# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Carter v. Canada (Attorney General),*
2013 BCCA 435

Date: 20131010
Docket Numbers: CA040079, CA040454

Docket: CA040079

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)

And

**Alliance Of People With Disabilities Who Are Supportive Of Legal Assisted Dying Society, Canadian Unitarian Council, Farewell Foundation For The Right To Die, Christian Legal Fellowship, Evangelical Fellowship Of Canada, Euthanasia Prevention Coalition and Euthanasia Prevention Coalition – British Columbia, and Council Of Canadians With Disabilities and Canadian Association For Community Living**

Intervenors

- and -

VANCOUVER

OCT 10 2013

COURT OF APPEAL
REGISTRY

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Respondents
(Plaintiffs)

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**Attorney General of Canada**

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(Defendant)

And

**Attorney General of British Columbia**

Appellant
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Newbury
The Honourable Madam Justice Saunders

On Appeal from the Supreme Court of British Columbia, June 15, 2012
(*Carter v. Canada (Attorney General)*, 2012 BCSC 886,
and November 1, 2012, 2012 BCSC 1587 (on costs)
Vancouver Docket Number S112688)

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| Place and Date of Hearing: | Vancouver, British Columbia<br>March 18, 19, 20, 21 & 22, 2013 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>October 10, 2013 |

**Dissenting Reasons by:**
The Honourable Chief Justice Finch

**Written Reasons by:**
The Honourable Madam Justice Newbury (P. 67, para. 236)

**Concurred in by:**
The Honourable Madam Justice Saunders

***Summary:***

*The Facts and Reasons of the Trial Judge:*

*The plaintiffs Ms. Carter and Ms. Taylor, both of whom suffered from intractable and progressive diseases and are now deceased, joined with others in bringing this civil claim challenging the constitutionality of the Criminal Code provisions against assisted suicide and euthanasia, specifically ss. 14, 21(1)(b), 21(2), 22, 222(1)-222(5), and 241 of the Criminal Code. The main focus of their case, however, was s. 241(b), which prohibits assisting another person to commit suicide.*

*The plaintiffs succeeded in the court below notwithstanding the previous decision of the Supreme Court of Canada in R. v. Rodriguez (1993), in which s. 241 was found not to infringe certain rights under the Canadian Charter of Rights and Freedoms.*

*The trial judge carried out a lengthy review of the history of the impugned provisions, expert opinion evidence on medical ethics and medical end-of-life practices, evidence from other jurisdictions, and the feasibility of safeguards for physician-assisted suicide. She concluded that safeguards could be put into place to protect against the risks associated with physician-assisted dying; that the evidence did not support an increased risk for elderly individuals; and that the risks inherent in permitting physician-assisted death could be "very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced." The trial judge recognized that the existence of "a different set of legislative and social facts" might not on its own warrant a fresh enquiry under s. 1 of the Charter, but found that a change in the applicable legal principles had also occurred since Rodriguez was decided, such that she was no longer bound by it.*

*In particular, the trial judge was of the view that Rodriguez had not considered the right to "life" in s. 7, nor the principles of overbreadth or gross disproportionality, which in her view were not fully formed principles of fundamental justice when Rodriguez was decided. As well, she found that s. 15 was open to her to consider, since the majority of the Court in Rodriquez had only assumed a violation of s. 15 and had proceeded to the question of justification under s. 1 of the Charter.*

*With respect to s. 15, the trial judge concluded that the impugned provisions created a distinction on the basis of the analogous ground of physical disability by denying disabled individuals access to physician assistance which was necessary for them to commit suicide, while able-bodied individuals had no legal impediment to committing suicide. She found that the effect of this distinction was to create a disadvantage by perpetuating prejudice and stereotyping. The trial judge concluded that the violation of s. 15 could not be saved by s. 1 because it failed the minimal impairment test and at the proportionality stage of the analysis.*

*With respect to s. 7, the trial judge concluded that the right to life was engaged because the prohibition had the effect of causing some people to end their lives*

*sooner than they would if physician-assisted dying was available to them. As well, she concluded that these deprivations were not in accordance with principles of fundamental justice in that the effects of s. 241 were overbroad and grossly disproportionate to the interests of the state sought to be achieved by s. 241.*

*In the result, the trial judge granted two declaratory orders, one under s. 15 and one under s. 7. Each declaration was to the effect that the impugned provisions of the Criminal Code infringed the Charter and are of no force and effect to the extent that they prohibit physician-assisted suicide "by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully informed, non-ambivalent competent adult patient" who is free from coercion and undue influence, not clinically depressed, and suffers from a "serious illness, disease or disability (including disability arriving from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person." The declarations were suspended for one year, but the plaintiff Ms. Taylor was granted a constitutional exemption to enable her to obtain physician-assisted death during the one-year period. Ms. Taylor died prior to the hearing of this appeal. The Attorney General of Canada ("AGC") appealed and various groups – some supporting the trial judgment and some opposing it – joined as intervenors.*

*Held: appeal allowed, Chief Justice Finch dissenting.*

*The majority (per Newbury and Saunders JJ.A.) found the trial judge was bound by stare decisis (or "binding precedent") to apply Rodriguez. The test for the application of stare decisis begins with the question of what the earlier case decided. Dealing first with s. 7 of the Charter, the majority found that "life" as it appears in s. 7 had been considered in Rodriguez as a counterweight to liberty and security of the person. Since Rodriguez, courts have continued to regard the making of personal decisions regarding one's body as falling under the "security of the person" or "liberty" rubric in s. 7, while "life" has been interpreted in its existential sense, not its qualitative sense. Although Chief Justice Finch suggested in his reasons that "life" includes the ability to enjoy various experiences and to make various decisions, the majority stated that those who have only limited ability to enjoy such blessings are no less "alive" and have no less a right to "life", than able-bodied and fully competent persons. Charter protection cannot be extended to such experiences.*

*In any event, Rodriguez found that the prohibition on assisted-dying accorded with the principles of fundamental justice.*

*The majority reviewed the principles of fundamental justice as interpreted by the Supreme Court of Canada over the years. Although particular "tests" have varied, the essential exercise has been to evaluate broadly the rationality and normative balance struck by the law in question. The case law relating to arbitrariness,*

*overbreadth and disproportionality illustrated that these were fluid concepts and that disproportionality was not a "new" principle of fundamental justice established by the Supreme Court of Canada in 2003 (in Malmo-Levine), as suggested by the trial judge. The use of different "lenses" employed under s. 7 from time to time does not mean that new principles have been established, making all previous decisions under s. 7 no longer binding.*

*With respect to s. 1, the Court in Rodriguez had found that s. 241 had a clearly pressing and substantial legislative objective grounded in respect for and the desire to protect human life and that it was rationally connected to its purpose. The Court also found that s. 241 was not overbroad, in the context of the Oakes test, and that it struck an appropriate balance between the restriction and the government objective. The trial judge was bound by these findings despite her opinion that the Court had addressed them "only very summarily" in Rodriguez. The focus for purposes of stare decisis should be on what was decided, not how it was decided or how the result was described. In the majority's opinion, the same analysis as was carried out under s. 1 could have been made under the rubrics of overbreadth and disproportionality under s. 7.*

*Returning to the question of what Rodriguez had decided, the majority was of the view that it decided s. 241(b) of the Code did not violate s. 7 as it is now understood and that any assumed violation of s. 15 was justified under s. 1. Had it been necessary to consider s. 1 in connection with a violation of s. 7, the majority opined that the s. 1 analysis carried out in respect of s. 15 would have led to the same conclusion – that the "blanket protection" of s. 241 was justified. The majority allowed the appeal on this basis.*

*In the event that the SCC does review Rodriguez, however, the majority went on to suggest that consideration should be given to the remedy of a "constitutional exemption" in favour of persons on whom an otherwise sound law has an extraordinary and even cruel effect. The remedy of a constitutional exemption had been favoured by a minority of the Supreme Court of Canada in Rodriguez in the context of a conclusion the law infringed the Charter rights of Ms. Rodriguez, and by the dissenting judge in this court in finding the operation of the law infringed her Charter rights. Accepting that s. 241 is directed to the interests of the vulnerable, a constitutional exemption for those who are clear-minded, supported in their life expectancy by medical opinion, rational and without outside influence, might not undermine the intention of the legislation.*

*The majority also suggested that if the constitutional exemption were approved, it should not be on the terms suggested by the trial judge. At the least, court approval of some kind should be sought in addition to the bare requirement of two medical opinions and a request from the patient. An application to a court could provide a perspective and a safeguard from outside the often overstressed healthcare regime in which patients and physicians find themselves.*

*On the matter of costs: The majority was of the view that the allowing of the appeal should result in a different disposition of costs in relation to Canada. While an award of special costs could not be sustained, the majority recognized that the issue presented was of broad public interest and that the question of stare decisis was "not without uncertainty". It ordered that the parties bear their own costs in the Supreme Court of British Columbia.*

*With respect to British Columbia's appeal of the trial judge's costs order, the majority found it could not be said that the province's limited degree of participation had been improper or deserving of a costs order. The majority therefore set aside the order requiring British Columbia to pay trial costs.*

*As for the costs of the appeal, the majority ordered that the parties bear their own costs.*

*Chief Justice Finch (dissenting), would have allowed the appeal against the s. 15 order, but dismissed the remainder of the appeals, except for the cross appeal and the challenge to Ms. Taylor's constitutional exemption, both of which were moot.*

*Chief Justice Finch held that the trial judge made no error with respect to her application of s. 7 and corresponding analysis under s. 1. However, with respect to her analysis under s. 15, the trial judge was bound by the result of s. 1 in Rodriguez, and the appeal against the s. 15 order was therefore allowed.*

*Turning to s. 7, Chief Justice Finch agreed that Rodriguez considered the right to liberty and security of the person, but did not consider the right to life, viewed either narrowly, as advanced by the Attorney General of Canada, or broadly, as advanced by the Respondents. Reviewing the principles of fundamental justice as they applied to the s. 7 analysis, Chief Justice Finch held that the principles of overbreadth and gross disproportionality were not considered in Rodriguez. It was therefore open to the trial judge to consider these principles and she did so correctly. She made no errors in her analysis under s. 1. The appeal against the s. 7 order was therefore dismissed.*

*On procedural objections raised by the AGC, Chief Justice Finch found no merit to the argument that reply submissions had been inappropriately received and timelines compressed.*

*Reviewing the question of costs, there was no merit in the argument that the trial judge erred in awarding special costs or costs against the Attorney General of British Columbia as an intervenor.*

**Dissenting Reasons for Judgment of the Honourable Chief Justice Finch:**

## *I. Introduction and Summary*

[1] The Attorney General of Canada ("AGC") appeals from the order of the Supreme Court of British Columbia pronounced by Madam Justice Lynn Smith on 15 June 2012 and entered on 29 October 2012. Justice Smith declared that sections 14, 21, 22, 222 and 241 of the *Criminal Code* of Canada unjustifiably infringe s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms*, and are of no force and effect to the extent that they prohibit physician-assisted dying.

[2] Justice Smith suspended the effect of her declaration for one year. She further granted one plaintiff, Gloria Taylor, an immediate constitutional exemption upon certain conditions. The full provisions of the order are appended to these reasons as Appendix "A."

[3] In this appeal, the AGC argues that Smith J. erred in finding that the impugned sections of the *Criminal Code* infringed the respondents' rights under s. 7 and s. 15 of the *Charter* and were not saved by the application of s. 1. The AGC also argues that these findings are precluded by the precedential effect of *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, a case decided on a similar set of facts and legal principles. The respondents say that Smith J. made no error in distinguishing *Rodriguez* and properly applied the legal tests under ss. 7, 15 and 1 of the *Charter.*

[4] As discussed below, I have concluded that Smith J. made no error with respect to her application of s. 7 and corresponding analysis under s. 1. However, I have concluded that Smith J. erred in concluding that an infringement of s. 15 was not saved by s. 1, as she was bound by the result on s. 1 in *Rodriguez*.

[5] With respect to s. 7, I agree with Smith J.'s conclusion that *Rodriguez* considered the right to liberty and security of the person, but did not consider the right to life. *Rodriguez* also did not consider overbreadth and gross

disproportionality, two principles of fundamental justice which were not fully formed when *Rodriguez* was decided. It was therefore open to Smith J. to consider the life interest under s. 7 and to evaluate whether the impugned provisions were overly broad or grossly disproportionate in their purpose and effect. I can find no error in her analysis.

[6] The AGC also argues that Smith J. improperly imposed expedited timelines which prevented the AGC from presenting all its evidence, and further, improperly accepted reply submissions to which the AGC could not adequately respond. As discussed below, I see no merit to these submissions.

[7] The AGC also challenges the constitutional exemption granted to Ms. Taylor that would have allowed her to seek a physician-assisted death. As conceded by the AGC, that issue is now moot as Ms. Taylor has passed away. I decline to address this exemption in these reasons.

[8] The respondents cross appeal against Smith J.'s ruling that the s. 15 remedy does not apply to those persons so disabled they would require assistance of a kind that would render the act "euthanasia". Having found Smith J. erred in distinguishing *Rodriguez* in her s. 1 analysis, only the s. 7 order remains. As the s. 7 order contemplates voluntary euthanasia, this cross appeal is moot.

[9] Finally, the AGC and the Attorney General for British Columbia ("AGBC") contend the judge erred in granting the respondents an order for special costs. The AGBC further says the judge erred in awarding costs against the AGBC as an intervenor. I can see no error of fact, law, or principle that would enable this Court to vary either aspect of Smith J.'s order as to costs.

[10] I would therefore allow the appeal against the s. 15 order, but dismiss the remainder of the appeals, except for the cross appeal and the challenge to Ms. Taylor's constitutional exemption, both of which are moot.

## *II. Reasons of the Trial Judge*

[11] Justice Smith provided extensive, thorough, and carefully drafted reasons which I will not attempt to summarize. However, I will provide an overview of her approach and her key findings so as to better inform the balance of these reasons.

[12] At paragraphs 36 to 43 of her reasons, Smith J. provided a useful set of definitions. I adopt those definitions in these reasons.

[13] The definitions differentiate between the concepts of "physician-assisted suicide," and "euthanasia." Physician-assisted suicide involves intentionally killing oneself where a physician, or someone under the direction of a physician, provides the knowledge, means, or both to assist in the suicide. The patient, however, performs the act which causes death. Euthanasia occurs where the physician performs the act which leads to death. Euthanasia may be voluntary, non-voluntary, or involuntary. Physician-assisted dying is a term which covers both physician-assisted suicide and voluntary euthanasia.

[14] Following these definitions, Smith J. provided a review of the evidence. Justice Smith made factual findings in a number of areas, including: the history of the impugned provisions; expert opinion evidence on medical ethics and medical end-of-life practices; evidence from other jurisdictions, and, the feasibility of safeguards for physician-assisted dying. Her findings regarding medical ethics and end-of-life practices included:

> 1. Palliative sedation, where a patient who is near death is sedated and may be provided with artificial hydration or nutrition is considered ethical. Palliative sedation occurs in Canada, and is not currently regulated (paras. 200 - 201, 357);
>
> 2. A few physicians in Canada provide assistance in suicide or euthanasia despite the prohibition. Some Canadians travel to other jurisdictions to receive assisted suicide (paras. 204 - 205);
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> 3. 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 (paras. 207, 231);

> 4. Physicians may legally administer medications even though they know that the doses may hasten death, so long as the intention is to provide palliative care by easing the patient's pain (paras. 225, 231);
>
> 5. If physician-assisted dying were legal in Canada, some physicians in Canada would find the practice consistent with their ethical principles (para. 319);
>
> 6. There is no ethical distinction between physician-assisted dying and end of life practices whose outcome is highly likely to be death; there is no ethical distinction between suicide and assisted suicide, where the decision "is entirely rational and autonomous, it is in the patient's best interest, and the patient has made an informed request for assistance." (paras. 335, 339);
>
> 7. There is no clear societal consensus on physician-assisted dying as being ethical; however, for the practice to be considered ethical, there is a strong consensus that it should be restricted to competent, informed, voluntary adult patients who are grievously ill and suffering symptoms that cannot be alleviated, and where performed in accordance with the wishes of the patient and in the patient's best interests, and performed to relieve suffering (para. 358).

[15] In considering the evidence from other jurisdictions where physician-assisted dying is permitted, Smith J. directed her findings of fact to three issues: the level of compliance with safeguards, the effectiveness of safeguards at preventing abuse, and the inferences that can be drawn as to the likely effectiveness of comparable safeguards in Canada.

[16] Justice Smith concluded that safeguards can be put in place to protect against the risks associated with physician-assisted dying. These safeguards include having properly qualified and experienced physicians assess the competence of patients seeking physician-assisted dying; identifying inappropriate influences on a person's decision through a capacity assessment; and by assessing informed consent in a manner similar to how such assessments are made in the context of patients refusing medical treatment.

[17] She concluded that any risks to disabled individuals connected to prejudice and stereotyping about the reduced value of their lives can be effectively addressed through the above safeguards.

[18] Justice Smith summarized her findings on the effectiveness of the safeguards as follows:

> [883] My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that 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.

[19] Justice Smith then turned to the legal issues in the case. First, she examined whether or not the majority reasons of Sopinka J. in *Rodriguez* left any issues open for her to decide. She considered the conclusions in *Rodriguez* in three areas: s. 7, s. 15, and s. 1.

[20] Under s. 7 she concluded that *Rodriguez* had not decided whether the impugned provisions deprived individuals of the right to life, nor had it considered overbreadth or gross disproportionality, which were not fully formed principles of fundamental justice at the time of the decision (paras. 921, 985).

[21] Under s. 15, she concluded that Sopinka J. had not decided the s. 15 issue, but had instead assumed a s. 15 violation and proceeded to s. 1. This left the entirety of s. 15 open to her to consider (paras. 986 – 988).

[22] Under s. 1, she concluded that, while the existence of significantly and materially different legislative and social facts would not allow a fresh s. 1 inquiry, the combination of those facts and evolutions in the test under s. 1 of the *Charter* entitled her to embark on a new analysis of s. 1, or at least parts of it (para. 998).

[23] Justice Smith then considered the s. 15 arguments. She concluded that the impugned provisions created a distinction on the basis of the analogous ground of physical disability by denying disabled individuals access to physician assistance which was necessary for them to commit suicide, while able-bodied individuals had no legal impediment to their access to suicide. She found that the effect of this distinction was to create a disadvantage by perpetuating prejudice and stereotyping (paras. 1158 – 1159, 1161).

[24] Justice Smith concluded that the s. 15 violation could not be saved by s. 1 of the *Charter*. She concluded that the AGC had failed to show that the legislation

impaired the respondents' *Charter* rights as little as possible and therefore failed the minimal impairment test under s. 1. At the proportionality stage of the analysis (para. 1245 and following), Smith J. found that the severe and specific deleterious effects of the law outweigh its generalized, and sometimes ambivalent salutary effects (paras. 1281, 1283).

[25] Under s. 7, Smith J. concluded that the respondents' interests in security of the person and liberty were engaged by the impugned legislation (para. 1304). She also concluded that the right to life was engaged because the prohibition had the effect of causing some people to end their lives sooner than they would if physician-assisted dying was available to them (para. 1322).

[26] She found that these s. 7 deprivations were not in accordance with principles of fundamental justice, specifically overbreadth and gross disproportionality (paras. 1371, 1378). She accepted that the government objective was to protect vulnerable individuals from being induced into committing suicide in times of weakness. She found that a system with properly designed and administered safeguards could, with a very high degree of certainty, achieve this objective while permitting exceptions for competent fully-informed persons acting voluntarily to receive physician-assisted death (para. 1367). She also considered that the effect of the absolute legislative prohibition on the life, liberty and security of the person interests of the respondents was very severe and was grossly disproportionate to the state interests at issue in the case (para.1378).

