33. The majority of the BCCA in this case noted that "the issue presented is of broad public interest" and although this Court had considered the issue of assisted dying twenty years ago, the majority held "the issue of the application of *Rodriguez* was not without uncertainty".[71] Given the significant evolution of the law and the changes in social and legislative facts since *Rodriguez* was decided, it is in the public interest that this Court reconsider the questions of *Charter* infringement and justification in today's context.

34. All of the justices who have considered the issues have recognized, in various ways, the profound public importance of this case. This recognition has been most express in the context of costs judgments. All costs orders to date have departed from the usual rule on costs in light of the public importance of the litigation.[72]

35. Notably, the significant public importance of the case was conceded by the Attorneys General in the courts below. As the trial judge noted:

> [60] There is little room for doubt that this case involves matters of public importance. As counsel for the AGC and the AGBC argued at the trial, the constitutional validity of the absolute prohibition against physician-assisted death

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[71] CA Reasons, para. 346

[72] *Carter v. Canada (Attorney General)*, 2012 BCSC 1587 [Costs Judgment], paras. 60, 87; CA Reasons, paras. 216-17 (Finch CJ, dissenting). While the majority overturned the award of special costs, they did so on the basis that the issues had been previously resolved, not on the basis that the issues were not of public importance: see paras. 34. Even though they determined the case on the basis of the doctrine of *stare decisis*, the BCCA majority recognized the public importance of the case by making an order that each side bear their own costs: paras. 343-46.

raises significant issues about the meaning of the *Charter* and implicates fundamental social values and policies.[73]

36. The public interest in the case is another clear indicia of the public importance of the case. The overwhelming public interest in the case is evidenced *inter alia* by CBC's application to televise the trial proceedings,[74] the BC Courts' use of a media lock-up preceding the release of the trial and BCCA judgments in this case, an unprecedented live webcast of the BCCA proceedings, and by the sheer number of intervenors who participated at the trial and appeal levels.[75] The extensive media coverage of the proceedings is another indicia of the public interest in the case.[76] This media coverage has included national and international attention and has gone largely unabated for over two years including coverage by the leading newspaper, television news and radio news outlets.[77] The proceedings have been documented by both of Canada's leading investigative news programs, CBC's *fifth estate*[78] and CTV's *W5*,[79] by *MacLean's* magazine and by the most listened to and respected radio shows in the country including *The Current* and *As It Happens*.[80]

37. There have been repeated calls from all quarters of society, be it editorial writers, academics, ordinary Canadians or those more prominent such as, most recently, the renowned Ontario microbiologist Donald Low, for this issue to be addressed at a national level.[81] In November 2011, an Expert Panel of the Royal Society of Canada delivered a report entitled *End-of-Life Decision Making* in response to national and international changes to the landscape of end-of-life care. Noting the recommendations in the Special Senate Committee Report in 1995, the Panel asked whether a careful reconsideration of the same issues would result in the same conclusions today. The Expert Panel unanimously recommended that the prohibitions on assisted suicide and voluntary euthanasia in the *Criminal Code* be modified to allow these

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[73] Costs Judgment, para. 60
[74] *Carter v. Attorney General (Canada)*, 2011 BCSC 1866 (application dismissed by Smith J.)
[75] Affidavit of Grace Pastine made October 24, 2013 ("Pastine Affidavit"), para. 18
[76] Pastine Affidavit, paras. 4-16
[77] Pastine Affidavit, paras. 8-14, Ex. A-F
[78] Pastine Affidavit, para. 13, Ex. E
[79] Pastine Affidavit, para. 14, Ex. F
[80] Pastine Affidavit, para. 12, Ex. D
[81] Pastine Affidavit, para. 15, Ex. G

practices in circumscribed and monitored circumstances.[82] A parallel *Charter* proceeding was commenced in Quebec, but abandoned when the claimant died in hospice.[83] The Quebec legislature is in the process of debating a bill designed to address medical aid for dying.[84]

38. Despite the public importance of the issues raised, and despite Canada's submissions in Court that this is an issue that must be left to Parliament, no political party seeks to debate the issue and the Federal Health Minister, Justice Minister and Prime Minister have repeatedly indicated that the government will not bring the issue of physician-assisted dying back before Parliament.[85] This Court is therefore the only place Canadians can look to protect their constitutional rights.

39. It is clear from all of the above that the issues raised will continue to be a source of legal uncertainty and thus cry out for authoritative determination by Canada's highest court. In short, Canada needs to know whether the impugned provisions are constitutional *today*.

B. *Charter* Issues

40. This case also presents the ideal and needed opportunity for the Court to clarify the jurisprudence or its application with respect to s. 7 and, in particular, with respect to: (a) the ambit of the right to "life"; and (b) the principles of fundamental justice and s. 1.

