

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

SOPHIA MATHUR, ZOE KEARY-MATZNER, SHAELYN HOFFMAN-MÉNARD,
SHELBY GAGNON, ALEXANDRA NEUFELDT, MADISON DYCK and LINDSAY GRAY

Applicants

And

HIS MAJESTY THE KING IN RIGHT OF ONTARIO

Respondent

**FACTUM OF THE INTERVENER,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**
(Application Returnable December 1-2, 2025)

September 12, 2025

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PART I - OVERVIEW

1. The B.C. Civil Liberties Association submits that there is no basis to apply a different framework under s. 7 of the *Charter* when the government purports to legislate incrementally or with the intention of balancing competing interests. Where a law is found to deprive claimants of life, liberty or security of the person, the means chosen by the government must be consistent with the principles of fundamental justice, including the principles against arbitrariness and gross disproportionality. Whether the law is effective in achieving its objectives, generates ancillary benefits for the public, or harms only a small proportion of the population are matters for s. 1.

2. A law is arbitrary if its effects on s. 7 interests are inconsistent with or do not further the objective. Arbitrariness is concerned with whether those effects are connected to the law's objective, not whether the law furthers the objective generally. Moreover, where there is no connection between the effects and the law's objective, the purpose behind the government's chosen means—including an incremental approach—may be examined to determine if it is grossly disproportionate to its effects, as the Supreme Court of Canada did in the *PHS* decision.

PART II - STATEMENT OF ISSUES, LAW AND AUTHORITIES

A. An incremental law is not immunized from scrutiny under s. 7

3. First, there is no basis to apply a different framework under s. 7 when the government purports to legislate incrementally or with the intention of balancing competing interests. Where a law is found to deprive claimants of life, liberty, or security of the person, the government's chosen means to pursue its objective must be consistent with the principles of fundamental justice. If not, s. 7 is infringed and the government must justify the law as a reasonable limit under s. 1 by establishing that the means chosen, while inconsistent with principles of fundamental justice, are nonetheless proportionate to a pressing and substantive legislative objective.

4. The s. 7 framework is a means test. It identifies laws that “run afoul of our basic values” by employing means that are “fundamentally flawed”.¹ It does so by comparing the law’s objective to its effects to determine whether the government’s chosen means impact life, liberty or security of the person in a manner that is arbitrary, overbroad, or grossly disproportionate. These principles of fundamental justice are known as “failures of instrumental rationality” because they identify inconsistencies or incongruencies between the law’s means and ends.² Section 7 does not prevent the government from enacting laws that impinge on life, liberty or security of the person, but it does constrain the government from doing so in a manner that is fundamentally unjust.

5. This means test applies to all government action. While the government can legislate incrementally and balance competing interests, its legislative choices are still subject to *Charter* scrutiny.³ To accept that a law is not arbitrary or grossly disproportionate because it simply “falls short” of its objective would risk distorting the s. 7 analysis in the same manner as approaching the claim as a “positive right”, which the Court of Appeal found was improper in this case.⁴ Whether the law is effective in achieving its objectives, generates ancillary benefits for the public, or harms only a small proportion of the population are matters for s. 1.⁵

B. Arbitrariness is concerned with the connection between the effects on s. 7 interests and the objective of the law

6. Second, a law that purports to be incremental will be arbitrary if its effects on life, liberty or security of the person undermines the very objective it was intended to further. The analysis is

¹ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 105.

² *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 107; *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 124.

³ *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 42; *Mathur v. Ontario*, 2024 ONCA 762 at paras. 40-41.

⁴ *Mathur v. Ontario*, 2024 ONCA 762 at paras. 49-53.

⁵ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 123; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 79; *Ewert v. Canada*, 2018 SCC 30 at para. 73.

concerned with the connection between the specific effects which engage s. 7 and the objective of the law, not whether the law furthers its objectives generally. Moreover, this connection must be grounded in evidence, not assertions of common sense or theory.

7. Legislation is arbitrary if it deprives life, liberty or security of the person in a manner that is not connected to the government's objective. Whether the effect on fundamental freedoms is expressed as "inconsistent with" or "unnecessary to" the objective, the law is arbitrary because the impact on s. 7 interests is not connected to the law's intended purpose.⁶ For a more severe deprivation, there must be a strong connection to furthering the objective.⁷ If this connection is missing, the means chosen are fundamentally flawed (or "inherently bad"⁸ or "manifestly unfair"⁹) and must be justified under s. 1. An arbitrary law is flawed because it "exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law."¹⁰

8. When assessing arbitrariness, the question is whether the *impugned deprivation* under s. 7 furthers the objectives of the law, and not whether the law furthers its objectives *generally*. This distinction is particularly important in a case like the present one, where the deprivations are frequently expressed at a broad societal level. A law that does not further its objective at all is arbitrary,¹¹ but so is a law that furthers its objective generally while exacting a constitutional price that is unconnected or inconsistent with that objective.¹² Indeed, identifying arbitrary effects of an

⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 118-119; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (S.C.C.), [1993] 3 SCR 519 at pp. 619-20, 594-95; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 132.