[27] In the result, she found that the s. 7 deprivations could not be saved under s. 1 of the *Charter* (para. 1383).

[28] Having found the impugned provisions to violate s. 15 and s. 7, and that neither violation could be saved under s. 1, Smith J. granted two declaratory orders, one under each of s. 15 and s. 7. The s. 7 order applied to both physician-assisted suicide and voluntary euthanasia, while the s. 15 order only applied to physician-assisted suicide. I have set out the difference in those terms above. The s. 7 order declared as follows:

> 2. The impugned provisions unjustifiably infringe s. 7 of the *Charter*, and are of no force and effect to the extent that they prohibit physician-assisted suicide or consensual physician-assisted death by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult person who: (a) is free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.

[29] The effect of the declarations was suspended for one year. Justice Smith granted an immediate constitutional exemption to one of the plaintiffs, Gloria Taylor, meaning that she could seek physician-assisted death before the one year had elapsed.

## *III. The Parties' Positions*

### *A. The Attorney General of Canada*

[30] The AGC argues that Smith J. erred by finding that she was not fully bound by the decision in *Rodriguez* with respect to her analysis under ss. 7, 15, and 1. In *Rodriguez,* a majority of the Supreme Court of Canada found, on similar facts, that s. 241(b) of the *Criminal Code* did not infringe s. 7 or s. 12 of the *Charter.* Though assuming an infringement under s. 15, the Court found that it was saved under s. 1.

[31] The AGC further argues that the respondents' rights under ss. 7 and 15 of the *Charter* were not infringed; and that, in any event, any infringement was justified under s. 1. The AGC says that in finding that the law infringed the respondents' rights under ss. 7 and 15 of the *Charter*, Smith J. asked the wrong question, or applied the wrong test. In examining whether the impugned provisions were overly broad or minimally impaired the respondents' rights, Smith J. should have asked whether there was a reasonable apprehension of harm that Parliament could only address with an absolute prohibition on assisted death.

[32] On the issue of minimal impairment under s. 1, the AGC's fundamental position on this appeal, as it was before Smith J., is that the only issue before the Court is whether Parliament's absolute prohibition against physician-assisted death was within the range of reasonable legislative alternatives. Justice Smith did not accept that proposition, but said, relying on *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, that the question was whether there is "an alternative, less drastic, means of achieving the objective in a real and substantial manner" (para. 1226 quoting *Hutterian Brethren* at para. 55).

[33] The AGC says Smith J. made procedural errors rendering the process unfair because she imposed expedited timelines which prevented the AGC from presenting its full evidentiary case, and improperly accepted reply submissions to which the AGC was not provided the opportunity to adequately respond.

[34] The AGC also takes issue with Smith J.'s having granted a constitutional exemption to Ms. Taylor from the suspension of her declaration of invalidity, but agrees that this issue is now moot since Ms. Taylor passed away after the trial judgment and before this appeal was heard.

[35] There is a cross appeal by both the AGC and the AGBC who contend that Smith J. erred in granting the respondents an order for special costs. The AGBC further says Smith J. erred in awarding costs against the AGBC as an intervenor. The respondents submit that Smith J. did not err in making either order.

### *B. The Intervenors Supporting the Attorney General of Canada*

[36] The AGC's position is supported by four intervenors: the Christian Legal Fellowship; the Evangelical Fellowship of Canada; the Council of Canadians with Disabilities and Canadian Association for Community Living; and the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition – British Columbia.

[37] The Euthanasia Prevention Coalition made three submissions. The first is that real autonomy is diminished by legalizing assisted suicide; the second is that an absolute prohibition against assisted suicide is not discriminatory but rather

protective; and the third is that there is no evidence adequate safeguards can be found to support Smith J.'s conclusions.

[38] The Christian Legal Fellowship referred the Court to *Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789 (H.L.) and to the consequences of the sterilization program in Alberta and the comments of Chief Justice McLachlin on that subject. It contended that if assisted suicide is permitted, coerced consent will result. Further, it submitted that individuals cannot waive the right to life, and that Courts should not give one person the permission to kill another person.

[39] The Evangelical Fellowship of Canada contended that the sanctity of human life is a *Charter* value and merits special protection. One cannot consent to die. They argue that compassion is misdirected when it posits killing as an antidote to what is difficult about dying. There can be no assisted suicide without another moral agent engaged in the killing. It would also require the State to be complicit in the act. No one has the right to be killed.

[40] The Council of Canadians with Disabilities and the Canadian Association for Community Living adopted the position of the AGC but added that one should be skeptical about research that involves asking doctors after the fact whether they complied with the law or whether they committed murder. Their counsel argued that people with disabilities face stigmatization and may internalize the view that their disabled lives are not worth living. Allowing physician-assisted dying will risk people acting on this view rather than working to live with their disability.

### *C. The Respondents*

[41] The respondents submit that Smith J. did not err in any of the ways asserted by the appellant, and that she asked and answered the correct questions.

[42] They argue that Smith J. was entitled to distinguish *Rodriguez* and that it was open to her to consider aspects of that decision that remained undecided. With respect to s. 7, the respondents argue that while the right to liberty and security of the person were considered, the right to life was not. It was therefore open to

Smith J. to consider whether the right to life was infringed, given that the rights to life, liberty and security of the person are separate rights with separate meanings.

[43] In considering the right to life, the respondents argued that s. 241(b) of the *Criminal Code*, which makes it an offence to aid or abet suicide, infringes the right to life by forcing terminally ill individuals to make an earlier life-ending decision than they would otherwise if they had access to physician-assisted dying. They argue that the impugned laws deprive individuals not only of liberty and security of the person, as considered in *Rodriguez*, but, in requiring one's life to be ended sooner than it otherwise might, of life itself.

[44] The respondents argue that "life" in the context of human rights provisions ought to be given a generous and expansive meaning. The grievously and irremediably ill may suffer and wish to end their lives, but the evidence established that the impugned laws cause some such people to end their lives before they otherwise would, because they would later be unable to act without the assistance the impugned laws prohibit. The purpose of the impugned laws may be to protect the vulnerable, but the effect is to deny the respondents their rights under s. 7. The respondents argue that the *Charter* must protect deprivations that occur whether by purpose or effect.

[45] The respondents further argue that it was open to Smith J. to consider whether the law was overly broad or grossly disproportionate, as these two principles of fundamental justice were not considered in *Rodriguez.* They argue that Smith J. did not err in rejecting the AGC's proposed test in evaluating whether the impugned provisions violate the principles of fundamental justice, namely whether there was any evidence to support a reasonable apprehension of harm short of an absolute prohibition.

[46] The respondents argue the reasonable apprehension of harm test is a "zero tolerance" argument because it requires the respondents to prove beyond a reasonable doubt that all harms can be avoided if physician-assisted dying is allowed. The standard of proof under s. 7 is to show a deprivation which does not

accord with the principles of fundamental justice, on a balance of probabilities. If the former standard were adopted, the respondents say that many meritorious *Charter* cases would fail.

[47] With respect to s. 15, the respondents claim their right to equality is infringed because the law has a more burdensome effect on persons with disabilities than on able-bodied persons, and so creates a distinction based on physical disability. The respondents submit that this distinction is discriminatory. The respondents say the unequal effect of the law cannot be justified under s. 1 of the *Charter* because the law is not rationally connected to the legislative objectives, is not minimally impairing, and is disproportionate. The respondents argue that it is unnecessary to conduct a s. 1 analysis for the s. 7 breach, but if it were necessary, they argue the burden of justifying a s. 7 breach is much heavier than for s. 15.

[48] The respondents cross appeal against Smith J.'s ruling that the s. 15 remedy does not apply to those persons so disabled they would require assistance of a kind that would render the act "voluntary euthanasia".

### *D. The Intervenors Supporting the Respondents*

[49] The respondents' position is supported by three intervenors: the Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society; the Canadian Unitarian Council; and the Farewell Foundation for the Right to Die.

[50] The Alliance of People with Disabilities who Are Supportive of Legal Assisted Dying Society submits that the law is overbroad and arbitrary because the absolute prohibition against assisted dying treats all disabled persons as vulnerable, protects those who do not need or wish to have protection, and denies them the capacity for autonomous decisions and self-determination. They also submit that the law deprives individuals of security of the person and dignity by denying them choice over the timing of their death.

[51] The Farewell Foundation submits that the blanket prohibition against assisted dying is not within a reasonable range of alternatives, because it results in more

suffering and less autonomy with no consequent benefits. There is risk of an unchosen death with or without the legislation.

[52] Counsel for the Canadian Unitarian Council addressed the right to "life" under s. 7. Counsel submits that the right to life includes freedom from state intervention in an individual's decision to die. Life includes the knowledge of what it means to be alive, and the power to make choices about both life and death. Life is much more than physical existence, and includes the quality of living. There is no supportable distinction between removal of life support, at the patient's request, and physician-assisted suicide.

[53] Having considered each of these submissions, I will now embark on determining which issues were open to Smith J. to decide.

## *IV. Can Rodriguez be Distinguished?*

### *A. The Law on Stare Decisis*

[54] The common law system requires that lower courts must follow and apply the decisions of higher courts in the same jurisdiction, to the extent that the higher court has decided the same or a substantially similar issue. The purpose of this rule, referred to as *stare decisis,* is to promote consistency in the application of the law, so that similar cases are decided similarly.

[55] The precedential effect of a decision therefore requires that a court must first determine what a previous case actually decides. That is the "*ratio decidendi*" of a case, or the rule that it lays down. This narrower application of the doctrine of *stare decisis* was described as the "traditional view" in *R. v. Henry*, 2005 SCC 76. However, the Court in that case cautioned against too narrowly defining what a case actually decides, particularly in *Charter* cases. The Court stated in *R v. Henry*:

> [53] ... In *R. v. Oakes*, [1986] 1 S.C.R. 103, for example, Dickson C.J. laid out a broad purposive analysis of s. 1 of the *Charter*, but the dispositive point was his conclusion that there was no rational connection between the basic fact of possession of narcotics and the legislated presumption that the

> possession was for the purpose of trafficking. Yet the entire approach to s. 1 was intended to be, and has been regarded as, binding on other Canadian courts. It would be a foolhardy advocate who dismissed Dickson C.J.'s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask "what *Oakes* actually decides", we would likely offer a more expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago.

[56] So, as a general rule, *obiter dicta*, or statements not essential to the actual decision, do not strictly bind lower courts: *Quinn v. Leathem,* [1901] A.C. 495 at 506 (H.L.), *Henry* at para. 53, but in some cases, statements outside the *ratio* which are clearly intended as guidance "… should be accepted as authoritative" (*Henry* at para. 57).

[57] Where lower courts are of the view that a decision of a higher court was wrongly decided, the appropriate approach is to apply the precedent and provide comment, or even find additional facts, to facilitate a reconsideration of the point by a higher court, if an appeal to that court should be pursued. This approach finds support in *Canada v. Craig*, 2012 SCC 43. In that case, the Tax Court of Canada declined to apply the decision of the Supreme Court of Canada in *Moldowan v. The Queen*, [1978] 1 S.C.R. 480. The *Moldowan* decision had been criticized in a later decision of the Federal Court of Appeal, *Gunn v. Canada*, 2006 FCA 281, which had considered the same statutory provision as *Moldowan* and stated that the *Moldowan* decision was problematic. Justice Rothstein, in pointing out the Tax Court's error in not following *Moldowan*, a decision which the Supreme Court subsequently overturned, stated:

> [20] It may be that *Gunn* departed from *Moldowan* because of the extensive criticism of *Moldowan*. Indeed, Dickson J. himself acknowledged that the section was "an awkwardly worded and intractable section and the source of much debate" (p. 482). Further, that provision had not come before the Supreme Court for review in the three decades since *Moldowan* was decided.
>
> [21] But regardless of the explanation, what the court in this case ought to have done was to have written reasons as to why *Moldowan* was problematic, in the way that the reasons in *Gunn* did, rather than purporting to overrule it.

[58] A similar conclusion was reached in *Canada (Attorney General) v. Bedford*, 2012 ONCA 186; leave granted: [2012] S.C.C.A. No. 159. In that case, the Ontario Court of Appeal determined that even where there was substantially different evidence before the trial court, as well as changes in underlying social assumptions, trial courts and appeal courts are nonetheless bound by earlier decisions on the same issues. Rather than not apply these decisions, the appropriate course is to provide commentary and even facts which may aid in reconsideration by the court of higher authority.

[59] When considering the binding effect of a judgment, the first step is to determine what the earlier case actually decided, and whether any of the *obiter* was intended to be authoritative. The second step is to determine whether or not the present case raises different issues. Only these different issues can be considered as open for decision.

[60] The first question then is what issues were decided by the majority reasons of Sopinka J. in *Rodriguez*.

### *B. What Did Rodriguez Decide?*

[61] For the purpose of assessing what *Rodriguez* decided and whether Smith J. correctly distinguished that case, I will consider the decision in its two relevant component parts: the decision on s. 7, and the decision on s. 15 and s. 1.

#### *1. Section 7 of the Charter*

[62] The s. 7 analysis of Sopinka J., speaking for five of the nine justices, focuses on an alleged deprivation of security of the person. He held that although such a deprivation existed, it was not shown to be other than in accordance with the principles of fundamental justice. He reached a similar conclusion concerning any deprivation of the liberty interest. The essence of the reasons given by Sopinka J., for the majority, is captured at 583:

> The most substantial issue in this appeal is whether s. 241(*b*) infringes s. 7 in that it inhibits the appellant in controlling the timing and manner of her death. I conclude that while the section impinges on the security interest of the appellant, any resulting deprivation is not contrary to the principles of fundamental justice. I would come to the same conclusion with respect to any liberty interest which may be involved.
> ...
> The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(*b*) deprives her of both her liberty and her security of the person. The appellant asserts that her application is based upon (a) the right to live her remaining life with the inherent dignity of a human person, (b) the right to control what happens to her body while she is living, and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. The first two of these asserted rights can be seen to invoke both liberty and security of the person; the latter is more closely associated with only the liberty interest.

And further at 588-589:

> ... There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.
>
> ... That there is a right to choose how one's body will be dealt with, even in the context of beneficial medical treatment, has long been recognized by the common law. To impose medical treatment on one who refuses it constitutes battery, and our common law has recognized the right to demand that medical treatment which would extend life be withheld or withdrawn. In my view, these considerations lead to the conclusion that the prohibition in s. 241(*b*) deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (considered in the context of the life and liberty interest) is therefore engaged, and it is necessary to determine whether there has been any deprivation thereof that is not in accordance with the principles of fundamental justice.
>
> [Emphasis added.]

[63] Justice Sopinka clearly decided that the impugned law deprived the plaintiff of her s. 7 right to security of the person, and I consider it may also be taken to have decided that the liberty interest was also impaired. Justice Sopinka did not directly decide whether the s. 7 right to life was engaged, and it does not appear that that issue was argued by the parties before the Supreme Court of Canada, according to

Sopinka J.'s summary of Ms. Rodriguez's submissions. Though "life" and "sanctity of life" are discussed as principles in the judgment, they are used only to inform the analysis of the rights to liberty and security of the person at the various stages.

[64] The majority reasons then considered whether the infringements of the rights to liberty and security of the person were other than in accordance with the principles of fundamental justice.

[65] Justice Sopinka characterized the issue this way at 595:

> The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.

[66] As to the state interest of protecting the vulnerable, he said at 595:

> Section 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken.

[67] He referred to the impugned provisions as "valid and desirable legislation which fulfills the government's objectives" (at 590). Justice Sopinka considered that the state interests in preserving and protecting the vulnerable must be weighed against the limit on Ms. Rodriguez's rights in order to determine if the provisions are arbitrary.

[68] After reviewing the history of the suicide provisions, practises concerning medical care at the end of life, and legislation in other countries, Sopinka J. concluded that the legislation did not offend the principles of fundamental justice (at 605 − 608). He considered the principle of "sanctity of life" as a fundamental value in Canadian society, drawing on the fact that life was protected under s. 7 as support for the importance of this value. In reaching this conclusion, Sopinka J. did not consider or decide whether the right to life was engaged; rather, he used the existence of a right to life to support the importance of the state interest of promoting

the sanctity of life. He concluded that anything less than an absolute prohibition against assisted suicide would create risks of abuse.

[69] Justice Sopinka concluded that the impugned provisions were neither arbitrary nor unfair, and that the deprivation of liberty and security of the person by the impugned law was therefore in accordance with the principles of fundamental justice.

*2. Sections 15 and 1 of the Charter*

[70] The majority reasons do not analyze Ms. Rodriguez's claim that the law also infringed her right to equality under s. 15 of the *Charter*; indeed, Sopinka J. expressly declined to decide that issue. Instead, Sopinka J. preferred to assume a s. 15 violation, as any such violation was "clearly saved under s. 1 of the *Charter*" (at 613).

[71] Under the s. 1 analysis, Sopinka J. agreed with Chief Justice Lamer that the legislation had a pressing and substantial objective and that it was rationally connected to the purpose of the legislation. He held that the legislation was not overbroad because "[t]here is no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose" (at 614).

[72] Regarding minimal impairment and proportionality, Sopinka J. said at 614 − 615:

> I wholeheartedly agree with the Chief Justice that in dealing with this "contentious" and "morally laden" issue, Parliament must be accorded some flexibility. In these circumstances, the question to be answered is, to repeat the words of La Forest J., quoted by the Chief Justice, from *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, at p. 44, whether the government can "show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment". In light of the significant support for the type of legislation under attack in this case and the contentious and complex nature of the issues, I find that the government had a reasonable basis for concluding that it had complied with the requirement of minimum impairment. This satisfies this branch of the proportionality test and it is not the proper function of this Court to speculate as to whether other alternatives available to Parliament might have been preferable.

> It follows from the above that I am satisfied that the final aspect of the proportionality test, balance between the restriction and the government objective, is also met. I conclude, therefore, that any infringement of s. 15 is clearly justified under s. 1 of the *Charter*.
>
> [Emphasis added.]

[73] This final paragraph is the only time Sopinka J. considers the final proportionality question of the *Oakes* test. While his reasons on this question are brief, he nonetheless answers the question and decides the issue.

*3. Summary of Issues Decided by Rodriguez*

[74] To summarize, the majority in *Rodriguez* decided the following:

1. Section 241(b) of the *Criminal Code* deprived the plaintiff of her rights to liberty and security of the person under s. 7;
2. The objective of the legislation is to preserve life and to protect the vulnerable;
3. The deprivations of liberty and security of the person were in accordance with the principles of fundamental justice because they were not arbitrary or unfair;
4. Any infringement of s. 15(1) would be justified under s. 1 of the *Charter* because:
    a) the legislation had a pressing and substantial objective;
    b) the legislation was rationally connected to the objective;
    c) the government had a reasonable basis for concluding that the minimal impairment test under s. 1 had been met; and
    d) the final proportionality stage of the *Oakes* test was satisfied.

[75] The next step is to consider whether Smith J. correctly distinguished *Rodriguez* in light of these decided issues.

### *C. Did the Trial Judge Err in Distinguishing Rodriguez?*

[76] Justice Smith made a careful analysis of what the majority in *Rodriguez* decided (see reasons paras. 885 – 936), and then considered the questions before her which remained open for decision (paras. 937 – 1008). She divided this second part of her analysis on *Rodriguez* into the three sections of the *Charter* in issue: ss. 7, 15, and 1.

#### *1. Section 7 of the Charter*

[77] In considering what *Rodriguez* had decided under s. 7, Smith J. identified two issues which were not decided by Sopinka J. First, as to the rights protected by s. 7, she concluded that the right to life had not been considered or decided by Sopinka J. As this issue had been raised by the claimants before her and had not been decided in *Rodriguez*, she held that this issue remained open to her to decide. Second, she concluded that certain principles of fundamental justice had crystallized after *Rodriguez* and had not been decided by that decision. I will address each point in turn.