(1) Right to Life

41. There is a dearth of case law which considers the right to life in s. 7. This case squarely raises this right for consideration and two issues have emerged in which litigants and lower courts would benefit from guidance: (a) the extent to which the life interest must be given independent consideration; and (b) the ambit of the right to life.

42. The trial judge struck the impugned provisions, in part, on the basis that they infringed the right to life. She held that "*Rodriguez* does not decide whether the right to life is engaged by the legislation, and since Ms. Rodriguez did not claim a deprivation of her right to life, I refrain

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[82] TJ Reasons, paras. 294-95
[83] Pastine Affidavit, para. 16, Ex. H
[84] Pastine Affidavit, para. 17, Ex. I
[85] Pastine Affidavit, paras. 19-21, Ex. J-L

from drawing any inferences in this regard from the reasoning in the majority decision."[86] She found that "the right to life is engaged only when there is a threat of death."[87] However, she further found that this narrow right to life was engaged, as one effect of the law is to force an earlier decision and possible earlier death on persons who fear the future loss of their ability to act alone.[88]

43. In dissent, Chief Justice Finch found that this Court had not considered the right to life in *Rodriguez*.[89] He upheld the trial judge's finding that the narrow right to life articulated was engaged.[90] He also correctly accepted a broader interpretation of the "right to life." He stated:

> [86] ... Surely this human rights guarantee should protect "life" beyond one's mere physical existence. "Everyone" lives in different circumstances, experiences life in different ways, and lives within the ambit of his or her own personal abilities, characteristics and aptitudes. The meaning of the term "life" in the context of s. 7 includes a full range of potential human experiences. The value a person ascribes to his or her life may include physical, intellectual, emotional, cultural and spiritual experiences, the engagement of one's senses, intellect and feelings, meeting challenges, enjoying successes, and accepting or overcoming defeats, forming friendships and other relationships, cooperating, helping others, being part of a team, enjoying a moment, and anticipating the future and remembering the past. Life's meaning, and by extension the life interest in s. 7, is intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, when suffering overwhelms all else, is an intensely personal decision which "everyone" has the right to make for him or herself.[91]

44. The majority disagreed and took a restrictive approach to the ambit of the right to life, similar to the trial judge, noting that "'life' has not been broadly construed and indeed has been invoked by the Supreme Court of Canada in only a few cases" and that it is a value "that by definition is the opposite of death."[92]

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[86] TJ Reasons, para. 1319
[87] TJ Reasons, para. 1320
[88] TJ Reasons, para. 1322
[89] CA Reasons, para. 68
[90] CA Reasons, para. 83
[91] CA Reasons, para. 86
[92] CA Reasons, paras. 273, 275

45. Without finding that the trial judge had committed any error of fact in finding that the impugned provisions *cause death*, a point that Canada conceded had not been argued in *Rodriguez*,[93] the majority erroneously suggested that it was possible to dismiss a claim based on the right to life even without specifically addressing that interest, when it said: "in *Rodriguez*, although the majority did not in so many words reject the notion that s. 241 constitutes a breach of the right to 'life' under s. 7, we *infer* that the Court dismissed such a notion out of hand."[94]

46. This conclusion was in error because the law is clear that the s. 7 rights to life, liberty, and security of the person are three distinct interests which must each be given separate consideration.[95] It is therefore not possible to "infer" from this Court's prior consideration of the liberty and/or security of the person interests that the right to life was considered and dismissed.

47. Delineation of the proper scope of the right to life and an authoritative statement that a prior decision of a higher court on one s. 7 interest is not binding with respect to other s. 7 interests will assist future litigants in framing evidence and arguments under s. 7.

(2) Overbreadth, Gross Disproportionality and Section 1

48. The majority judgment evinces confusion in the law in respect of a number of related issues: (a) the different roles of the principles of overbreadth and disproportionality; (b) the different roles of the principles of fundamental justice in respect of each separate breach of s. 7; (c) the different roles of the principles of fundamental justice and s. 1 under the *Charter*; and (d) the extent to which a separate s. 1 analysis is mandated for a separate *Charter* breach.

49. The majority of the BCCA erroneously concluded that a law upheld under an analysis applying any *one* of arbitrariness, overbreadth or gross disproportionality is shielded from *Charter* scrutiny on the basis of the others.[96]

50. The majority compounded this error by deciding that a law which had been challenged on the basis of a different provision of the *Charter* (here s. 15) and upheld *under s. 1*, is thereby

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[93] CA Reasons, para. 81
[94] CA Reasons, para. 281, see also paras. 278-82 (emphasis added)
[95] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, p. 205; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, p. 500; *Bedford_CA*, para. 69
[96] CA Reasons, paras. 312-13

shielded from subsequent *Charter* scrutiny under s. 7.[97] 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.