⁷ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 131; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at para. 22.

⁸ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 119; 123.

⁹ *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 SCR 30 at 110 at p. 110; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para. 131.

¹⁰ *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 83; *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397 at para. 201.

¹¹ *R. v. Heywood*, 1994 CanLII 34 (S.C.C.), [1994] 3 SCR 761, at p. 792.

¹² *Francis v. Ontario*, 2020 ONSC 1644 at para. 309, aff'd 2021 ONCA 197; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 112; *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 22.

otherwise effective law is a key function of this analysis. For the same reason, an incremental law is not exempt from arbitrariness simply because it furthers the objective in part.

9. Moreover, the connection must be established through evidence and not merely assumed.¹³ The means may be logical in theory but in practice be shown to restrict s. 7 protections in a manner that undermines the government's objective.¹⁴ The means analysis cannot be short-circuited by assuming that an incremental law has a logical connection to its impacts on life, liberty or security of the person. If the impact does not further the public good, the law must be justified under s. 1.

C. Gross disproportionality may be established based on the objective behind the means

10. Finally, where there is no connection between the effects and the law's objective, the purpose behind the government's chosen means—including a law purporting to be incremental—may be examined to determine if that objective is grossly disproportionate to its effects.

11. Traditionally, gross disproportionality is concerned with an impact on s. 7 interests that is completely out of sync with the law's objective. Although the effects are connected to the purpose, the means are fundamentally flawed because the connection falls outside the acceptable norms in a free and democratic society.¹⁵ The paradigm is a public cleanliness law that imposes a life sentence for spitting on the sidewalk.¹⁶ Such draconian means violate our constitutional norms—the law may be “rationally connected”, but it cannot be “rationally supported”.¹⁷

¹³ *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35 at paras. 131, 150, 168. See also *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 119; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 152-153; *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397 at para. 201.

¹⁴ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 119, citing *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 SCR 30 at p. 70; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 136; *R. v. Smith*, 2015 SCC 34, at para. 25; *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397 at para. 201.

¹⁵ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 120.

¹⁶ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 120.

¹⁷ *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 113, 120, 125; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 120; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 89.

12. But where there is no connection between the effects and objective of the law—i.e. the law is arbitrary—the Court may still find gross disproportionality by comparing those effects against the purpose behind the particular means chosen. This was the Supreme Court of Canada’s approach in *PHS*, where the Court found that the effects on health and life caused by the government’s denial of a statutory exemption to a safe injection site were arbitrary because they undermined the health and safety objectives of the enabling legislation. However, the Court also found those effects to be grossly disproportionate to the Minister’s policy’s rationale behind denying the exemption, which was to maintain a uniform stance on drug use.¹⁸ *PHS* demonstrates that the government’s means may be grossly disproportionate even where the objective is of unquestioned importance, and where the law does not in fact achieve its objective.

D. Conclusion

13. Although governments are entitled to take incremental steps toward legislative goals, their chosen means must comply with the *Charter*. A law that purports to be incremental may have arbitrary or grossly disproportionate effects on life, liberty or security of the person, in which case it will fall on the government to justify its choice of means to further its objectives. The Court should reject the proposition that some progress towards the goal cannot be arbitrary or grossly disproportionate as this would improperly shield legislative action from *Charter* scrutiny.

PART III - ORDER REQUESTED

14. The B.C. Civil Liberties Association takes no position on this Application. It does not seek costs and asks that no costs be awarded against it.

¹⁸ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 128, 133.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 12th day of September, 2025.

A handwritten signature in blue ink, appearing to read 'Teagan Markin', is positioned above a horizontal line.

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Lawyers for the Intervener, British Columbia Civil
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SCHEDULE “A” – AUTHORITIES CITED

1. *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30
2. *Canada (Attorney General) v. Bedford*, 2013 SCC 72
3. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
4. *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17
5. *Carter v. Canada (Attorney General)*, 2015 SCC 5
6. *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35
7. *Cycle Toronto et al. v. Attorney General of Ontario et al.*, 2025 ONSC 4397
8. *Ewert v. Canada*, 2018 SCC 30
9. *Francis v. Ontario*, 2020 ONSC 1644, aff’d 2021 ONCA 197
10. *Mathur v. Ontario*, 2024 ONCA 762
11. *Québec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17
12. *R. v. Heywood*, 1994 CanLII 34 (S.C.C.), [1994] 3 SCR 761
13. *R. v. Morgentaler*, 1988 CanLII 90 (S.C.C.), [1988] 1 SCR 30
14. *R. v. Smith*, 2015 SCC 34
15. *R. v. Safarzadeh-Markhali*, 2016 SCC 14
16. *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (S.C.C.), [1993] 3 SCR 519

Note: Under the Rules of Civil Procedure, an authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic, absent evidence to the contrary (rule 4.06.1(2.2)).

Date September 12, 2025



TEAGAN MARKIN

SCHEDULE “B” – LEGISLATION CITED

Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

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.

SOPHIA MATHUR, et al

Applicants

-and- HIS MAJESTY THE KING IN
RIGHT OF ONTARIO
Respondent

Court File No. CV-19-00631627-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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