[78] 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. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, Wilson J. declined to adopt a position that s. 7 protected a single right, and that life, liberty, and security of the person were simply elements of that single right. In considering this "single right theory" Wilson J. concluded at 205:

> Even if this submission is sound, however, it seems to me that it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the "right" contained in s. 7.

[79] This understanding of s. 7 as protecting three separate interests was subsequently endorsed by Lamer J. (as he then was), writing for the majority in

*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, who added (at 500): "[e]ach of ... [life, liberty, and security of the person], in my view, is a distinct though related concept to be construed as such by the courts." Similarly, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 52, Dickson C.J. referred to life, liberty, and security of the person as "independent interests, each of which must be given independent significance by the Court."

[80] In *Bedford*, the Ontario Court of Appeal heard a similar submission to distinguish a Supreme Court of Canada majority decision on s. 7. In that case, the impugned provisions of the *Criminal Code* involved prostitution. These provisions had already been considered under s. 7 in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"). In the *Prostitution Reference*, the majority of the Court considered the impugned provisions to deprive prostitutes of their liberty interests. The majority did not consider s. 7 security of the person interests. In *Bedford*, however, the claimants raised security of the person as the infringed right. After considering the law on s. 7 as containing three independent interests, the Court stated at para. 69:

> Surely, then, the *silence* of the Supreme Court on "independent interests ... which must be given independent significance" (*Morgentaler*, at p. 52) cannot preclude future consideration of those interests by a court of first instance.

[81] In oral submissions, counsel for the AGC agreed that the right to life as raised by the claimants in this case was not considered in *Rodriguez*. However, counsel submitted that even had it been considered, it would have had no effect on Sopinka J.'s s. 7 analysis. Having reviewed *Rodriguez*, I agree that Sopinka J. did not consider a deprivation of the right to life in the manner argued by the claimants in this case. It would be speculative to say whether or not that consideration would have affected his decision. Respectfully, I agree that it was open to Smith J. to consider whether the right to life was infringed as part of her analysis under s. 7.

[82] As to the meaning of life under s. 7, counsel for the AGC submitted that "life" in the context of s. 7 meant nothing more than the bare minimum of physical existence – a heartbeat, respiration, or brainwaves comprise the extent of the life

interest protected by s. 7. Other aspects of one's "life," such as the quality of one's life, are subsumed into the rights to liberty and security of the person.

[83] Even if this narrow definition is adopted, it remains the case that *Rodriguez* did not consider the impugned provisions in terms of causing premature death.

[84] However, a broader interpretation of life is both supportable and preferable. As a human rights document, the *Charter* must be interpreted by applying the plain meaning of its words, by giving effect to its purpose to protect fully those rights that it guarantees, and by limiting efforts to minimize those rights: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114 at 1134. This purposive approach has its genesis in the very origins of *Charter*-related jurisprudence. As stated in *R. v. Big M. Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 344*,* relying on *Hunter v. Southam,* [1984] 2 S.C.R. 145:

> The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

[85] In considering the definition of "life," it is appropriate to view it in the context of s. 7. Section 7 addresses life only in relation to human beings. "Everyone" has the right to life. The section protects the right to life for all members of the human species. It does not address other forms of life whether animate or inanimate.

[86] Viewed in this way, the meaning attributed to the life interest in s. 7 by the AGC is insupportable. 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.

[87] A similar appreciation of the right to life was eloquently expressed by the South African Constitutional Court in *S. v. Makwanyane and Another* [1995] ZACC 3. At para. 325, O'Regan J. stated:

> The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.

[88] If the life interest is viewed this way, it is clear that it has a larger meaning than can be encompassed in the right to liberty or the right to security of the person. Though "life" and the "sanctity of life" were considered in the context of liberty and security of the person in *Rodriguez,* the significance of life as a separate right was not.

[89] For these reasons, I respectfully agree with Smith J. that the right to life was not decided in *Rodriguez.* However, whether the life interest in s. 7 is viewed narrowly, as advanced by the AGC and accepted by Smith J., or more broadly as I

have articulated, the reasons of Sopinka J. did not consider the deprivation of the right to life as advanced by the claimants.

[90] Justice Smith also found that certain principles of fundamental justice, not considered by Rodriguez, were open for her to decide. She held that the principle of overbreadth (as distinct from arbitrariness) was not identified as a principle of fundamental justice until the Court's decision in *R. v. Heywood*, [1994] 3 S.C.R. 761; and that gross disproportionality (again as distinct from arbitrariness) was not recognized as a principle of fundamental justice until 2003 when the Court decided *R. v. Malmo-Levine*, 2003 SCC 74 (para. 983). As neither principle had been considered in *Rodriguez*, she held that these were questions that remained open for her to decide.

[91] To support this point, Smith J. applied *Bedford*, in which the Ontario Court of Appeal concluded that a case which was decided before certain principles of fundamental justice were established cannot be said to have decided those issues. In *Bedford*, the Court stated:

> [67] In addition, the number of recognized "principles of fundamental justice" referenced in the second half of s. 7 has expanded over the last 20 years. Whereas in 1990 the Supreme Court considered only vagueness and the perceived inconsistency in Parliament's response to prostitution, in this case the application judge was asked to evaluate the infringements against the principles of arbitrariness, overbreadth, and gross disproportionality.
>
> [68] The principles of fundamental justice at issue in this case were not considered in 1990 because they had not yet been fully articulated. Arbitrariness and overbreadth were only identified as principles of fundamental justice in 1993 and 1994, respectively: *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519; *R. v. Heywood*, [1994] 3 S.C.R. 761. Gross disproportionality emerged as a principle of fundamental justice a decade later: *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

[92] I agree with Smith J.'s position on overbreadth and gross disproportionality. While Sopinka J. mentioned "over-inclusiveness" in his consideration of the principles of fundamental justice, he subsumed this into his analysis of arbitrariness, and did not explicitly decide the issue of over-inclusiveness or gross disproportionality in his s. 7 analysis.

[93] The AGC submits that Sopinka J. in *Rodriguez* decided the issues of overbreadth and gross disproportionality in his s. 1 analysis conducted under an assumed s. 15(1) violation.

[94] I do not accept this submission. The balancing in s. 1 is to be done in relation to the specific right or freedom that is infringed. The right that was balanced in Sopinka J.'s s. 1 analysis in *Rodriguez* was Ms. Rodriguez's right to equality under s. 15(1). The rights being considered and balanced under s. 7 are the rights to life, liberty and security of the person. While Sopinka J.'s balancing under s. 1 may provide some guidance, it did not decide the issues of overbreadth or gross disproportionality argued before Smith J.

[95] Justice Smith did find that she was bound by Sopinka J.'s conclusion that the deprivations caused by the legislative prohibition were not arbitrary. Respectfully, I do not agree. Justice Sopinka's consideration of arbitrariness related to security of the person and liberty. Justice Sopinka did not consider whether a deprivation of the right to life was arbitrary. Having found that the right to life was infringed in this case, it was open to Smith J. to consider whether that deprivation was arbitrary. Justice Sopinka's conclusion that the deprivations of liberty and security of the person were not arbitrary would undoubtedly weigh in deciding this issue.

[96] For these reasons, I agree with Smith J. that the decision in *Rodriguez* did not decide whether the right to life in s. 7 was engaged, or whether any of the deprivations under s. 7 were overbroad or grossly disproportionate. These issues, along with the question of whether a deprivation of the right to life was arbitrary, were therefore open to Smith J. to consider.

*2. Sections 15 and 1 of the Charter*

[97] Justice Smith concluded that Sopinka J. had assumed a violation of s. 15 and therefore did not decide whether a s. 15 violation was actually established. By assuming the violation rather than deciding it, Smith J. held that the issue remained open for her to consider.

[98] I can see no error in Smith J.'s decision on this point. Justice Sopinka did not decide whether the impugned provisions violated s. 15. This issue was therefore open for her to consider. However, the effect of deciding this issue will ultimately depend on whether the s. 1 result in *Rodriguez* can be distinguished.

[99] At s. 1, Smith J. concluded that the adjudicative facts in this case did not distinguish it in any meaningful way from *Rodriguez* (para. 941), but that there was a significant body of evidence concerning legislative and social facts that was not available to the Court in *Rodriguez* (paras. 942 and 944).

[100] Justice Smith relied on the Ontario Court of Appeal's decision in *Bedford* and recognized that new facts alone cannot overcome the binding effect of a s. 1 decision on lower courts considering the same question. I agree that the new legislative and social facts in this case are insufficient to distinguish *Rodriguez*. While new legislative and social facts allow a trial court to make findings of fact that may lead a higher court to reconsider an earlier decision, they do not allow the lower court to disregard the binding effect of that higher authority.

[101] The respondents argued, however, that the Supreme Court of Canada's decision in *Hutterian Brethren* modified the law to create "a more rigorous analysis of proposed justification for *Charter*-infringing legislation" than was conducted in *Rodriguez* (para. 989).

[102] In accepting this argument, Smith J. held that the Supreme Court of Canada decision in *Hutterian Brethren* changed the law concerning the final step under s. 1 of the *Charter*, which examines the proportionality of the law's effects. She said:

> [994] ... Courts are to widen their perspective at the final stage to take full account of the deleterious effects of the infringement on individuals or groups, and determine whether the benefits of the legislation are worth that cost. That is a different question than whether the legislation is rationally connected to the government's objective or impairs the rights as little as possible.

And further:

> [1003] The clarification in *Hutterian Brethren* regarding the final step in the *Oakes* test has significant consequences in this case. Further, I note that the

> evidentiary record, bearing both on the assessment of consistency with the principles of fundamental justice under s. 7, and on justification under s. 1, is very different than the record that was before the courts in *Rodriguez*.

[103] Respectfully, I am of the view that *Hutterian Brethren* did not change the law under s. 1 of the *Charter*. In *Hutterian Brethren*, McLachlin C.J. addressed commentary from Peter W. Hogg that suggested that the final stage of the proportionality analysis, the weighing of salutary and deleterious effects, was redundant. In rejecting this suggestion, McLachlin C.J. first referred back to the explanation of that stage of the analysis given by Dickson C.J. in *Oakes*, where he stated at 139 – 140:

> Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[104] As I read *Hutterian Brethren*, the Chief Justice was not attempting to change the s. 1 analysis; rather, her points on the proportionality stage serve to counter academic commentary which suggested the final stage was now redundant. In doing so, rather than change the proportionality analysis, the Chief Justice re-emphasizes the analysis laid down by Dickson C.J. in *Oakes*.

[105] Turning to the analysis in *Rodriguez,* it is evident that Sopinka J.'s reasons treated the result of his application of the third stage as being based on conclusions reached in earlier stages. While this may not be in perfect harmony with *Hutterian Brethren*, I note that since *Hutterian Brethren* was decided, courts have, on occasion, continued to see the final stage as connected to the work done at earlier stages of the proportionality analysis. Most recently, in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, Rothstein J. for the Court concluded

at para. 148 that the result on the final proportionality stage was “apparent from the ... analysis” at the earlier stages of the *Oakes* test.

[106] *Hutterian Brethren* did not change the issues to be decided under s. 1. The issue before Smith J. was the same as the issue before Sopinka J. in *Rodriguez*, namely: was the prohibition proportionate in its effects. Given that *Hutterian Brethren* did not change the issues to be considered under s. 1, Smith J. remained bound by the s. 1 analysis with respect to s. 15 in *Rodriguez.*

[107] I therefore respectfully agree with the AGC that Smith J. erred in finding the question of s. 1, as it related to s. 15, was open to her to decide. Though she was entitled to comment on how Sopinka J.’s decision might be decided differently today, she was bound, as is this Court, to apply the result.

[108] As the s. 1 analysis applied to ‘any’ s. 15 violation, I am of the view that while the analysis of s. 15 was open to the trial judge, as well as this Court, the result would nonetheless be that such a violation is saved under s. 1. Given this result, I do not see it as necessary for this Court to consider s. 15.

[109] As the s. 1 analysis in *Rodriguez* applied to the reasonableness of limits on rights under s. 15, the Court’s conclusion cannot be taken to apply to a s. 1 analysis with respect to a s. 7 violation. Accordingly, if Smith J. found a violation of s. 7, she was free to conduct the related s. 1 analysis.

*3. Summary of Issues Not Decided by Rodriguez*

[110] For these reasons, I consider the following issues were open for Smith J. to decide:

1. Whether the s. 7 right to life was engaged by the prohibition;

2. Whether deprivations of the right to life, liberty, or security of the person were in accordance with the principles of fundamental justice of overbreadth and gross disproportionality;

3. Whether the deprivation of the right to life was arbitrary; and

4. Whether a violation of s. 7, if established, was saved under s. 1 of the *Charter*.

[111] The next step is to consider whether Smith J. erred in deciding the issues I have identified as left open for her to consider.

## *V. Section 7 of the Charter*

### *A. The Deprivation of the Right to Life*

[112] Justice Smith held that in addition to the right to liberty and the right to security of the person, the right to life protected by s. 7 was also engaged by the impugned legislation. She said:

> [1319] I agree with the plaintiffs 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 from drawing any inferences in this regard from the reasoning in the majority decision.
>
> [1320] However, I agree with Canada that the Chief Justice's comment in *Chaoulli* at para. 123 suggests that the right to life is engaged only when there is a threat of death, although security of the person may be engaged with respect to impingement on the quality of life.
>
> [1321] In my opinion, the security of the person and liberty interests engaged by the legislation encompass the essence of the plaintiffs' claim.
>
> [1322] Only one aspect of Ms. Taylor's claim seems to implicate the right to life *per se,* in the sense of a right not to die. The plaintiffs urge that the legislation has the effect of shortening the lives of persons who fear that they will become unable to commit suicide later, and therefore take their own lives at an earlier date than would otherwise be necessary. That point is supported by evidence from Ms. Taylor as well as other witnesses. In that respect, I agree with the plaintiffs that the right to life is engaged by the effect of the legislation in forcing an earlier decision and possibly an earlier death on persons in Ms. Taylor's situation.
>
> [Emphasis added.]

[113] Justice Smith made a number of findings about the nature of the deprivations. She stated:

> [1324] With respect to Ms. Taylor and others in her position, I note the following.
>
> [1325] First, they experience a shortened lifespan if they take steps to end their lives sooner than they would feel it necessary to do if they were able to receive assistance.
>
> [1326] Second, they are denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience. Further, their ability to discuss and receive support in this choice from their physicians is impaired.
>
> [1327] Third, for persons who are physically disabled, they are deprived of a measure of self-worth in that they are denied the same degree of autonomy as that afforded to others.
>
> [1328] Fourth, while palliative care including palliative sedation may relieve the suffering of many, for some persons it may be unavailable (due to the nature of their illness) or unacceptable to them (because they value maintaining consciousness and the ability to communicate, feel that death while under palliative sedation will be difficult for their families to observe, worry that they will in fact maintain consciousness, or for other reasons). Thus, they may be required to continue to undergo physical pain or psychological suffering or both, possibly exacerbated by terrible fear about what is yet to come.
>
> [1329] Fifth, they are required to undergo stress. The non-availability of physician-assisted death means that patients cannot obtain an "insurance policy" that they may never use but that gives them some peace of mind and relieves their fear.
>
> [1330] As to Ms. Carter and Mr. Johnson and others in their position, they are forced to risk prosecution for a serious criminal offence if, even reluctantly and purely out of compassion, they accede to a request to help a relative or loved one who wishes to obtain assisted death.

[114] The AGC submits that the right to life is not engaged by s. 241(b) because there is no sufficient causal connection between the taking of one's life, and Parliament's action in passing the legislation. The AGC says that in order to establish a breach of the s. 7 right, there must be a causal link between the limit on an individual's choice, or freedom to act, and the state conduct.

[115] The AGC further argues that preventing an individual from choosing assisted death does not create a sufficient causal connection between an individual's actions and state conduct. In addition, the AGC says that the decision to shorten one's life is only one of many responses to anticipated suffering that may result from a prohibition on assisted death. To establish a causal connection, the AGC suggests

there must be a direct link between the state conduct and the actual consequences of the prohibition. The AGC argues that premature suicides are not caused by the law and its prohibitive effect, but simply the fear of living with a degenerative medical condition.

[116] The respondents say a direct causal link is established. They say that but for the impugned provisions, they would be able to have the assistance of a physician to end their life at some time in the future, when they are no longer able to do so themselves unassisted. It is because of that impediment that the choice is made to end their lives prematurely.

[117] However, it is not only the assistance of a physician in ending life that must be considered. Instead, access to physician assistance in considering death can have a preventative effect. Justice Smith considered the affidavit evidence of Dr. Bentz concerning a physician's ability to prevent suicides in Oregon, by addressing the underlying motivation of the patient. Justice Smith stated:

> [413] Dr. Bentz says that since assisted suicide was legalized in Oregon, roughly half a dozen patients have raised the issue with him. For none of the patients was physical suffering the motivating factor. He writes, "[w]hy those patients have wanted to die varies but common to each case is that once I have assisted the patient in addressing whatever their concern was, they no longer want to die."

[118] By imposing an absolute prohibition on assisted death, the effect of the law is to decrease, if not eliminate, the role for physicians in the decision making process for individuals contemplating ending their lives prematurely. At the very least, such involvement may increase the likelihood that the person considering suicide is aware of the full range of options before making a decision. At the most, as was the experience of Dr. Bentz, this involvement may decrease the chance that the suicide takes place.

[119] In my opinion, there is a sufficient causal connection between the impugned provisions and premature deaths. The standard advocated by the AGC, which would require showing a direct causal link between the legislation and its effects is not the correct standard to apply. In *Canada (Attorney General) v. PHS Community*

*Services Society*, 2011 SCC 44, the Court accepted that depriving drug users of access to medical supervision amounted to depriving the users of the right to life. For a unanimous Court, McLachlin C.J. stated:

> [91] The record supports the conclusion that, without an exemption from the application of the *CDSA*, the health professionals who provide the supervised services at Insite will be unable to offer medical supervision and counselling to Insite's clients. This deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person. The result is that the limits on the s. 7 rights of staff will in turn result in limits on the s. 7 rights of clients.

[120] In *Bedford,* the appellants argued that a high standard of causation was necessary to establish a link between interference with interests and legislation. In rejecting that argument, the Ontario Court of Appeal stated that "[t]he analysis and outcome in *PHS* also belies the appellants' contention that the courts must impose a strong causation requirement before finding a link between interference with interests and legislation" (para. 121).

[121] In this case, the record shows that without the prohibition some physicians would willingly provide physician-assisted dying. The record also shows that because of the prohibition on accessing a medical service, some individuals are taking their own lives prematurely. Justice Smith accepted that evidence and said it sufficiently established a causal connection. I agree. But for the impugned law, the respondents and those in their circumstances could choose a longer life, and they could have greater access to medical supervision and advice over their decisions. The impugned provisions thereby deprive individuals of their right to life.

### *B. The Deprivation of Liberty and Security of the Person*

[122] Justice Smith accepted that a deprivation of security of the person was made out, as was found in *Rodriguez* in circumstances that were similar to Ms. Taylor in this case.

[123] I agree with Smith J., and with Sopinka J., that the impugned provisions deprive individuals of their security of the person by requiring them to endure

physical pain and psychological stress. I would add, however, that this is not the only means by which the prohibition deprives individuals of their right to security of the person. In this case, unlike *Rodriguez*, the evidence shows that individuals are taking their own lives without medical advice or supervision. Accordingly, the deprivation is not simply about the pain and suffering endured by not ending one's life, but also about the dangers associated with being deprived of medical advice or supervision should one attempt to end that suffering. As McLachlin C.J. summarized in *PHS* at para. 93, "[w]here a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out."