51. The majority's melding approach to the principles under s. 7 is also fundamentally inconsistent with this Court's admonition in *Hutterian* that each step in a proportionality analysis has distinct work to do. It is for this reason that a law may pass the rational connection test, but fail minimal impairment, or pass minimal impairment but fail the final step of s. 1. The same reasoning would adhere, *mutatis mutandis*, in respect of s. 7. Thus, prior decisions considering only one principle cannot be binding in respect of the others.

52. Further, contrary to the conclusion of the majority,[98] 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* had been conducted regarding a breach of s. 7.[99] It was not. The majority's reasoning is in error and takes *stare decisis* much too far.

53. To the extent these errors elucidate ambiguities in the law that require clarification, leave should be granted to guide lower courts. To the extent these errors are merely mistakes of law, because they have in this case, and could in others, preclude a determination of the substantive merits of a legal issue of overwhelming public importance, it is in the interests of justice that this Court grant leave.

(3) Remedies

54. The majority, recognizing the possibility that this Court would grant leave, opined on possible remedies should this Court find the impugned provisions unconstitutional. The majority's comments on this point question the wisdom of this Court's approach to constitutional remedies as clarified in *Ferguson*[100] when there is political unpalatability of certain constitutional issues reaching the Court and the spectre of a legislative vacuum. The Applicants do not share

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[97] CA Reasons, para. 322
[98] CA Reasons, para. 323
[99] *R. v. Oakes*, [1986] 1 S.C.R. 103, para. 70; and *Hutterian*, para. 134 (Abella J., dissenting, but not on this point)
[100] *R. v. Ferguson*, 2008 SCC 6

the majority's concerns; however, to the extent that the majority's judgment questions the correct approach to constitutional remedies, this Court should make clear that *Ferguson* remains good law.

C. Provincial Interjurisdictional Immunity

55. In their Notice of Civil Claim, filed prior to this Court's decision in *PHS*,[101] the Applicants sought a declaration that the impugned provisions do not apply to physician-assisted dying on the basis of ss. 92(7), (13) and (16) or any combination thereof of the *Constitution Act, 1867* and the doctrine of interjurisdictional immunity.

56. The Applicants did not press this argument in the lower courts in light of this Court's decision in *PHS*.[102] However, the Applicants reserved their right to raise the arguments at a later stage in the litigation.

57. In light of Quebec's recent efforts to pass a law in relation to this very subject matter, this case presents an ideal and needed opportunity for this Court to opine on whether provincial interjurisdictional immunity can be applied to protect a core sphere of competence over health care procedures with regard to the medical practice of physician-assisted dying. The record before the Court is more than sufficient. There is no prejudice to Canada of having arguments raised in relation to this issue given that the evidence bearing upon it is complete and that Canada had notice of the division of powers issue before trial and the Applicants did not indicate that the issue would not be pressed below until final argument.

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[101] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS*]

[102] In *PHS*, at paragraph 69, this Court said: "Third, application of interjurisdictional immunity to a protected core of the provincial health power has the potential to create legal vacuums. Excluding the federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures, such as human cloning or euthanasia. The provinces might choose not to legislate in these areas, and indeed might not have the power to do so. The result might be a legislative vacuum, inimical to the very concept of the division of powers." This passage was likely *obiter* and while likely binding on the trial judge and Court of Appeal we will submit in this Court, if leave is granted, that the passage is not determinative of the issues in this case.

D. Costs

58. The trial judge awarded the plaintiffs special costs on the basis that the matter was one of public importance. The costs order was made against both the Attorney General of Canada and the Attorney General of British Columbia in recognition of the fact, as found by the trial judge who was also the case management judge in these proceedings, that the Attorney General of British Columbia participated as a party in these proceedings.[103]

59. Chief Justice Finch, dissenting, would have upheld those findings of fact and affirmed the order made as to costs.[104]

60. The BCCA majority, however, erroneously concluded that the matter did not merit special costs because the issues raised had been "resolved" in *Rodriguez*.[105] Further, with respect to the Attorney General of British Columbia, the BCCA majority erroneously substituted its own view of the extent of the Attorney General's participation, for that of the trial judge.[106] The BCCA majority instead ordered that no costs be awarded to any party at the BC Supreme Court or the Court of Appeal.

61. This Court should endorse the trial court's superior position to assess the participation of parties at the trial level and in so doing to make costs determinations.

62. More importantly, with respect to the issue of special costs, the question the BCCA majority ought to have asked itself was whether the *current* constitutional validity of the impugned provisions was an unresolved question of sufficient public importance. Even if the majority was satisfied that *Rodriguez* answered the same question of law[107], the social and legislative facts have vastly changed and the public interest warrants an up-to-date judicial determination.