[124] Justice Sopinka did not clearly decide whether or not a deprivation of the right to liberty was established, and instead stated that any such deprivation would be upheld as neither arbitrary nor unfair. Justice Sopinka did conclude that the prohibition deprived Ms. Rodriguez of her autonomy in the context of his discussion of security of the person. Justice Smith noted that this has later been interpreted as a conclusion on liberty, and found that a deprivation of the liberty interest was thereby established. I see no error in this approach.

[125] For these reasons, I accept that the impugned provisions engage the respondents' rights to life, liberty, and security of the person. I will now consider whether these deprivations are in accordance with the principles of fundamental justice, to the extent that this question has not already been decided by *Rodriguez*.

### *C. The Principles of Fundamental Justice*

[126] The central principles of fundamental justice at issue in this case are overbreadth and gross disproportionality. Arbitrariness was also argued at trial, but Smith J. found that she was bound by the result in *Rodriguez* that the prohibition was not arbitrary. As mentioned above, this was correct as it related to the deprivation of the right to liberty or security of the person, but not the deprivation of the right to life. Accordingly, the question of arbitrariness is open to be considered, but only in a limited sense. The respondents have also raised "parity" as a principle

of fundamental justice. I will consider arbitrariness and parity separately at the end of this section. I will focus the analysis on overbreadth and gross disproportionality as, in my view, those principles are central to the outcome of this appeal.

*1. Overbreadth and Gross Disproportionality*

[127] In *R. v. Khawaja*, 2012 SCC 69, decided after the trial judgment in this case was released, McLachlin C.J., writing for a unanimous Court, declined to decide whether or not overbreadth and gross disproportionality are distinct constitutional doctrines, and instead dealt with the two together. She explained her approach to these two concepts as follows:

> [40] For the purposes of this appeal, I need not decide whether overbreadth and gross disproportionality are distinct constitutional doctrines. Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach of the principles of fundamental justice. Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest": *PHS Community Services Society*, at para. 133; see also *Malmo-Levine*, at para. 143. In order to address the appellants' s. 7 constitutional challenge, I will (1) examine the scope of the law (2) determine the objective of the law and (3) ask whether the means selected by the law are broader than necessary to achieve the state objective and whether the impact of the law is grossly disproportionate to that objective. Thus, I will examine both overbreadth and gross disproportionality in a single step, without however deciding whether they are distinct constitutional doctrines.
>
> [Emphasis added].

[128] Given that both overbreadth and gross disproportionality are central to this appeal, as they were in *Khawaja*, I will follow the Chief Justice's three-step approach for these two questions. While Smith J. did not have the benefit of *Khawaja*, her approach was not at odds with it, and she made the necessary findings of fact to address each of the three steps.

[129] Before applying *Khawaja*, I must address an argument raised by the AGC concerning a 'reasonable apprehension of harm' test for the principles of fundamental justice. Counsel for the AGC submits that a more deferential test should be applied which asks whether there is a reasonable apprehension of harm

associated with anything short of an absolute prohibition. The AGC submits that the evidence did disclose a reasonable apprehension of harm in the absence of an absolute prohibition. It was therefore not open for the judge to conclude, as she did, that the law was both overbroad and grossly disproportionate.

[130] Counsel for the AGC drew our attention to five cases to support this proposed reasonable apprehension of harm test: *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Bryan*, 2007 SCC 12; *Saskatchewan v. Whatcott*; and *R. v. Malmo-Levine*.

[131] The first four of these cases are all ones where the right to freedom of expression under s. 2(b) of the *Charter* was said to be infringed. They raised the issue of whether any such infringement could be justified under s. 1 of the *Charter.* In s. 1 cases, the Court has reasoned that it may be impossible for governments, who bear the onus of proof under a s. 1 justification, to adduce social science evidence to justify the infringement on free speech, or that such evidence might be inconclusive or not unanimous. For example, in *R. v. Bryan*, Justice Bastarache said:

> [20] In a series of cases on freedom of expression, this Court gradually reached the recognition that the paucity of social science evidence in some cases required that a reasonable apprehension of harm could be sufficient as a grounding to a s. 1 argument: see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 776; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 137; *Thomson Newspapers* at paras. 104-7. In *Harper*, the Court extended this line of reasoning to the realization that some harms are "difficult, if not impossible, to measure scientifically" (at para. 79), and that in such cases logic and common sense become all the more important. At least one commentator has suggested that the impetus for this move lies in the origins of the *Oakes* test itself (*R. v. Oakes*, [1986] 1 S.C.R. 103), in that the test was formulated without explicit contemplation of situations such as those discussed above, in which "cogent and persuasive" evidence does not exist: see S. Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006), 34 *S.C.L.R.* (2d) 501.
>
> [Emphasis added]
>
> ...
>
> [28] In *Harper*, I referred to the contextual factors as favouring a "deferential approach to Parliament": see para. 88. However, in my view the

> concept of deference is in this context best understood as being about "the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society": *Harper*, at para. 75 (emphasis added). What is referred to in *Harper* and *Thomson Newspapers* as a "deferential approach" is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate.
>
> [Emphasis added by Bastarache J.]

[132] In my view, it is significant that all four of these cases examine the reasonable apprehension of harm standard when examining s. 1 and applying the *Oakes* test. It is well settled that under s. 1, the onus of proving justification rests on the party seeking to uphold the limitation, which in most cases, as here, is the government: *R. v. Oakes*, [1986] 1 S.C.R. 103. Given the difficulty of proof in some such cases, the Court has concluded that it is proper to give deference to Parliament, and to accept that a reasonable apprehension of harm may suffice to justify infringement where positive proof of harm cannot be adduced.

[133] *R. v. Malmo-Levine* is the only case referred to by the AGC in which "reasonable apprehension of harm" was used in a s. 7 analysis, rather than s. 1. Respectfully, nothing in *Malmo-Levine* supports using reasonable apprehension of harm as a 'test' or as modifying how the principles of fundamental justice are to be analysed under s. 7. Rather, *Malmo-Levine* identifies that Parliament's "apprehension of harm" may be considered as a valid state interest/objective when considering the individual principles of fundamental justice: *Malmo-Levine*, para. 131. If Parliament had a reasonable apprehension of harm, this apprehension would be considered at the second step of *Khawaja*, that of establishing legislative objectives.

[134] I do not see anything in *Malmo-Levine* that would suggest that framing the objective in terms of preventing a reasonably apprehended harm should attract more deference than other objectives. Virtually any *Criminal Code* provision can have its objectives recast into terms of addressing a reasonable apprehension of harm.

Deference has already been built into the principles of fundamental justice of overbreadth and gross disproportionality: *Khawaja*, para. 37, *Malmo-Levine*, para. 169. Granting additional deference for objectives framed one way would be duplicative and inappropriate.

[135] Further, to the extent that differing levels of deference have been applied in the s. 7 analysis, it is best done by examining the seriousness of the deprivation of the right in question. This was the approach adopted by the Chief Justice and Major J. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35. In discussing arbitrariness, the Chief Justice and Major J. said:

> [131] In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.
>
> [Emphasis added.]

[136] In this case, the claimants have asserted a deprivation of life, which Smith J. found was established and with which I agree. Accordingly, life itself is at stake. I see no reason to provide additional deference on top of the deference already built into the principles of fundamental justice.

[137] *Khawaja* suggests three steps in determining overbreadth and gross disproportionality. I will consider the reframed state interest of an apprehension of harm under the second step, that of identifying the state objective.

*a) The Scope of the Impugned Provisions*

[138] Justice Smith reviewed the impugned provisions at para. 101 of her reasons and it is common ground that these sections create a complete prohibition on assisted death. The impugned provisions allow for no exceptions regardless of who

is providing the assistance, including a physician, or who is seeking the assistance, including those who are not vulnerable, are fully competent, are free from coercion, and have provided informed consent.

*b) The Objective of the Impugned Provisions*

[139] The parties, Smith J., and Sopinka J. in *Rodriguez*, identified a number of objectives for the impugned provisions. Smith J. accepted the legislative objective as follows:

> [1190] I conclude that the objective of the legislation is, by imposing criminal sanctions on persons who assist others with suicide, to protect vulnerable persons from being induced to commit suicide at a time of weakness. The underlying state interest which this purpose serves is the protection of life and maintenance of the *Charter* value that human life should not be taken, as Justice Sopinka stated in *Rodriguez* at 608:
>
> > This consensus finds legal expression in our legal system which prohibits capital punishment. This prohibition is supported, in part, on the basis that allowing the state to kill will cheapen the value of human life and thus the state will serve in a sense as a role model for individuals in society. The prohibition against assisted suicide serves a similar purpose. In upholding the respect for life, it may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide. To permit a physician to lawfully participate in taking life would send a signal that there are circumstances in which the state approves of suicide.
> >
> > [Emphasis added by trial judge.]

[140] In *Rodriguez*, Sopinka J., for the majority, also referred to the objectives of the law in this way at 590:

> In this case, it is not disputed that in general s. 241(*b*) is valid and desirable legislation which fulfils the government's objectives of preserving life and protecting the vulnerable. The complaint is that the legislation is over-inclusive because it does not exclude from the reach of the prohibition those in the situation of the appellant who are terminally ill, mentally competent, but cannot commit suicide on their own. It is also argued that the extension of the prohibition to the appellant is arbitrary and unfair as suicide itself is not unlawful, and the common law allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care which has the effect of hastening death. The issue is whether, given this legal context, the existence of a criminal prohibition on

> assisting suicide for one in the appellant's situation is contrary to principles of fundamental justice.
>
> [Emphasis added.]

And at 595:

> Section 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken.

[141] On this appeal, the AGC submits that a further objective of the impugned provisions is to convey the message to all persons that suicide is not an acceptable way to end one's life, whether assisted or not. As expressed in the appellant's factum, the purpose is:

> ... also to discourage everyone, even the terminally ill, from choosing death over life, and to guard against the negative social messaging that would result from a system which signals that there are circumstances in which the state condones suicide. In this regard, the prohibition prevents sending the message that the lives of some are less valuable, and less worthy of protection, than others.

[142] The AGC submits that the deprivations must be measured against the impugned provisions' primary purpose of protecting the vulnerable, and its secondary deterrent purpose of sending a message to all that suicide is wrong, and that all lives are equally worthy of protection.

[143] Justice Smith rejected an expansion from the objective as stated in *Rodriguez*, as she was of the view that *Rodriguez* was binding on this point. While I agree that *Rodriguez* identified one aspect of the legislative purpose, this does not prevent the AGC from raising another aspect of that purpose. The impugned provisions may serve multiple purposes, and I can see no harm in considering the purpose of preventing negative messaging about the value of certain human lives.

[144] The AGC also made submissions about Parliament's reasonable apprehension of harm should anything short of an absolute prohibition be adopted. The submissions on this point were discussed above. Based on *Malmo-Levine*, the

appropriate place to consider a reasonable apprehension of harm is in establishing state interests.

[145] Having already accepted the state objective of preventing harm to vulnerable individuals, I would also accept that objective as being based on a reasonable apprehension of harm that would result, should physician-assisted death be allowed.

[146] Accordingly, the objective of the legislation can be stated as follows: to prevent harm to vulnerable individuals who may be induced into taking their own lives in times of weakness, or to address Parliament's reasonable apprehension of harm that abuse may occur; and to avoid sending a message, both to disabled individuals and the general public, that the state condones suicide. Both of these objectives support the state's interest in protecting the value of all human life.

*c) The Means of the Impugned Provisions*

[147] The final step is to consider whether the legislative means selected are broader than necessary to achieve the state objective and whether the impact of the law is grossly disproportionate to that objective.

[148] As noted above, Smith J. did not have the benefit of *Khawaja*. However, her analysis under overbreadth and gross disproportionality aptly fits under this final stage of assessing the means. In considering overbreadth, Smith J. phrased the test in two ways:

> [1363] Is an absolute prohibition the least restrictive means of preventing the inducement to suicide of vulnerable persons? Is an absolute prohibition necessary in order for the state to achieve its objective?

[149] Counsel for the AGC has submitted that the first phrasing, of "least restrictive means" was the wrong test. I do not see any need to decide this point, as Smith J.'s second phrasing of the test is indistinguishable from that stated in *Khawaja*. To the extent that there is any inconsistency between the two, Smith J.'s analysis relied on the second phrasing. She said:

> [1364] A prohibition with carefully designed and well enforced exceptions would less restrict the plaintiffs' interests in life, liberty and security of the person, but the question is whether a prohibition without exceptions is necessary in order to meet the government's objectives.
>
> [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.
>
> [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.
>
> [1367] However, that is not what the evidence shows. 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.

And further:

> [1370] I also take into account the unknown extent to which physician-assisted death and assisted death by non-physicians already occurs in Canada. I have found that the evidence supports the conclusion that such deaths do occur, though likely in a very small number of instances. Moving to a system of physician-assisted death under strict regulation would probably greatly reduce or even eliminate such deaths and enhance the likelihood that only competent, fully-informed, voluntary and non-ambivalent patients would receive such assistance.
>
> [1371] I conclude, therefore, that the impugned provisions are overbroad and that the plaintiffs have established their claim under s. 7.

[150] Justice Smith found that the state objective of preventing harm to the vulnerable could be achieved with something less than an absolute prohibition, provided adequate safeguards were put into place. This was supported by her findings of fact on the feasibility of safeguards preventing harms, which were summarized succinctly as follows:

> [883] My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that 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.

[151] In this case, the foregoing findings were based upon a review of social science evidence, as well as on testimony from numerous expert witnesses. While findings that are founded on social and legislative facts together with testimony of live witnesses are not subject to the ordinary palpable and overriding error standard on review, they are owed some level of deference: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, per McLachlin J. (as she then was), at para. 141.

[152] Counsel for the AGC made a number of submissions in an effort to undermine this and similar findings of fact. In essence, counsel for the AGC attempted to demonstrate that the safeguards identified by Smith J. are insufficient to achieve the objectives of the impugned provisions.

[153] Counsel for the AGC argued that evidence from jurisdictions which allow physician-assisted dying demonstrate that safeguards are insufficient to prevent abuse. Specifically, the AGC pointed to evidence of what was referred to as “life-ending acts without explicit request” or “LAWER”, as evidence of how safeguards are ineffective. LAWER occurs when a physician takes steps to end a patient’s life without first obtaining necessary consent.

[154] While LAWER occurs in jurisdictions which allow physician-assisted dying, these deaths occur in particular circumstances which do not correspond to the range of the activities caught by Smith J.’s s. 7 order. The order only authorizes physician-assisted dying, a term used to refer to both physician-assisted suicide and *voluntary* euthanasia. Physician-assisted suicide occurs where the patient takes his or her own life, but with the assistance of a physician. As LAWER occurs where a physician takes the patient’s life, LAWER is not relevant to considering safeguards for physician-assisted suicide. Voluntary euthanasia occurs where the physician takes the patient’s life, but with the patient’s explicit prior consent. As LAWER occurs where a physician takes a patient’s life without consent, LAWER is not relevant to considering safeguards for voluntary euthanasia.

[155] Instead, LAWER relates to what Smith J. described as non-voluntary, or involuntary, euthanasia. These forms of euthanasia occur where a physician takes a patient's life without, or contrary to, the patient's prior expressed wishes. This was not the type of euthanasia the claimants in this case were seeking, as Smith J. noted:

> [313] The plaintiffs do not argue that physician-assisted death should be imposed on patients who do not, themselves, request it. Therefore, the ethical debate relevant to this case focuses on a limited class of patients: those who are competent adults (decisionally capable); fully informed as to their diagnosis, prognosis and all options for treatment or palliative care; persistently and consistently requesting assistance with death (that is, non-ambivalent); and not subject to coercion or undue influence.

[156] Justice Smith's s. 7 order does not sanction involuntary or non-voluntary euthanasia. Therefore, the order does not impact the legality of LAWER in British Columbia. I therefore do not see LAWER as relevant to the question of the effectiveness of safeguards for physician-assisted dying.

[157] Another issue concerning the effectiveness of the proposed safeguards is the capacity of the medical system to adequately perform the necessary checks to prevent abuse of physician-assisted dying. During submissions a question was raised as to whether available medical services in British Columbia could provide the safeguards suggested by Smith J., to the appropriate degree of certainty. It was suggested that patients typically do not have a close, or in many cases, any relationship with a general physician, and that the safeguards posited were theoretical and not practicable.

[158] It does not appear that this question was addressed directly by evidence at trial.

[159] There is evidence however that the number of persons who might seek physician-assisted death is very small, and typically, all of those persons have been under the care of physicians and engaged in the provincial health care system for a very long time. It would be reasonable to conclude, as suggested by counsel for the respondents, that no one seeking physician-assisted death would be a "walk-in

patient" at a medical clinic. Support for this comes from a review of the order granted by Smith J., which limits the application of the s. 7 relief to an individual who:

> [1393] .... has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.

[160] Virtually all persons who satisfy these conditions will, by their circumstances and of necessity, have a close patient/physician relationship with one or more doctors.

[161] Counsel for the AGC also submitted that safeguards would not be feasible as medical professionals responsible for administering these safeguards would be unable to overcome their unconscious biases regarding the value of certain lives. Similarly, vulnerable patients may face pressure from family members to seek physician-assisted dying, making assessments of voluntariness difficult.

[162] Physicians are granted a high level of trust to uphold their professional responsibilities to the highest degree and to act only in the best interests of their patients. Part of their responsibility has evolved to include making end of life decisions through forms of terminal sedation. The risks of unconscious biases referred to by the AGC would be equally present for terminal sedation, a practice which remains unregulated in Canada. The respondents submit, and I respectfully agree, that these biases can be addressed through the education of physicians.

[163] With respect to the risks of coercion, I would note that, even under the terms of Smith J.'s order, pressuring individuals to commit suicide, whether assisted by a physician or not, will remain criminal under s. 241. The combined effect of the limits placed on the order under s. 7, which focus on assessing voluntariness, and the continued criminalization of coercing vulnerable individuals to commit suicide, offer safeguards against coercion.

[164] For these reasons, I see no error in Smith J.'s conclusion that the proposed safeguards can greatly reduce the risks associated with physician-assisted dying. 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.

[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.

[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.

[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.

*2. Arbitrariness and Parity*

[168] A law is arbitrary when it has no connection to the state interest in question. Justice Smith noted that in this case, she was bound by the decision in *Rodriguez* that the impugned provisions were not arbitrary. I am of the view that Smith J. was able to consider arbitrariness, but only in relation to the deprivation of the right to life.

[169] The respondents also presented submissions on parity as a new principle of fundamental justice.

[170] I do not consider it necessary to decide either issue given my conclusion on overbreadth and gross disproportionality.

*3. Conclusion on Section 7 of the Charter*

[171] I conclude that the respondents are deprived of their rights to life, liberty, and security of the person by the provisions of s. 241(b) and I further conclude that the deprivations suffered have been proven on a balance of probability to be overbroad and grossly disproportionate to the state objectives.

[172] I must now consider whether these deprivations may nonetheless be saved under s. 1 of the *Charter* as reasonable limits in a free and democratic society.

## *VI. Section 1 of the Charter*

[173] I have accepted that the respondents have been deprived of their rights to life, liberty, and security of the person in a manner other than in accordance with the principles of fundamental justice. It has been noted that s. 7 violations will seldom be saved under s. 1: *R. v. D.B.*, 2008 SCC 25 at para. 89. However, I will proceed through the analysis.

[174] The test at s. 1 is well known, and was set out in *Oakes*. The first question requires the reviewing court to identify the objective of the impugned provisions and determine whether or not that objective is pressing and substantial. The objectives of the impugned provisions have already been canvassed in these reasons. They are: to prevent harm to vulnerable individuals who may be induced into committing suicide in a time of weakness, or to address a reasonable apprehension of such harm arising; and to avoid sending the message that suicide is acceptable. I accept that these objectives are pressing and substantial.

[175] I am also satisfied that the prohibition is rationally connected to these objectives, the second step in the *Oakes* test. Where an activity such as physician-

assisted death poses certain risks, and Parliament wishes to avoid those risks, a prohibition of the activity is a rational response.

[176] The third step of the *Oakes* test requires determining whether the impugned provisions minimally impair the rights in question. The test at this stage of the analysis is sometimes expressed as asking if the impugned provisions fall within a range of reasonable alternatives. Parliament is not obliged to select the least restrictive means provided the means selected fall within that range.

[177] In this case, I have already concluded that Smith J. was correct to find that the prohibition is overbroad in that it impairs s. 7 rights more than is necessary to achieve the objectives of the legislation. Given this conclusion, I am also satisfied that the impugned provisions cannot pass the minimal impairment section of the *Oakes* test. An absolute prohibition which deprives individuals of their right to life, liberty, and security of the person in a way which is unnecessarily broad cannot be said to be within a range of reasonable alternatives. A carefully regulated scheme would allow access to consensual physician-assisted dying while reducing the risks of harm with which Parliament is concerned.

[178] Similarly, there are many better means of sending messages about the importance of life than by denying patients access to medical care to assist in their end-of-life decisions, particularly when that denial is causing shortened lives. Such messaging cannot be said to minimally impair s. 7 rights.

[179] Given the failure to pass the minimal impairment stage, it is unnecessary to consider the final proportionality stage of the *Oakes* test. Justice Smith was correct to find that the s. 7 violation cannot be saved under s. 1 of the *Charter*.

## *VII. Cross Appeal on Euthanasia*

[180] Justice Smith made two orders, one under s. 15 and one under s. 7. The order under s. 15 only applies to physician-assisted suicide, not physician-assisted dying, meaning that voluntary euthanasia is not covered. The s. 7 order applies to

both physician-assisted suicide and consensual physician-assisted dying. This would include voluntary euthanasia.

[181] The respondents have raised, by way of a cross appeal, the argument that Smith J.'s order discriminates against materially disabled individuals who are unable to perform the final act which would lead to their death. They submit that the order violates s. 15 of the *Charter*.

[182] Having found that Smith J. erred in distinguishing *Rodriguez* at s. 1, and that therefore Smith J. was not able to provide a s. 15(1) remedy, only the s. 7 order remains. As the s. 7 order includes voluntary euthanasia, the issue raised in the cross appeal is moot. I would decline to decide this issue.

### *VIII. Procedural Issues*

[183] In the alternative to its other grounds of appeal, the AGC seeks a new trial on the basis of two procedural errors. The first such error alleged is that Smith J. forced the case to proceed on an expedited schedule, depriving the AGC the opportunity to lead all necessary and available evidence to answer the respondents' case.

[184] The second such error is that Smith J. improperly accepted reply submissions from the respondents, to which the AGC did not have an opportunity for sur-reply.

[185] As to the expedited time schedule, the respondents filed their notice of civil claim on 26 April 2011. The AGC filed its response on 22 June 2011.

[186] On the respondents' application, on 3 August 2011, the Court ordered that the case proceed as a summary trial on 14 November 2011. Respondents' counsel advanced two main reasons for proceeding on an expedited basis. The first was Ms. Taylor's deteriorating physical condition, and the second was limits on counsel's ability to represent the respondents *pro bono* in an extended conventional trial.

[187] The respondents filed some 66 affidavits in support of their case, and the AGC served some 21 affidavits and reports in answer. The respondents filed a further 19 affidavits in reply.

[188] The AGC took the position fairly early on that the case was not suitable for trial on affidavit evidence. Directions were given for cross examination on some of the deponents' affidavits, and the parties agreed to the cross examination of other witnesses. The case planning also contemplated the *viva voce* testimony of some witnesses before Smith J. The case proceeded as something of a "hybrid" summary trial.

[189] On 7 October 2011, the AGC filed its notice of application under Supreme Court Rule 9-7(11) to dismiss the summary trial application. The motion was originally set for hearing on 20 October 2011, but was adjourned by Chief Justice Bauman because Smith J. was not available.

[190] On 8 November 2011, Smith J. heard the application of both the AGC and the AGBC to dismiss the respondents' summary trial application.

[191] Rule 9-7(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides:

> On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that
>
> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii) the summary trial application will not assist the efficient resolution of the proceeding.

and Rule 9-7(15) provides:

> On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,

> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[192] After hearing very full submissions, Smith J. dismissed the applications to strike the summary trial proceeding. She confirmed that the summary trial should commence as scheduled on 14 November 2011, and gave some general guidelines as to scheduling.

[193] Justice Smith provided further reasons on this issue at paras. 137 – 147 of her judgment. She concluded:

> [144] There is no doubt that the timelines under which all counsel worked were challenging. Despite the timelines, in my view, a remarkably comprehensive and complete record was provided to the Court.
>
> [145] Significantly, counsel for the defendants did not point to any specific evidence that they would have provided to the Court, but for the timelines.
>
> [146] Having heard all of the evidence and submissions, I find that I am able, on the whole of the evidence, to find the facts necessary to decide the issues in this case. There was no issue as to the credibility of any witness of fact. Although some issues arose as to the reliability of expert witnesses and the weight that should be given to their opinions, none of those issues, in my view, was difficult or impossible to decide, particularly given that the parties had the opportunity to cross-examine the key witnesses on their affidavits before the Court, and did so.

[194] On this appeal, the AGC does not now say that the case was unsuitable for disposition on a summary trial. Rather, the AGC submitted that the voluminous material, and the tight timeline, prevented it from adducing all the evidence it would have if more time had been afforded for preparation and response to the respondents' case.

[195] In particular, the AGC says that given the opportunity, it would have put forward evidence as to elder abuse and the prejudice faced by persons with disabilities in both society at large and in the medical community.

[196] There is no affidavit evidence before us as to what the nature of that other evidence might have been. And, when pressed in oral argument, counsel could not

tell us even in general terms what difference, if any, that other evidence might have made to Smith J.'s decision.

[197] The AGC did not apply in this Court for leave to adduce fresh evidence on those matters where it says it was effectively prevented from doing so at trial.

[198] In a case such as this, where the remedy sought is a new trial, the general rule is that in order to succeed, the appellant will have to show that the trial judgment results in a substantial wrong, or a miscarriage of justice: see *Knauf v. Chao*, 2009 BCCA 605 and the cases there cited.

[199] Justice Smith's decision to meet the trial date of 14 November 2011, and the tight timeline that resulted, were matters within her discretion. I am not persuaded that there was any error in the exercise of that discretion. And there is nothing before us to support an allegation that a miscarriage of justice has occurred.

[200] I would not give effect to the first branch of the "procedural error" submission.

[201] The AGC's second point on the procedural error ground of appeal is that Smith J. erred in accepting the respondents' written reply submissions of some 163 pages, which were provided to defence counsel on the last day of the trial. The AGC says this resulted in the AGC having no opportunity for a sur-reply.

[202] The AGC filed a 17-page submission before the judge objecting to the respondents' reply.

[203] Justice Smith addressed the AGC's position on this issue at paras. 148 – 159 of her reasons. Her conclusion on this issue was as follows:

> [157] In their reply submissions, the plaintiffs did not tender any new evidence, though they did draw to the Court's attention aspects of the existing evidence that, in their view, responded to specific pieces of the evidence upon which Canada relied. Nor did the plaintiffs advance new theories of the case or make arguments that were not responsive to arguments raised by the defendants. For example, one aspect of the plaintiffs' reply to which Canada objected was a section in which the plaintiffs set out what they said would be safeguards responding to the defendants' submissions raising concerns about risks. In my view, the plaintiffs could not have been expected to

> anticipate Canada's very thorough and detailed argument about risks, and it was appropriate for them to respond with specific reference to the evidence.
>
> [158] Though the plaintiffs' reply is lengthy and detailed, in my view it is proper reply under the Rules and practice of this Court, in the context of this case.

[204] I can see no reversible error in Smith J.'s disposition of this issue. It was well within her discretion in the conduct of this difficult case. Counsel for the AGC has not identified any arguments she was prevented from making at trial, that were not made before us on appeal.

[205] I would not give effect to this submission.

[206] In the result, I would dismiss the procedural errors ground of appeal, and refuse to order a new trial.

## *IX. Appeals on Costs*

[207] In reasons released 1 November 2012, indexed at *Carter v. Canada (Attorney General)*, 2012 BCSC 1587, Smith J. granted the respondents an order for special costs of the proceedings, and held that those costs be allocated as to 90% against the AGC, and 10% against the AGBC.

[208] The AGC appeals against the award of special costs. The AGBC supports the AGC in the appeal against the award of special costs and, in addition, appeals the assessment of any costs against the AGBC as an intervenor acting in the public interest under the provisions of the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68.

[209] Justice Smith delivered extensive reasons covering both issues raised on the costs appeal. With respect to the issue of special costs, she reviewed all of the relevant authorities where special costs awards had been made in public interest litigation, including: *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 1453; *Broomer v. Ontario (Attorney General)* (2004), 3 C.P.C. (6th) 194 (Ont. S.C.J.); and, importantly, *Victoria (City) v. Adams*, 2009 BCCA 563.

[210] Justice Smith referred to this Court's judgment in *Adams* as follows:

> [32] Thus, the Court of Appeal in *Adams* set out these principles: (1) the degree of exceptionality required for a departure from the usual costs rule is proportionate to the magnitude of the departure; (2) an award of special costs to a successful public interest litigant constitutes a lesser departure than the others; (3) special costs, even for successful public interest litigants, must be the exception rather than the norm; and (4) access to justice considerations must be balanced against other important factors.
>
> [33] The Court of Appeal identified four factors relating to whether special costs are warranted in exceptional cases, at para. 188:
>
> > Having said that, the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:
> >
> > (a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
> >
> > (b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
> >
> > (c) As between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and
> >
> > (d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.

[211] In applying these principles Smith J. said:

> [69] Some of the issues the plaintiffs sought to raise had been resolved in *Rodriguez*. I concluded that the plaintiffs also raised issues that were not decided in that case. As well, evidence is now available that did not exist when *Rodriguez* was decided, including evidence regarding the experience in other jurisdictions where physician-assisted death is permissible. The plaintiffs satisfied this Court that *stare decisis* did not preclude a decision on the evidence and legal arguments that they advanced.
>
> [70] In my view, this case meets the first criterion in *Adams,* in that it concerns matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved.
>
> ...
>
> [78] Having considered the arguments on both sides, I conclude that this case meets the second criterion in *Adams*. None of the plaintiffs has or had a personal, proprietary or pecuniary interest in the outcome of the litigation that

> would justify the proceeding economically, especially given their means and the high cost of this kind of litigation.
>
> [79] The third and fourth criteria in *Adams* have less relevance in this case. The two Attorneys General did not dispute that they have superior capacity to bear the costs of the proceedings, though they point out that their resources are not unlimited. With respect to the fourth criterion, there was no suggestion that the plaintiffs conducted this litigation in an abusive, vexatious or frivolous manner.

[212] With respect to the over-arching issue, whether the public interest justifies the exceptional measure of a special costs award, Smith J. held:

> [86] Does the public interest justify an award of special costs in this case? I have concluded that it does, for these reasons.
>
> [87] First, the issues in this litigation are both complex and momentous. They affect life and death, and the quality of life of people who are ill and dying. The resolution of these issues – indeed, whatever the outcome on final appeal – will affect many people and will also have an impact on the development of fundamental principles of Canadian law.
>
> [88] Second, the *pro bono* lawyers who represented the plaintiffs did not stint in their efforts, but were conscious of the need for efficiency and were not profligate with the Court's time. Further, I am satisfied that the plaintiffs would not have been able to prosecute their claim without the assistance of *pro bono* counsel. While access to justice is not the only or even the predominant factor, it favours special costs in this case.
>
> [89] Third, I note that the required degree of exceptionality is somewhat less for special costs awards than for the more dramatic departures from the normal costs rule when a litigant who may or may not succeed is granted advance costs, or a litigant who was unsuccessful nevertheless receives costs: *Adams* at para. 190.
>
> [90] I conclude that this public interest litigation is exceptional and that the plaintiffs should receive special costs.

[213] On this appeal, the AGC says the learned trial judge erred by giving too much weight to encouraging counsel to take on cases like this one *pro bono*, and that in addition, she misapplied the principles set out in *Adams* governing special costs in *pro bono* litigation.

[214] In support of these submissions, the AGBC added that *Adams* emphasized the exceptional nature of a special costs award, even for a public interest litigant. Counsel says it is essentially a question of whether the public interest is of such a

nature as to justify the exceptional award. The AGBC says this case is little different from most major *Charter* litigation, which is:

> ... typically complex, impacts on development of fundamental principles of law, affects many people and requires less exceptionality as an award of special costs once a decision is handed down.

[215] Here, the AGBC says Smith J. set the bar too low and has made a costs award that amounts to an alternate legal aid program.

[216] As to the application of the *Adams* principles, I am unable to accept the AGC's submissions. In my view, Smith J. was correct to say that this case involved matters of public importance which had not previously been resolved. The AGC's argument is premised on the idea that everything at issue in this case had been decided in *Rodriguez*. As is evident from the reasons of Smith J., and from the conclusions I have reached on the merits of this appeal, that is simply not so. In particular, the "right to life" as a stand-alone right guaranteed by s. 7 of the *Charter*, was not decided in *Rodriguez*. To say, as the AGC does, that prior to trial in this case the law was very clear, and that there was nothing that required resolution, is untenable. As Smith J. observed at paras. 69 – 70 of her reasons, this case did require a consideration of unresolved issues.

[217] The case was of importance to the general public, affecting as it does the s. 7 *Charter* protection for "the right to life", and it was important to the respondents and others in similar circumstances. It is not suggested that their interests could have justified the proceedings on an economic basis. Public interest is also evidenced by the number of intervenors who participated in the appeal.

[218] As to Smith J.'s consideration of counsels' acting for the respondents on a *pro bono* basis, the AGC says that factor should not be used to justify an award of special costs. However, this Court has consistently held that a claimant's inability to proceed without *pro bono* assistance is a relevant factor: see *Adams*; *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 425; *Vancouver (City) v. Zhang*, 2011 BCCA 138; and *PHS Community Services,* 2008 BCSC 1453.

[219] In *Adams*, this Court endorsed access to justice as a relevant policy consideration in public interest litigation. The judge considered it along with the other relevant considerations.

[220] The power to award special costs is given to the Supreme Court of British Columbia by reason of its inherent jurisdiction, and as well by the *Supreme Court Civil Rules*. The discretion is to be exercised on a principled basis.

[221] In my respectful opinion, Smith J. considered all relevant principles and applied them in a balanced way in the exercise of her discretion. Neither the AGC nor the AGBC has identified any error of principle or law that would enable this Court to intervene.

[222] I would dismiss the appeal against the award of special costs.

[223] Turning to the AGBC's appeal against Smith J.'s allocation of the cost award against her, to the extent of 10%, the AGBC contends that Smith J. erred in making such an order against an Attorney General intervening in the public interest, pursuant to statute, in a case that was neither rare nor exceptional. The AGBC argues that the fact an intervening Attorney General leads evidence as to legislative facts, is not a sufficient justification for an award against her of any costs, let alone special costs.

[224] The AGBC says the identification of the rare case that will warrant costs against an intervening Attorney General must be done on a principled basis where exceptions to the rule of no costs are clearly stated; such as, where an intervenor engages in serious misconduct, materially prolongs a proceeding, or effectively assumes carriage of the litigation.

[225] The AGBC says that her actual participation in the summary trial was about one day out of the 21 trial days, so she cannot be said to have materially prolonged the proceeding. And she says that she did not effectively assume carriage of the proceedings because, out of the total of 56 experts' affidavits referred to by Smith J., only two affidavits were provided by the AGBC and that evidence addressed the

palliative care system in British Columbia. Overall the AGBC says that its participation in, and contribution to, the proceedings was so limited that there was no basis for an award of any costs against the AGBC.

[226] It has not been suggested by anyone that the AGBC engaged in any conduct that could be characterized as "serious misconduct". There is certainly nothing in Smith J.'s reasons that would support such a conclusion.

[227] The respondents support Smith J.'s allocation of a percentage of the special costs against the AGBC. Counsel referred to what Smith J. said in her reasons on this account:

> [15] Counsel for the AGBC advised the Court at a Case Planning Conference before the trial that the AGBC would take on the task of dealing with issues within the provincial sphere. The AGBC addressed matters such as developments in palliative medicine and hospice care, suicide prevention, medical ethical requirements in Canada and internationally, and B.C. criminal prosecution policies. In addition, the AGBC produced the full record that had been before the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*].
>
> [16] Counsel for the AGBC took a fairly active role in pre-trial proceedings and at trial led evidence, cross-examined the plaintiffs' witnesses on their affidavits, both in and out of court, and made written and oral submissions on most of the issues.

[228] Counsel also points out that in addition to the AGBC's role in the preparation and adducing of evidence, it submitted a 96-page written submission, participated fully in the extensive pre-trial management process, and participated fully in the procedural and factual aspects of the case.

[229] The respondents say that the AGBC and the AGC effectively shared the carriage of the case in response to the respondents' claims.

[230] As with the question of special costs, Smith J. carefully reviewed the law and principles applicable to an award of costs against an intervening Attorney General (see paras. 40 – 49).

[231] She said in addition:

> [95] In my view, the authorities do not disclose a firm rule that an Attorney General who becomes involved in constitutional litigation as of right will be immune from responsibility for costs in all but the rarest of circumstances. With the exception of *Adams*, the cases upon which the AGBC relies are dissimilar to this one. Neither *Daly, Evans Forest Products* nor *Faculty Assn.* involved an Attorney General intervening as of right. *Children's Aid Society* concerned an award of costs against an Attorney General in favour of parents who had unsuccessfully opposed blood transfusions for their infant child, on religious grounds. In at least one previous British Columbia case (*Polglase*), costs were awarded against an intervening Attorney General.
>
> [96] In principle, it seems to me that the responsibility for costs should depend upon the role that the Attorney General takes in the litigation. If the Attorney General assumes the role of a party, it may be liable for costs in the same manner as a party, in the discretion of the Court.
> ...
>
> [98] The level of involvement by the AGBC in this case was very different from that in *Adams* and I am not persuaded that the AGBC should be excused from responsibility for costs.
>
> [Emphasis in original.]

[232] In my respectful opinion, the AGBC has not identified any error of fact, law or principle that would enable this Court to vary this aspect of the costs order. It is not open to us to substitute our views on this issue, even if they differed from those of Smith J.

[233] In the result, I would dismiss the AGBC's appeal against the allocation of 10% of the special costs award against the AGBC.

[234] I would therefore dismiss both of the costs appeals.

## *X. Conclusion*

[235] I would allow the appeal against the s. 15 order, but dismiss the appeal against the s. 7 order. I would also dismiss the appeal seeking a new trial, and the appeal seeking a change in the order for costs.

The Honourable Chief Justice Finch

**Reasons for Judgment of the Honourable Madam Justice Newbury and the Honourable Madam Justice Saunders:**

***Introduction***

[236] This appeal revisits the same section of the *Criminal Code* considered and found to be compliant with the *Canadian Charter of Rights and Freedoms* 20 years ago in *Rodriguez v. British Columbia*. The Chief Justice would dismiss the appeal on a new analysis of s. 7, affirming the view taken by the trial judge that it is open to us to decline to follow *Rodriguez*. We do not agree with that conclusion, and would allow the appeal.