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[103] Costs Judgment, paras. 14-18, 100
[104] CA Reasons, paras. 207-34
[105] CA Reasons, paras. 337-46
[106] CA Reasons, paras. 349-50
[107] As noted above, the majority acknowledged that "the issue of the application of *Rodriguez* was not without uncertainty": CA Reasons, para. 346

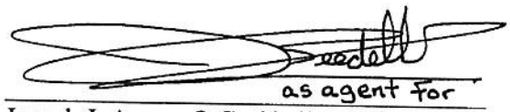
63. The test proposed by the BCCA majority is not only incorrect, it will operate to stymie future public interest litigation. Canada now has 20 years of *Charter* jurisprudence. Cases like *Bedford_CA* and the present demonstrate that *Charter* analyses grounded in social and legislative facts may have a built-in obsolescence and that, where there are material changes in social and legislative facts, the public interest will mandate that the law be tested against its new reality.

PARTS IV AND V. COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

64. The Applicants seek an order granting leave to appeal with costs, including special costs on account of the exceptional public importance of this case, in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, the 25th day of October, 2013.



Joseph J. Arvay, Q.C., Sheila M. Tucker and
Alison M. Latimer
Counsel for the Applicants

PART VI. TABLE OF AUTHORITIES

PART VII. STATUTES RELIED ON

	Paragraph(s)
Canadian Charter of Rights and Freedoms, ss. 1, 7 and 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11	2, 9-10, 24, 28-29, 33, 37, 40-41, 45-52, 63
Constitution Act, 1867 (U.K.). 30 & 31 Vict., c. 3, ss. 92(7), (13) and (16), reprinted in R.S.C. 1985, App. II, No. 5	55
Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 21, 22, 222 and 241	2, 26, 37, 45

***Canadian Charter of Rights and Freedoms*, ss. 1, 7 and 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11**

http://www.canlii.org/en/ca/const/const1982.html

Rights and freedoms in Canada	**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.
...		
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 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.

Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11

http://www.canlii.org/fr/ca/legis/lois/annexe-b-de-la-loi-de-1982-sur-le-canada-r-u-1982-c-11/derniere/annexe-b-de-la-loi-de-1982-sur-le-canada-r-u-1982-c-11.html

Droits et libertés au Canada	**1.**	La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Field

...

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

...

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Constitution Act, 1867 **(U.K.). 30 & 31 Vict., c. 3, ss. 92(7), (13) and (16), reprinted in R.S.C. 1985, App. II, No. 5**

http://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

...

13. Property and Civil Rights in the Province.

...

16. Generally all Matters of a merely local or private Nature in the Province.

Loi constitutionnelle de 1867, 30 & 31 Victoria, c 3

http://www.canlii.org/fr/ca/legis/lois/30---31-victoria-c-3/derniere/30---31-victoria-c-3.html

Sujets soumis au contrôle exclusif de la législation provinciale

92. Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

...

7. L'établissement, l'entretien et l'administration des hôpitaux, asiles, institutions et hospices de charité dans la province, autres que les hôpitaux de marine;

...

13. La propriété et les droits civils dans la province;

...

16. Généralement toutes les matières d'une nature purement locale ou privée dans la province.

***Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 21, 22, 222 and 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.

...

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.

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.

...

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.

...

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.

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

http://www.canlii.org/fr/ca/legis/lois/lrc-1985-c-c-46/derniere/lrc-1985-c-c-46.html

Consentement à la mort
14. Nul n'a le droit de consentir à ce que la mort lui soit infligée, et un tel consentement n'atteint pas la responsabilité pénale d'une personne par qui la mort peut être infligée à celui qui a donné ce consentement.

...

Participants à une infraction
21. (1) Participent à une infraction :
- *a*) quiconque la commet réellement;
- *b*) quiconque accomplit ou omet d'accomplir quelque chose en vue d'aider quelqu'un à la commettre;
- *c*) quiconque encourage quelqu'un à la commettre.

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

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

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

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

...

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

Sortes d'homicides
(2) L'homicide est coupable ou non coupable.

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

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

Idem
(5) Une personne commet un homicide coupable lorsqu'elle cause la mort d'un être humain :
- *a*) soit au moyen d'un acte illégal;
- *b*) soit par négligence criminelle;
- *c*) soit en portant cet être humain, par des menaces ou la crainte de quelque violence, ou par la supercherie, à faire quelque chose qui cause sa mort;
- *d*) soit en effrayant volontairement cet être humain, dans le cas d'un enfant ou d'une personne malade.

Exception
(6) Nonobstant les autres dispositions du présent article, une personne ne commet pas un homicide au sens de la présente loi, du seul fait qu'elle cause la mort d'un être humain en

amenant, par de faux témoignages, la condamnation et la mort de cet être humain par sentence de la loi.

...

Fait de conseiller le suicide ou d'y aider

241. Est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans quiconque, selon le cas :

a) conseille à une personne de se donner la mort;

b) aide ou encourage quelqu'un à se donner la mort,

que le suicide s'ensuive ou non.