[237] The central provision at issue is s. 241(b) of the *Criminal Code*:

> 241. Every one who
> …
> (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.

[238] The order appealed from declared s. 241 unconstitutional in the context of fully-informed, competent adult persons with diminishing or diminished physical abilities, and a high degree of suffering that cannot be remedied. It also declared s. 14 (consent to death), s. 21 (parties to offences), s. 22 (person counselling offence), s. 222 (homicide) and s. 241(a) (counselling suicide) of the *Code* unconstitutional in the same context. However, all before us agree that s. 241(b) is the main focus of the issues presented.

[239] The question of physician-assisted suicide comes to us on difficult, and sympathetic, plaintiffs' facts, as did *Rodriguez*. Like Ms. Rodriguez, the individual plaintiffs, for themselves or a loved one, ask the Court to strike s. 241 so that they or people in like positions may be within the law in pursuing, if they choose, physician-assisted death as an alternative to the difficult passage projected by their doctors. They are joined in this quest by the British Columbia Civil Liberties Association.

[240] As sympathetic and honest as the position of the plaintiffs is, their aspirations are not without strong opposition from others who say there will be unacceptable risk

to vulnerable members of the community in the event the plaintiffs succeed. Those concerns are the basis of Canada's appeal. Both sides of the issue, as recounted by the Chief Justice, have attracted support, including from organizations representing disabled persons and from religious or faith-based entities.

[241] Notwithstanding the staunch submissions of the respondents, and those speaking in their support, for a fresh consideration of the issues unencumbered by *Rodriguez*, in our view *Rodriguez* must determine this appeal. On the jurisprudence as it now stands, only Parliament may relieve against s. 241.

[242] In these reasons we explain why we consider that *Rodriguez* answers the questions posed by the plaintiffs. We will then make some comments on remedy, which would be relevant if it were open to us to do other than dismiss the appeal. We will then address the costs issues, including those raised by British Columbia's separate appeal.

***Legal Analysis***

[243] In 1993, in *Rodriguez*, Mr. Justice Sopinka warned that the principles of fundamental justice "leave a great deal of scope for personal judgment" and that courts must be careful that such principles do not become ones that are of fundamental justice "in the eye of the beholder *only*". (At 590.) This remains an instructive observation 20 years later, in the context of a society that demands and has enjoyed a greater degree of individual autonomy than ever before. Yet the societal consequences of permitting physician-assisted suicide in Canada – and indeed enshrining it as a constitutional right – are a matter of serious concern to many Canadians, and as is shown by the evidence reviewed by the trial judge in this case, no consensus on the subject is apparent, even among ethicists or medical practitioners.

[244] For courts of law, the issue raises other considerations. First, it demonstrates like no other the principle that there is no "political questions" doctrine in Canada. No law is immune from *Charter* scrutiny, and it is not open to a court to say in response

to a case like this, “Leave the issue to Parliament.” (See *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441 at 472 and P.W. Hogg, *Constitutional Law of Canada* (5th ed., looseleaf, at §36.6.) If there were such a doctrine in Canada, we would certainly be minded to leave the value-laden question of physician-assisted suicide to be decided by our elected representatives after an informed public debate.

[245] As it is, Parliament has spoken on the topic, in the form of s. 241(b) of the *Criminal Code* (which was left in place in 1972 when the offence of attempted suicide *per se* was repealed), and the Supreme Court of Canada has spoken in *Rodriguez*. Normally, a lower court would be required to dismiss the plaintiffs’ action on the basis of *stare decisis.* The trial judge concluded, however, that both the law and the adjudicative facts relating to assisted suicide had changed to the point that she was no longer bound by the Supreme Court’s ruling.

[246] This appeal therefore requires us to make highly qualitative judgements concerning the point at which the constant refinement and evolution of *Charter* law in Canada may effect substantive changes such that a decision like *Rodriguez* must be regarded as no longer authoritative. Indeed the central question in this appeal is whether it is fatal to *Rodriguez* – and presumably to several other cases decided prior to 2003 − that the Supreme Court did not deal with what are now regarded as three aspects of fundamental justice under s. 7 of the *Charter* in the structured manner it now prefers. As will be seen below, it is our view that although the law with respect to the *Charter* has certainly evolved since 1993, no change sufficient to undermine *Rodriguez* as a binding authority has occurred, and that the trial judge erred in deciding to the contrary.

***The Adjudicative Facts***

[247] As Chief Justice Finch has observed, there was before the court below much more opinion and other expert evidence about physician-assisted suicide than was before the Court in *Rodriguez*. Madam Justice Smith carried out a lengthy and thorough exploration of this material in addressing: (i) prevailing ethicists’ opinions

"for and against the proposition that it can ever be right for a physician to assist a patient with her own death" (para. 183 *et seq*.); (ii) whether anything "short of a blanket prohibition against assisted dying is sufficient to protect vulnerable individuals from what [Canada] terms 'wrongful death'" − a question involving the consideration of other jurisdictions in which physician-assisted suicide is permitted (para. 359 *et seq*.); and (iii) the feasibility of implementing adequate and effective safeguards in Canada (para. 747 *et seq.*).

[248] We will not attempt even to summarize this evidence. As we have already suggested, it did not demonstrate a clear consensus of public or learned opinion on the wisdom of permitting physician-assisted suicide. One of the professional bodies canvassed by the trial judge, for example, was the Canadian Medical Association, which prepared a policy document in 2007 entitled *Euthanasia and Assisted Suicide.* Among other things, it stated:

> Euthanasia and assisted suicide are opposed by almost every national medical association and prohibited by the law codes of almost all countries. A change in the legal status of these practices in Canada would represent a major shift in social policy and behaviour. For the medical profession to support such a change and subsequently participate in these practices, a fundamental reconsideration of traditional medical ethics would be required.

The policy recommended that a Canadian study of medical decision-making during dying should be undertaken to determine the "possible need for change and identify what those changes should be." Further, it was said:

> The public should be given adequate opportunity to comment on any proposed change in legislation. The law should be determined by the wishes of society, as expressed through Parliament, rather than by court decisions.
> …
> If euthanasia or assisted suicide or both are permitted for competent, suffering, terminally ill patients, there may be legal challenges, based on the *Canadian Charter of Rights and Freedoms*, to extend these practices to others who are not competent, suffering or terminally ill. Such extension is the "slippery slope" that many fear. Courts may be asked to hear cases involving euthanasia for incompetent patients on the basis of advance directives or requests from proxy decision makers. Such cases could involve neurologically impaired patients or newborns with severe congenital abnormalities. … Psychiatrists recognize the possibility that a rational, otherwise well person may request suicide. Such a person could petition the

> courts for physician-assisted suicide. [Quoted at para. 274 of the trial judge's reasons.]

[249] In addition to the CMA, the World Medical Association, and the Medical Associations of Australia, the U.S.A., the U.K. and New Zealand were all opposed to physician-assisted death. (Para. 275.) The trial judge pointed out that these official bodies do not necessarily represent the views of all their members. She also noted contrary or neutral positions taken by the American Academy of Hospice and Palliative Medicine, the Swiss Academy of Medical Sciences, and the American Medical Women's Association. (Para. 276.) The Canadian Hospice Palliative Care Association, she observed, takes a neutral stand on the subject. (Para. 277.)

[250] Referring to the views of "public committees", Smith J. noted that a Special Committee of the Senate, which published a report in June 1995, was unable to achieve unanimity with respect to assisted suicide and euthanasia. A majority of members recommended no amendment to s. 241(b), while a minority recommended that an exemption be added to permit persons to assist in suicide under clearly defined conditions. (Para. 290.) Following its receipt of this report, the Senate shifted its focus to palliative care. A more recent study undertaken by an expert panel of the Royal Society of Canada and published in 2011 recommended changes to the *Criminal Code* to allow assisted suicide and voluntary euthanasia under carefully monitored conditions. (Para. 295.)

[251] At the end of her review of this and other evidence, the trial judge could find no "clear societal consensus either way" on the issue before the Court. In her words:

> In summary, there appears to be relatively strong societal consensus about the following: (1) human life is of extremely high value, and society should never, or only in very exceptional circumstances, permit the intentional taking of human life; and (2) current end-of-life practices, including administering palliative sedation to relieve physical suffering and acting on patients' or substituted decision-makers' directions regarding withholding or withdrawal of life-sustaining treatment, are ethically acceptable.
>
> As to physician-assisted death, weighing all of the evidence, I do not find that there is a clear societal consensus either way, in an individual case involving a competent, informed, voluntary adult patient who is grievously ill and

> suffering symptoms that cannot be alleviated. However, there is a strong consensus that if physician-assisted dying were ever to be ethical, it would be only be with respect to those patients, where clearly consistent with the patient's wishes and best interests, and in order to relieve suffering. [At paras. 357-58; emphasis added.]

[252] This comment is similar to that made by Sopinka J. for the majority of the Court in *Rodriguez* at 607-08:

> The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people. From the review that I have conducted above, I am unable to discern anything approaching unanimity with respect to the issue before us. Regardless of one's personal views as to whether the distinctions drawn between withdrawal of treatment and palliative care, on the one hand, and assisted suicide on the other are practically compelling, the fact remains that these distinctions are maintained and can be persuasively defended. To the extent that there is a consensus, it is that human life must be respected and we must be careful not to undermine the institutions that protect it. [Emphasis added.]

At 608, Sopinka J. also placed "some significance" on the fact that various medical associations opposed decriminalizing assisted suicide.

[253] The majority in *Rodriguez* did note that some European countries had "mitigated prohibitions" on assisted suicide in a way that would allow it to be administered legally in circumstances such as those of Ms. Rodriguez. In the U.S., Sopinka J. noted, attempts in Washington and California to legalize assisted suicide had been voted down. In summary, he stated:

> Overall, then, it appears that a blanket prohibition on assisted suicide similar to that in s. 241 is the norm among Western democracies, and such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights. Recent attempts to alter the status quo in our neighbour to the south have been defeated by the electorate, suggesting that despite a recognition that a blanket prohibition causes suffering in certain cases, the societal concern with preserving life and protecting the vulnerable rendered the blanket prohibition preferable to a law which might not adequately prevent abuse. [At 605.]

[254] Although criminal sanctions against assisting in suicide remain the "norm" in western democracies, the trial judge in the case at bar had much more to work with

in terms of evidence from "permissive" jurisdictions, given that physician-assisted suicide in some form has been legalized in the Netherlands, Belgium, Switzerland, Luxembourg, Colombia, Oregon, Washington, and Montana. (In all but two of these jurisdictions, the permissive laws were enacted by legislation, as opposed to being imposed by courts of law.) She addressed three questions in connection with this evidence.

[255] The first concerned "What level of compliance have the permissive jurisdictions achieved with respect to their safeguards?" Smith J. observed:

> … Although the record is extensive, it is not exhaustive. The data do not permit firm conclusions about certain matters, as is apparent in the evidence of one of the plaintiffs' witnesses, Professor Lewis. Further, independent analysis of the data beyond that which the expert witnesses have undertaken is not possible. [At para. 647.]

Having said that, she was able to find that in Oregon, the "process is working fairly well but could be improved, including with respect to oversight"; that in the Netherlands, compliance with legal safeguards is "continually improving, but … is not yet at an ideal level"; that in Belgium the reporting of cases of euthanasia is low (approximately 53% of presumed cases of euthanasia had been reported in 2007); that high rates of "life-ending acts without explicit request" ("LAWER") still exist in Belgium, although one expert had opined that the number of LAWER cases had declined since assisted death had been legalized; and that in both the Netherlands and Belgium, the "law reforms … have made considerable progress in achieving their goals." (Para. 660.)

[256] The second question addressed by the trial judge was whether the safeguards enacted in each permissive jurisdiction effectively prevent abuse of vulnerable individuals. The judge preferred the evidence of Professor Battin over the evidence of other experts tendered by Canada. In Smith J.'s analysis:

> I accept that the conclusions stated in the Battin et al. study are soundly based on the data. I find that the empirical evidence gathered in the two jurisdictions does not support the hypothesis that physician-assisted death has imposed a particular risk to socially vulnerable populations. The evidence does support Dr. van Delden's position that it is possible for a state to design

> a system that both permits some individuals to access physician-assisted death and socially protects vulnerable individuals and groups.
>
> No conclusion can be drawn from that study with respect to situational vulnerability. However, there is some evidence bearing on that question.
>
> First, depression is a factor that may enter into decision-making about assisted death. Although many patients are screened out because of depression, Dr. Ganzini acknowledges that it is virtually impossible to guarantee that a person whose decisional capacity is affected by depression will not slip through the safeguards designed to reduce that risk.
>
> It seems unlikely that persons suffering from Major Depressive Disorder or depression causing impaired judgment would both have the persistence and will-power to work their way through the approval process for assisted death, and escape detection by the reviewing physicians. However, the evidence (from the Ganzini Depression Study) suggests that up to three persons in Oregon may have done so.
>
> Second, patients may have received assistance in death after experiencing subtle or overt pressure, facing unconscious suggestions by caregivers that their circumstances are hopeless, or sensing that they are a burden on their families. It is impossible to know from statistical evidence whether this has occurred, or how often. However, the evidence from both Oregon and the Netherlands about actual decision-making practices does not support the conclusion that pressure or coercion is at all wide-spread or readily escapes detection. Dr. Ganzini, for example, who studied the decision-making process, said that the involvement of family members was usually to try to dissuade rather than persuade patients from seeking assisted death. That most patients in Oregon are in hospice care and that the decision-making process in the Netherlands involves extensive deliberation with a long-term family physician suggest that it is unlikely that many patients successfully obtain a physician-assisted death because of outside pressure to do so. The incidents referred to by Dr. Hendin and others cannot be disregarded, but, on my reading of the evidence, are highly isolated.
>
> With respect to Belgium, it is difficult to reach any firm conclusion. In cross-examination, Professor Deliens acknowledged that patients who do not have a psychiatric disorder but who have some level of depression might be vulnerable to being euthanized. He also acknowledged that patients with cognitive impairments such as dementia might be vulnerable. However, I note Professor Deliens's evidence that the *Chambaere et al. Population Study* does not show elderly patients or patients dying of diseases of the nervous system (including dementia) to be proportionately at greater risk of LAWER than other patient groups. [At paras. 667-72.]

[257] Finally, with respect to what could be inferred by the Court regarding the likely effectiveness of comparable safeguards in Canada, Smith J. acknowledged that one should be cautious about drawing inferences for Canada, given certain differences between this country and the "permissive" states. For one thing, palliative care

practices and the practice of medicine generally differ among the various jurisdictions. In British Columbia, she said, end-of-life care is provided in a broader range of settings than in Oregon. In the Netherlands and Belgium, patients are much more likely to have long-term relationships with their family physicians; and unlike medical practitioners in the Netherlands and Belgium, Canadian practitioners are generally "compliant with the absolute legal prohibition of assisted death, suggesting that the physicians would also be compliant with any regulatory regime concerning the practice." (Para. 680.) Overall, the trial judge reached the following conclusions:

> First, cultural and historical differences between the Netherlands and Belgium, on the one hand, and Canada on the other, mean that possible concerns about the level of compliance with legislation in those countries do not necessarily transpose into concerns about Canada. The experience of compliance in Oregon is more likely to be predictive of what would happen in Canada if a permissive regime were put in place, although even there only a weak inference can be drawn.
>
> Second, the expert opinion evidence from persons who have done research into the question is that, with respect to all three jurisdictions, the predicted abuse and disproportionate impact on vulnerable populations has not materialized. Again, inferences for Canada can only be drawn with caution.
>
> Third, although none of the systems has achieved perfection, empirical researchers and practitioners who have experience in those systems are of the view that they work well in protecting patients from abuse while allowing competent patients to choose the timing of their deaths. [At paras. 683-85.]

[258] Smith J. also rejected the argument that the legalization of physician-assisted dying would impede the future development of palliative care in British Columbia: see paras. 686-736. A recent report of a Senate subcommittee entitled *Raising the Bar: A Roadmap for the Future of Palliative Care in Canada* (2010) had described the current situation, which the judge summarized as follows:

> *Raising the Bar* states that only 10% of people die suddenly; the remaining 90% potentially benefit from palliative care. In 1995, only 5% of Canadians had access to quality palliative care. In 2008, a best estimate suggested that between 16-30% of Canadians had some level of access, depending on their location. According to the report, it follows that upwards of 70% of Canadians lack access to even minimal forms of palliative care. The report cautions that the health care system will be further stretched and access to palliative care will be at risk of erosion given the increase in the number of deaths expected over the next generation, together with the prevalence of chronic disease (a

> result of our ability to manage these conditions longer and more effectively than ever before). [At para. 705.]

[259] In her analysis, however, the evidence established that "the effects [of permitting physician-assisted death] would not necessarily be negative" and predictions as to how palliative care would be effected in Canada would only be "speculative". (Para. 736.) She rejected the suggestion that if the law permitted physician-assisted suicide, patients' relationships with their doctors would necessarily be adversely affected. In summary, she said, "it is likely that the relationship would change, but the net effect could prove to be neutral or for the good." (Para. 746.)

[260] Finally, in her discussion of adjudicative facts, the trial judge turned to Canada's argument that unless physician-assisted suicide is absolutely prohibited, there is an unacceptable risk of "wrongful deaths". (Para. 748.) Again, the parties adduced extensive expert evidence. The judge's general conclusions were that:

i) It is feasible for properly-qualified and experienced physicians to assess patient competence reliably, including in the context of life-and-death decisions, so long as they apply the very high level of scrutiny appropriate to the decision and proceed with great care (para. 798);

ii) Coercion and undue influence on patients can be detected "as part of a capacity assessment". Clinicians carrying out such assessments "would have to be aware of the risks of coercion and undue influence, of the possibility of subtle influence, and of the risks of unconscious biases regarding the quality of the lives of persons with disabilities or persons of advanced age" (para. 815);

iii) It would be feasible to require informed consent for physician-assisted death. In this context, care would have to be taken to "ensure a patient is properly informed of her diagnosis and

> prognosis, given the seriousness of the decision. As well, the range of treatment options described would have to encompass all reasonable palliative care interventions, including those aimed at loss of personal dignity" (para. 831); and
>
> iv) It is feasible to "screen out" patients who are ambivalent about physician-assisted death by "assessing capacity and requiring some time to pass between the decision and its implementation" (para. 843).

Smith J. also disagreed with the proposition that the risks posed to persons with disabilities "are such that they cannot be avoided through practices of careful and well-informed capacity assessments by qualified physicians who are alert to those risks." (Para. 853)

[261] In conclusion of this discussion and the preceding sections of her reasons, the judge stated that "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." (Para. 883; our emphasis.)

[262] Despite the striking difference between the type and volume of evidence adduced in this case as compared with that adduced in *Rodriguez,* Smith J. recognized at para. 998 of her reasons that the existence of "a different set of legislative and social facts" "may not" on its own warrant a fresh inquiry under s. 1 of the *Charter*. She found, however, that a change in the "legal principles to be applied" had also occurred, warranting a finding that she was no longer bound by *Rodriguez.*

***Stare Decisis***

[263] This brings us to the doctrine of *stare decisis,* or in the phrase of the Ontario Court of Appeal in *Bedford*, the notion of "binding precedent". Historically, the

Supreme Court of Canada adopted a strict view of this rule. In *Woods Mfg. Co. Ltd. v. The King* [1951] S.C.R. 504, for example, Chief Justice Rinfret observed:

> … It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. [At 515.]

The Court in *Bedford* described the rule and its rationale in the following terms:

> … The notion of binding precedent, often used interchangeably with the principle of *stare decisis*, requires that courts render decisions that are consistent with the previous decisions of higher courts. The rationale for the rule is self-evident: it promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law: *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co*. (2005), 76 O.R. (3d) 161 (C.A.), at paras. 119-120. [At para. 56.]

[264] But the rule has generally been given a narrow scope, applying only to the *ratio decidendi* of a prior decision or one of a higher court. As noted in *Halsbury's Laws of Canada, Civil Procedure I* (1st ed., 2008), quoted in *Bedford* at para. 57:

> To employ the traditional terminology: only the *ratio decidendi* of the prior court decision is binding on a subsequent court. The term *ratio decidendi* describes the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision. All other comments contained within the reasons of the prior court are termed *obiter dicta*, and in essence such incidental remarks are treated as asides. They may have persuasive value, but they are not binding. [At 282.]

[265] In *R. v. Henry* (2005), one of the issues before the Supreme Court was the extent to which a lower court was bound by what were strictly *obiter dicta* of a higher court. The Court distanced itself from the so-called "*Sellars* principle" (see *Sellars v. The Queen* [1980] 1 S.C.R. 527 at 529), which was seen by some as meaning that "whatever was said" in a majority judgment of the Supreme Court of Canada was binding, no matter how incidental to the point decided. This "broadened"

approach had been criticized as depriving the legal system of "creative thought" and likely to stultify the growth of the common law. The question in each instance, Binnie J. stated for the Court in *Henry*, is: "what did the case decide?" He continued:

> … Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience. [At para. 57.]

The Court of Appeal in *Bedford* inferred from the foregoing that there is now a "spectrum of authoritativeness" and that the traditional division between *ratio* and *obiter* is now more nuanced. (Para. 58.)

[266] In *Bedford* itself, the plaintiffs had sought a declaration that certain offences in the *Criminal Code* relating to prostitution were unconstitutional. The plaintiffs relied on their rights to life, liberty and security of the person under s. 7 and freedom of expression under s. 2(b) of the *Charter*. Not surprisingly, Canada argued that the Supreme Court's previous decision in the *Prostitution Reference* (1990), together with the principle of *stare decisis,* precluded the lower court from considering these issues anew. The motions judge in the lower court held, however, that the *Prostitution Reference* should be revisited in light of the "breadth of evidence that has been gathered over the course of the intervening twenty years" and in light of the possibility that "the social, political and economic assumptions underlying the *Prostitution Reference* are no longer valid today." Thus she considered herself free to reconsider whether the impugned provisions violated s. 7 or whether the violation of s. 2(b) continued to be justified under s. 1 of the *Charter.* (See 2010 ONSC 4264, at para. 83.)

[267] The Court of Appeal upheld the motions judge's decision in part. On the one hand, it ruled that she had been correct with respect to s. 7 and the principles of fundamental justice. In the words of the majority opinion of Doherty, Rosenberg and Feldman JJ.A.:

> In this case, the parties agree that the respondents' s. 7 liberty interest is engaged by the challenged provisions. However, the respondents also argue that the provisions engage their s. 7 security of the person interest. This independent interest was not considered by the majority in the *Prostitution Reference*.
>
> In addition, the number of recognized "principles of fundamental justice" referenced in the second half of s. 7 has expanded over the last 20 years. Whereas in 1990 the Supreme Court considered only vagueness and the perceived inconsistency in Parliament's response to prostitution, in this case the application judge was asked to evaluate the infringements against the principles of arbitrariness, overbreadth, and gross disproportionality.
>
> The principles of fundamental justice at issue in this case were not considered in 1990 because they had not yet been fully articulated. Arbitrariness and overbreadth were only identified as principles of fundamental justice in 1993 and 1994, respectively: *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519; *R. v. Heywood*, [1994] 3 S.C.R. 761. Gross disproportionality emerged as a principle of fundamental justice a decade later: *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571.
>
> …
>
> It cannot be said that the *Prostitution Reference* decided the substantive s. 7 issues before the application judge in this case. Therefore, *stare decisis* did not apply, and the application judge did not err by conducting her own analysis and coming to her own conclusions. [At paras. 66-8, 70; emphasis added.]

[268] On the other hand, the Court of Appeal disagreed that the motions judge had been free to disregard the judgment in the *Prostitution Reference* with respect to s. 2(b) of the *Charter*. The majority found she had erred in equating *her* position with the position of a court that is asked to consider one of *its own* prior decisions. In the words of the majority:

> … Reasons that justify a court departing from its own prior decision have no application to, and cannot justify, a lower court's purported exercise of a power to reconsider binding authority from a higher court.
>
> Third, the application judge erred by holding that the binding authority of the *Prostitution Reference* could be displaced by recasting the nature of the expression at issue as promoting safety, and not merely commercial

> expression. This change in perspective has not altered the *ratio decidendi* of that case, which was that the communicating provision is a reasonable limit on freedom of expression. In coming to this conclusion, the majority applied the *Oakes* test based on the best information available to them at the time. There may be good reasons for the Supreme Court to depart from this holding for all the reasons discussed in *Polowin Real Estate*, but that is a matter for the Supreme Court to decide for itself.
>
> In our view, the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.
>
> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. It would be particularly problematic in the criminal law, where citizens and law enforcement have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court. Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced. [At paras. 81-4; emphasis added.]

[269] Smith J. relied heavily on the Court of Appeal's decision in *Bedford*, with which she expressed agreement. (Para. 911.) In response to the question "What did *Rodriguez* decide?", she concluded that:

i) it did not address the question of whether s. 241(b) of the *Criminal Code* engaged the "right to life" under s. 7;

ii) it did not address whether the deprivation of security of the person or liberty was contrary to the principles of fundamental justice regarding overbreadth or gross disproportionality;

iii) it did not address whether, or if so, how, s. 241(b) of the *Code* infringes s. 15 of the *Charter*; and

iv) it "addressed only very summarily the final step in the s. 1 analysis, balancing salutary and deleterious effects of the legislation" (para. 936).

In addition, she found that in *Hutterian Brethren,* the Supreme Court of Canada had "put life into the final balancing step in the analysis of proffered justifications for infringements of *Charter* rights" under s. 1, such that *Hutterian Brethren* marked a substantive change in the law. In her view, this made *Rodriguez* distinguishable. (Paras. 994-95.)

[270] With respect to the latter point regarding the effect of *Hutterian Brethren,* we agree with the reasoning and conclusion of Chief Justice Finch that it did not represent a change in the law but served as an application of the fourth *Oakes* factor under s. 1 − the "balancing" of salutary and deleterious effects under s. 1. This "effects" principle has been a part of the s. 1 analysis since *Oakes* and we read the reasons of Chief Justice Dickson (with Lamer J., as he then was, concurring) in *Morgentaler* (1988), at 75-6, as containing this type of analysis, albeit it in brief terms. In any event, *Hutterian Brethren* did not in our view represent a change to the law under s. 1.

[271] We turn, then, to each of the foregoing points that were said not to have been decided by the Supreme Court in *Rodriguez*. In doing so, we respectfully adopt the observation of the Ontario Court of Appeal in *Bedford*, that a "robust" approach to *stare decisis* should be taken in *Charter* cases. As we hope to demonstrate below, the law in this context is constantly evolving and refining itself to adapt to the "creative thought" of litigants and their counsel. Analytical paradigms, formulae and multi-branch tests are adopted in earlier cases only to be modified, re-organized, de-emphasized or found not to be helpful in later cases. Given this, it is important not to lose sight of *what* was actually decided, as opposed to *how* it was decided, in a given case.

***Right to "Life" under Section 7***

[272] Several years before *Rodriguez* was decided, Wilson J. stated that each of "life, liberty and security of the person" in s. 7 is an interest that must be given independent analytical significance: see *Singh v. Minister of Employment and*

*Immigration* (1985) at 204-05. This statement was adopted by a majority of the Court, *per* Lamer J., in the *Motor Vehicle Reference* (1985):

> … "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only deprivation of liberty was considered in these proceedings and that no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this Court, to determining the scope of the words "principles of fundamental justice", I will not attempt to give any further content to liberty nor address that of the words life or security of the person. [At 500-01.]

(See also *Morgentaler* at 52.)

[273] Nevertheless, unlike liberty and security of the person, "life" has not been broadly construed and indeed has been invoked by the Supreme Court of Canada in only a few cases. Professor Hogg states in his text that in respect of "life", s. 7 has "little work to do, because governmental action rarely causes death." (*Supra*, §47.6.) He suggests that the most obvious case for the application of this *Charter* right would have been the death penalty, but this was removed from the *Criminal Code* in 1976, years before the *Charter* was adopted.

[274] The majority in *Rodriguez* accepted that life, liberty and security of the person all play independent roles under s. 7. Sopinka J. noted:

> None of these values prevail a *priori* over the others. All must be taken into account in determining the content of the principles of fundamental justice and there is no basis for imposing a greater burden on the propounder of one value as against that imposed on another. [At 584.]

[275] Sopinka J. saw the life "value", however, as one that was a counterweight to liberty and security of the person in this context. In his words, "… a consideration of these interests cannot be divorced from the sanctity of life, which is one of the three *Charter* values protected by s. 7." We read his judgment as based on the concept of "life" as a value that by definition is the opposite of death. At 585, for example, Sopinka J. noted that "sanctity of life" has been understood historically as "excluding freedom of choice in the self-infliction of death". Even when death appears imminent, he noted, seeking to control the manner and timing of one's death "constitutes a conscious choice of death over life. It follows that life as a value is engaged even in the case of the terminally ill who seek to choose death over life." With respect to the argument that the terminally ill are "particularly vulnerable as to their life", he stated:

> I do not draw from this that in such circumstances life as a value must prevail over security of person or liberty as these have been understood under the *Charter*, but that it is one of the values engaged in the present case. [At 586; emphasis added.]

[276] Sopinka J. was persuaded that Ms. Rodriguez's security interest ("considered in the context of the life and liberty interest") was engaged. (At 589.) Building on *Morgentaler*, he saw personal autonomy, "at least with respect to the right to make choices concerning one's own body, control over physical and psychological integrity, and basic human dignity" as encompassed within "security of the person" in s. 7. (At 588.)

[277] Since *Rodriguez*, courts have continued to regard the making of personal decisions regarding one's body as falling under the "security of the person" rubric and to a lesser extent, under "liberty" in s. 7. In *R. v. Clay* 2003 SCC 75, the sister case to *Malmo-Levine*, the majority cited *Godbout v. Longueuil (City)* [1997] 3 S.C.R. 844, *Morgentaler* (1988) and *B. (R). v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, concluding that:

> What stands out from these references, we think, is that the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in "matters that can properly be characterized as fundamentally or inherently personal" (*Godbout*, at para. 66). [At para. 31.]

(See also *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44.)

[278] The right to life was invoked more recently in *Chaoulli v. Quebec (Attorney General)* (2005), in the reasons of Chief Justice McLachlin and Major J., who found that a prohibition in a Quebec statute against private medical insurance impermissibly limited the "right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice." (At para. 104.) McLachlin C.J.C. and Major J. emphasized evidence to the effect that delays in the public health system in Quebec significantly increased the risk of death in many cases: see paras. 112-17. As they stated, "Where lack of timely health care can result in death, s. 7 protection of life itself is engaged." (At para. 123.)

[279] It seems to us, then, that considerations involving personal autonomy, decision-making and dignity − the very values asserted by both Ms. Rodriguez and the plaintiffs in the case at bar − have consistently been regarded as engaging security of the person and to a lesser extent, liberty. Life, on the other hand, has been regarded in the existential sense with, in Sopinka J.'s phrase, "deep intrinsic value of its own"; and indeed the majority in *Rodriguez* referred to the "sanctity of life" in a non-religious sense. (At 585.) This value is reflected not only in the rejection of capital punishment in this country, but in the laws of every country that regards murder as one of the most serious crimes.

[280] In our view, this differentiation between "life" as an existential value and the values of individual autonomy and liberty, including the ability to enjoy the kinds of experiences described by Chief Justice Finch at para. 86 of his reasons, is as it should be. Those who have only limited ability to enjoy those blessings are no less "alive", and have no less a right to "life", than persons who are able-bodied and fully competent. If "life" were regarded as incorporating various qualities which some persons enjoy and others do not, the protection of the *Charter* would be expanded far beyond what the law can 'guarantee', while conversely, a slippery slope would open up for those who are unable to enjoy the blessings described by the Chief Justice. In this regard, the observations of McKenzie J. in the 1983 case of *British*

*Columbia (Superintendent of Family and Child Services) v. Dawson*, [1983] 145 D.L.R. (3d) 610 (B.C.S.C.), although made in a different context, are apt:

> … It is not appropriate for an external decision maker to apply his standards of what constitutes a livable life and exercise the right to impose death if that standard is not met in his estimation. The decision can only be made in the context of the disabled person viewing the worthwhileness or otherwise of his life in its own context as a disabled person – and in that context he would not compare his life with that of a person enjoying normal advantages. He would know nothing of a normal person's life having never experienced it. [At 620-21.]

[281] In the result, 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. Instead, Sopinka J. noted the societal consensus that "human life must be respected and we must be careful not to undermine the institutions that protect it." (At 608.) We therefore disagree that "life" in s. 7 was set to one side, or that, as Chief Justice Finch suggests, "life" includes the freedom to make the kinds of decisions or experience the pleasures he describes. To the contrary, we find it inherent in the majority's reasons in *Rodriguez* that "life" in the context of s. 7 has a narrow compass and does not include a right to die in the manner and at the time of one's choosing. As stated by Sopinka J., "seeking to control the manner and timing of one's death constitutes a conscious choice of death over life. It follows that life … is engaged even in the case of the terminally ill who seek to choose death over life." (At 586.)

[282] Even if we were wrong in this conclusion, and Sopinka J. did not consider the right to "life" under s. 7, it is still correct to say that the majority found in *Rodriguez* that the prohibition on assisted dying accorded with the principles of fundamental justice. Thus, regardless of whether s. 241(b) was analyzed under life, liberty or security of the person, *Rodriguez* decided that the law met the tests of arbitrariness (as the trial judge held at para. 1331 of her reasons) and what are now referred to as overbreadth and proportionality. We turn now to those principles.

***Principles of Fundamental Justice***

[283] There is no doubt that both the sources and content of what are regarded as the principles of fundamental justice for purposes of s. 7 have evolved over the last three decades. The first pronouncements of the Supreme Court of Canada focussed on whether "fundamental justice" extended only to procedural fairness or natural justice. The *Motor Vehicle Reference* (1985) confirmed that it was not so limited, holding that absolute liability in criminal law offended fundamental justice. (At 514-15.) On a more theoretical level, the Court also made it clear that the principles of fundamental justice are not concerned with public policy but with the "basic tenets of our legal system" that lie "in the inherent domain of the judiciary as guardian of the justice system." (At 503.)

[284] As noted by Prof. H. Stewart in *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012) at 106-07, Sopinka J. in *Rodriguez* summarized the appropriate approach to determining the principles of fundamental justice. He stated:

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. in *Re B.C. Motor Vehicle Act* … at pp. 512-13, are as follows:
>
> > Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
> >
> > ... the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots"...
> >
> > Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of

> that principle within the judicial process and in our legal system, as it evolves. [At 590-91 of *Rodriguez*.]

[285] Sopinka J.'s remarks were substantially echoed by McLachlin C.J.C. for the majority in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* 2004 SCC 4, where she stated that a principle of fundamental justice under s. 7 must fulfill three criteria:

> First, it must be a legal principle … Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice" … The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. [At para. 8.]

[286] For some years, the proper "balance" of the interests of the state with those of the individual was regarded as a principle of fundamental justice: see *Rodriguez*, where at 592-94, Sopinka J. adverted to the reasoning of McLachlin J. (as she then was) in *Cunningham v. Canada* [1993] 2 S.C.R. 143:

> I cannot subscribe to the opinion expressed by my colleague, McLachlin J., that the state interest is an inappropriate consideration in recognizing the principles of fundamental justice in this case. This Court has affirmed that in arriving at these principles, a balancing of the interest of the state and the individual is required …
>
> …
>
> This concept of balancing was confirmed in a very recent judgment of this Court. In *Cunningham v. Canada* … McLachlin J. concluded that the appellant had been deprived of a liberty interest protected by s. 7. She then considered whether that deprivation was in accordance with the principles of fundamental justice (at pp. 151-52):
>
> > *The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally …*
>
> McLachlin J. held that the appropriate balance had been struck "by qualifying the prisoner's expectation regarding the form in which the sentence would be served" (p. 152). [Emphasis by underlining added.]

This "balancing" approach has more commonly been adopted in deportation and extradition cases: see *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1; *United States v. Burns* 2001 SCC 7.

[287] In recent years, however, the Supreme Court has retreated from the notion that a general balancing of individual and societal interests is appropriately carried out under s. 7. In *Malmo-Levine* (2003), the majority wrote that:

> We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown *within s. 7* "to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions" (Caine's factum, at para. 24).
> …
> The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez, supra*, "*in arriving at these principles* [*of fundamental justice*], a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:
>
> > It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.
>
> [At paras. 96, 98; emphasis by underlining added.]

(Professor Stewart suggests that despite these comments, the notion of "striking a fair balance" does continue to function as a principle of fundamental justice in the context of cases where the constitutional challenge is to a decision of a state official

rather than to a statutory provision: see 113-14. This would account for its continued application in the extradition cases mentioned earlier.)

[288] The majority in *Malmo-Levine* sought again to rationalize the principles of fundamental justice, and in doing so, referred to the majority's discussion in *Rodriguez,* which had built on Lamer J.'s comments in the *Motor Vehicle Reference* (1985). (See para. 280 above.) In *Malmo-Levine*, the majority went on to summarize:

> … In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. [At para. 113.]

[289] As we demonstrate below, however, laws that come under *Charter* scrutiny are assessed according to a number of standards that, while couched as discrete tenets of the justice system, overlap, oscillate and even merge. This doctrinal imprecision and pliability are likely unavoidable consequences of dealing with normative and abstract ideas. Although the standard, or particular "test", varies, the essential exercise undertaken with respect to fundamental justice under s. 7 is to evaluate broadly the rationality and normative balance struck by the law in question. (See, e.g., *A.C. v. Manitoba (Director of Child and Family Services)* 2009 SCC 30, where the majority conducted this evaluation explicitly at para. 108.)

[290] We turn now to a consideration of the judicially-recognized substantive principles of fundamental justice.

### *Substantive Principles under Section 7*

[291] At present, the substantive principles of fundamental justice that are relevant to this appeal are arbitrariness, overbreadth and gross disproportionality. (We leave vagueness aside, as it was not raised in this case and is not relevant except to the extent that it overlaps with overbreadth.) None of these has had an uninterrupted

path to fruition as an ‘independent’ principle, and each has been ‘lumped in’ with one or more of the others at one time or another.

*Arbitrariness*

[292] The Supreme Court of Canada originally used the language of “manifest unfairness” to describe what is now referred to as “arbitrariness” − i.e., where the law in question has no rational connection to its stated objective. The principle came to the fore in *Morgentaler* (1988), where Chief Justice Dickson concluded for himself and Lamer J. that criminal prohibitions on the obtaining of an abortion were not in accordance with fundamental justice because the law may not hold out a defence that is “illusory”. (At 70.) He found that the procedures contemplated by what was then s. 251 of the *Criminal Code* for obtaining abortions were “arbitrary and unfair” under s. 7. (At 75.) Beetz J. agreed, but used only the language of “manifestly unfair”, observing:

> An administrative structure made up of unnecessary rules, which result in an additional risk to the health of pregnant women, is manifestly unfair and does not conform to the principles of fundamental justice … [S]ome of these requirements are manifestly unfair because they have no connection whatsoever with Parliament's objectives in establishing the administrative structure in s. 251(4). Although connected to Parliament's objectives, other rules in s. 251(4) are manifestly unfair because they are not necessary to assure that the objectives are met. [At 109-10; emphasis added.]

[293] Subsequent case law has applied the standard of inconsistency with legislative purpose in determining whether the law in question is arbitrary. In *Malmo-Levine*, the majority rejected the argument of the accused that the prohibition against the possession of marihuana was arbitrary, ruling that Parliament had a reasonable apprehension of harm arising from the use of the substance. Like the majority in *Rodriguez*, the Court found that a complete prohibition was rationally connected to the apprehension of harm. (At para. 136.)

[294] Since *Malmo-Levine*, the standard on which a court will find a law to be arbitrary is not entirely certain. In *Chaoulli* (2005) the Supreme Court split three-three on the question of whether Quebec’s prohibition against the purchase of

private health insurance offended this principle of fundamental justice. (The tie was broken by Deschamps J., who found that the provisions violated the Quebec *Charter of Human Rights and Freedoms*.) The reasons of McLachlin C.J.C. and Major and Bastarache JJ. described arbitrariness as follows:

> A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals. [At paras. 130-31; emphasis added.]

[295] These judges went on to comment on *Morgentaler* (1988) and the "manifest unfairness" standard, suggesting that this was an example of arbitrariness, in that some limitations were "unnecessary" to ensure the government's objectives, while others "bore no connection" to those objectives. (Para. 132.) A provision would be arbitrary, in other words, if the interference with life, liberty or security of the person lacked a "real connection" to the purpose of the legislation in question. (Para. 134.)

[296] Binnie and LeBel JJ., on the other hand, took issue in *Chaoulli* with the language of necessity, also referring back to *Rodriguez*:

> … We … do not agree with our colleagues' expansion of the *Morgentaler* principle to invalidate a prohibition simply because a court believes it to be "unnecessary" for the government's purpose. There must be more than that to sustain a valid objection.
>
> The accepted definition in *Rodriguez* states that a law is arbitrary only where "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation". To substitute the term "unnecessary" for "inconsistent" is to substantively alter the meaning of the term "arbitrary". "Inconsistent" means that the law logically contradicts its objectives, whereas "unnecessary" simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting "security of the person" that the court considers unnecessary, there would be much greater scope for

> intervention under s. 7 than has previously been considered by this Court to be acceptable. (In *Rodriguez* itself, for example, could the criminalization of assisted suicide simply have been dismissed as "unnecessary"? As with health care, many jurisdictions have treated euthanasia differently than does our *Criminal Code*.) The courts might find themselves constantly second-guessing the validity of governments' public policy objectives based on subjective views of the *necessity* of particular means used to advance legitimate government action as opposed to other means which critics might prefer. [At paras. 233-34; emphasis by underlining added.]

[297] This dispute does not appear to have been resolved: see *A.C. v. Manitoba* (2009) and *Canada (Attorney General) v. PHS Community Services Society* 2011 SCC 44 at para. 132, where the Court explicitly declined to settle the question, concluding that the Minister's decision would fail on either standard; see also *Bedford* at paras. 143-47.

[298] In summary, we note Professor Stewart's description of how the test of arbitrariness has been variously framed by the Supreme Court:

> It has been said that a law is arbitrary if it is not necessary to achieve the objective of the legislation in question [citing *PHS* at para. 132], if "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" [citing *Rodriguez*], if there is "no real connection on the facts to the purpose the interference is said to serve," [citing *Chaoulli* at para. 134] or if it is not "rationally connected to a reasonable apprehension of harm." [Citing *Malmo-Levine* at para. 136.] At a minimum, to avoid being arbitrary, a law or decision must have some positive effect on the purpose it is supposed to serve; otherwise the section 7 interest will have been effected for no good reason. <u>Like the norm against overbreadth, the norm against arbitrariness requires a court to identify the purpose of the law and to assess the connection between those purposes and the limits on life, liberty, or security created by the law</u>. (At 136; emphasis added.)

*Overbreadth*

[299] Laws that, while infringing a protected interest under s. 7, are drafted more broadly than necessary to meet the state's objectives may be struck down as overbroad and therefore not in accordance with fundamental justice: see Kent Roach and Robert Sharpe, *The Charter of Rights and Freedoms* (4th ed., 2009) at 237. In the early years of *Charter* jurisprudence, the position of what is now called "overbreadth" was uncertain. In *R. v. Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606, the Supreme Court agreed with an earlier minority opinion that

"overbreadth is subsumed under the 'minimal impairment branch' of the *Oakes* test, under s. 1." Gonthier J. for the Court referred to cases in which criminal sanctions are assessed under s. 12 and observed:

> This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.
>
> In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the State, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument.
>
> The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58:
>
> > Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.
>
> I agree … [At 629-30; emphasis added.]

[300] The matter was revisited in *Heywood* (1994), in which certain vagrancy provisions in the *Criminal Code* were challenged. It was an offence for a person previously convicted of sexual assault involving a child to be "loitering" in certain areas (playgrounds, parks, bathing areas and so on). The majority found that the purpose of the law was to protect children, but ruled that the geographic and temporal scope of the law, as well as the scope of persons to whom it applied, were too broad for the purpose of the law. (At 794-802.) Cory J. for the majority noted that vagueness and overbreadth overlap and that the effect of overbreadth may result in arbitrariness or disproportionality. As well, he noted the "balancing" inherent in analyzing an impugned law for overbreadth. In his words:

> … Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an

> objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.
>
> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual. This type of balancing has been approved by this Court: see *Rodriguez* … [At 792-93; emphasis added.]

(It will be recalled that the reference to the limitation of rights "for no reason" echoes Sopinka J.'s comment regarding arbitrariness in *Rodriguez* that:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. This is, to my mind, essentially the type of analysis which E. Colvin advocates in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev*. 560, and which was carried out in *Morgentaler*. That is, both Dickson C.J. and Beetz J. were of the view that at least some of the restrictions placed upon access to abortion had no relevance to the state objective of protecting the foetus while protecting the life and health of the mother. In that regard the restrictions were arbitrary or unfair. It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. [At 594; emphasis added.])

[301] For some years after *Heywood*, the Supreme Court seemed reluctant to apply the criterion of overbreadth, at least explicitly. In *R. v. Demers* 2004 SCC 46, however, the provisions of the *Criminal Code* that addressed those unfit to stand trial were challenged successfully on the basis of overbreadth. The *Code* did not permit a review board to discharge an individual found to be permanently unfit even if there was no evidence that he or she was a danger to society. If the person was found fit, he or she would go to trial; otherwise, as long as the Crown had a *prima facie* case, he or she would remain detained. The law was found to be overly broad because

the means chosen were "not the least restrictive of an unfit person's liberty and not necessary to achieve the state's objective." (Para. 43.)

[302] The Court in both *Heywood* and *Demers* found that overbreadth was infringed merely where the law in question went beyond what was "necessary" to meet its objective. In *Clay*, however, the standard of overbreadth appeared to be equated at least in part with "gross disproportionality" and, again, linked to arbitrariness. The Court stated:

> The analysis of overbreadth in relation to s. 7 was considered in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 793, where Cory J. observed that:
>
> > The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly* disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out, related to arbitrariness. In *Heywood*, he went on to note, at p. 793:
>
> > In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices.
>
> The appropriate degree of deference referred to in *Heywood* is built into the applicable standard of "gross disproportionality", as explained in *Malmo-Levine* and *Caine*. [At paras. 37-9; emphasis added.]

*Gross Disproportionality*

[303] It is now said to be a principle of fundamental justice that the impact of a state's legislative measures on a person's life, liberty or security of the person must not be "so extreme that they are *per se* disproportionate to any legitimate government interest". (See *Suresh* at para. 47.) It is commonly thought that this principle was first recognized in *Malmo-Levine* (see paras. 142-43). The majority adopted a standard approximating that approved under s. 12 of the *Charter*, which prohibits cruel and unusual punishment: see *R. v. Morrisey* 2000 SCC 39. As stated by Gonthier and Binnie JJ. in *Malmo-Levine*:

> Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.
>
> Accordingly, even if we were persuaded by our colleague Arbour J. that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met. [At paras. 160-61; emphasis added.]

This standard was said to provide Parliament with "broad latitude" to effect its interests: para. 175.

[304] Perhaps not surprisingly, following *Malmo-Levine* and *Clay* there was some uncertainty as to the relationship between gross disproportionality and overbreadth. Until recently, very few cases struck down laws on the basis that the effects of the law were grossly disproportionate to the benefits to the state's interest: see Stewart at 149. In *PHS* (2011), however, the Supreme Court considered arbitrariness and gross disproportionality separately, finding that the effect of the Minister's decision on the health and safety of Insite's users was both arbitrary and grossly disproportionate to any state interest in maintaining the prohibitions on the drugs used at the clinic. In these circumstances, the Court found it unnecessary to analyze overbreadth: see paras. 132-34.

[305] Two cases decided by the Ontario Court of Appeal in 2008 illustrate the difficulty of keeping the three concepts separate. In *R. v. Dyck* 2008 ONCA 309, the Court relied on the majority judgments in *Clay* and *Malmo-Levine* for the proposition that overbreadth was a "function of arbitrariness" and was subsumed in the "ultimate standard" of gross disproportionality. (See paras. 94-6.) The Court stated that "a law will not fail a constitutional challenge on this ground simply because it goes further than is strictly necessary or even because it is merely disproportionate to the objective at issue, as opposed to 'grossly' disproportionate." (At para. 96.) It would

appear that overbreadth was here merged with gross disproportionality, raising the threshold for finding a breach of fundamental justice.

[306] In *Cochrane v. Ontario (Attorney General)* 2008 ONCA 718, *lve. to app refused* [2009] S.C.C.A. No. 105, the Court appeared to deal with the principles slightly differently. Sharpe J.A. for the Court said this:

> Overbreadth is a term used to describe legislation that, as drafted, covers more than is necessary to attain the legislature's objective and thereby impinges unduly upon a protected right or freedom. A law is unconstitutionally overbroad if it deprives an individual of "life, liberty and security of the person" in a manner that is "grossly disproportionate" to the state interest that the legislation seeks to protect. Such a law is said to be "arbitrary" and offends "the principles of fundamental justice" and therefore violates s. 7 of the *Charter*. A law that restricts the rights guaranteed by s. 7 is also "arbitrary" unless it is grounded in a "reasoned apprehension of harm". The onus of proving that the law is "arbitrary" or "grossly disproportionate" lies on the applicant: see *R. v. Malmo-Levine* … [At para. 18.]

On this view the test for "overbreadth" and for "arbitrariness" would appear to be gross disproportionality, although arbitrariness could also be shown by the absence of a reasoned apprehension of harm. Arguably, all three principles were combined. Sharpe J.A. went on to consider the appellant's submissions against viewing arbitrariness and disproportionality as elements of the broader norm of overbreadth. Again in his words:

> I disagree with the appellant's submissions and see no error in the approach taken by the application judge. In my view, the appellant's submission misstates − and significantly understates − the burden that rests upon a claimant who challenges a law under s. 7 on grounds of overbreadth. As I have stated, the test for a breach of s. 7 on grounds of overbreadth is whether the law is "arbitrary" because there is no "reasoned apprehension of harm" or whether the law is "grossly disproportionate" to the legislative objective. To meet that test, the appellant had to satisfy the onus of demonstrating that the legislature did not have a basis for a "reasoned apprehension of harm" from pit bulls or that the action taken by the legislature was "grossly disproportionate" to the risk posed by pit bulls. Fairly read, the reasons of the application judge indicate that she quite properly focussed her analysis on these issues. In my view, the record amply supports the application judge's conclusion that the appellant failed to satisfy the onus of demonstrating a breach of s. 7 on grounds of overbreadth. [At para. 25; emphasis added.]

[307] Similarly, in *United States of America v. Nadarajah* 2010 ONCA 859, the Court of Appeal stated:

> In assessing whether the means chosen by Parliament overshoots the legislative purpose of the prohibition, the courts will afford a substantial measure of deference to Parliament's assessment of the means needed. Such deference requires that the means used by Parliament be "grossly disproportionate" to the state objective underlying the criminal prohibition before the law will be said to be unconstitutionally overbroad: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, at para. 159; *Lindsay*, at para. 21 (Ont. C.A.); *Ahmad*, at para. 39.
>
> The overbreadth inquiry proceeds through three stages. First, the impugned provision must be interpreted to determine the scope of the criminal prohibition created by the statutory provision. Second, the legislative purpose animating the impugned provision must be determined. Finally, the court must determine whether the scope of the impugned provision is "grossly disproportionate" to the state objective underlying the provision. [At paras. 16-7; emphasis added.]

(The Supreme Court upheld this decision but reserved its comments on the substantive principles for its companion decision in *R. v. Khawaja* 2012 SCC 69, discussed below.)

[308] As we have seen, the Court of Appeal in *Bedford* concluded that despite some uncertainty, gross disproportionality had "emerged" as an independent principle of fundamental justice in 2003 in *Malmo-Levine*. The Court acknowledged the "fluidity" of the principles of fundamental justice and attempted to clarify the foregoing 2008 cases in light of *PHS*. (At para. 150.) It concluded that any commingling of the standards would be an error, given the Supreme Court of Canada's treatment of the principles as doctrinally distinct (albeit closely related) in *PHS*: see para. 155.

[309] This court has treated overbreadth, arbitrariness and gross disproportionality as doctrinally distinct: see *Victoria (City) v. Adams* (2009) and this court's decision in *PHS*, indexed as 2010 BCCA 15.

[310] In its most recent pronouncement on the subject in *Khawaja*, the Supreme Court of Canada noted that "the authorities continue to suggest that overbreadth and gross disproportionality are − at least analytically − distinct." However, McLachlin

C.J.C. for the majority declined to decide whether the two are "distinct constitutional doctrines." In her analysis:

> Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach of the principles of fundamental justice. Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are "so extreme as to be disproportionate to any legitimate government interest" [citing *PHS* at para. 133 and *Malmo-Levine* at para. 143]. … I will examine both overbreadth and gross disproportionality in a single step, without however deciding whether they are distinct constitutional doctrines. [At para. 40.]

The Chief Justice went on to consider the two principles together without any substantive distinction: see paras. 62-3. Whether her remarks and analysis were intended as a tentative endorsement of a unified overbreadth/disproportionality approach is unclear, although it is difficult to escape the notion that lower courts should apply the test as a single inquiry for the time being.

[311] Professor Stewart, *supra*, addresses the question "Overbreadth, Arbitrariness and Disproportionality: How Many Principles?" in one summarizing paragraph as follows:

> The norms against overbreadth, arbitrariness, and gross disproportionality all involve failures of instrumental rationality, in the following sense. Whenever a law fails to satisfy one of these norms, there is a mismatch between the legislature's objective and the means chosen to achieve it: the law is inadequately connected to its objective or in some sense goes too far in seeking to attain it. <u>It might be thought that these norms are really three separate ways of identifying the same kind of defect in the law: perhaps these three norms are different facets or aspects of a larger overarching norm requiring a minimal degree of instrumental rationality in legislation</u>. On the other hand, it might be thought that each of them names a distinct failure of instrumental rationality: maybe, for example, a law can be overbroad without being arbitrary or grossly disproportionate. Or it might be thought that while the three norms are not identical, there is enough overlap between them that perhaps the law could manage with fewer than three. [At 151; emphasis added.]

[312] But whether gross disproportionality is now to be separated in all cases from overbreadth and arbitrariness or whether it merely involves looking at a law with a "different lens", it is not in our view correct to say that a <u>new</u> principle of fundamental

justice was "established" in *Clay* or *Malmo-Levine*. Rather, the Court invoked a particular way of expressing, or looking at, the broader question of whether an impugned law "goes too far", measured against its objectives. This concept may be, and has been, framed in terms of whether the objectives of the law could be met by other (less intrusive) means, whether the law is "necessary" (in all its aspects) to achieve its objective, or whether its effects are "disproportionate" in light of its objectives.

[313] It may be that as different kinds of legislation come under scrutiny in future, other aspects of "fundamental justice" will emerge as more or less powerful "lenses" are employed under s. 7. (Counsel for the plaintiffs, citing *R. v. Arcand* 2010 ABCA 363, indeed contended that "parity" has been recognized as a new principle of fundamental justice under s. 7, although not by the Supreme Court of Canada. If anything, parity would seem to be simply another lens that might be employed where criminal sentences are challenged, for assessing laws under the established principles.) The point is that if lower courts are to be free to reconsider and depart from established precedent every time the Supreme Court of Canada articulates a new refinement or variant of what are now principles of fairly long standing, the role of such principles as the "shared assumptions upon which our system of justice is founded" (see *Canadian Foundation for Children*, at para. 8) will inevitably decline, along with, we suggest, the public's perception of the role of courts as the legitimate arbiters of legislation under the *Charter*.

***Rodriguez***

[314] Turning finally to *Rodriguez* itself, it is true that the majority's reasons do not follow the structured paradigm that now characterizes many of the Supreme Court's reasons in s. 7 cases. The judgment referred to what is now called arbitrariness − the notion that where an individual's rights have been deprived "for no valid purpose", the principles of fundamental justice will have been violated. (At 594.) Sopinka J. noted, but rejected, the argument that the "blanket prohibition on assisted suicide" was "arbitrary or unfair" because it was unrelated to the state's interest in

protecting the vulnerable. (At 595.) The judgment also referred to 'over-inclusiveness' (which equates with "overbreadth") in the context of Ms. Rodriguez's central argument that no exclusion was made for persons in her situation or persons who are mentally competent, but cannot commit suicide on their own. (At 590.) Ultimately, the majority concluded that it could not be said the blanket prohibition on assisted suicide was "arbitrary or unfair, or that it is not reflective of fundamental values at play in our society." (At 608.)

[315] We see this as the key holding in the case − that s. 241(b) of the *Code* was rationally connected to its objective and that the "societal concern with preserving life and protecting the vulnerable [against abuse] rendered the blanket prohibition preferable to a law that might not adequately prevent abuse." (At 605.) The impugned law did not, in other words, 'go too far.'

[316] With all due respect to the trial judge, we believe that she was bound by *stare decisis* to conclude that the plaintiffs' case had already been determined by the Supreme Court of Canada. We also respectfully disagree with the conclusion of the Ontario Court of Appeal in *Bedford* that gross disproportionality "emerged" as a new principle of fundamental justice in *Malmo-Levine*. (At para. 68.) This holding opens up to reconsideration every case decided under s. 7 prior to 2003. Such a result seems contrary to the Court of Appeal's later observation that in the context of *Charter* litigation, courts should take a "robust" view of *stare decisis*, given the fact that evidence, legislative facts, values, attitudes and perspectives will never stand still. Nor was it open, in our view, for the trial judge to apply what has been called "anticipatory overruling": see *HMTQ in Right of the Province of Saskatchewan v. The Saskatchewan Federation of Labour et al.* 2013 SKCA 43 at paras. 48-50; and see *Air Canada Pilots' Association v. Kelly et al.* 2012 FCA 209, where Pelletier J.A. observed:

> … the evolution of social policy over time may justify the Supreme Court revisiting a particular issue but it cannot justify a lower court's failure to follow the Supreme Court's jurisprudence.
>
> This is not to say that lower courts do not have a role to play in the evolution of the jurisprudence once the Supreme Court has spoken. Where a challenge

> to the existing jurisprudence is raised, the role of the lower court is to allow the parties to gather and present the evidence and to make the necessary findings of fact and of credibility, so as to establish the evidentiary record upon which the Supreme Court can decide whether to reconsider its earlier decision: see *Bedford*. ... [At paras. 47-8.]

(See also Debra Parkes, *Precedent Unbound? Contemporary Approaches to Precedent in Canada* (2007) 32 *Man. L.J.* 135.)

***Section 1***

[317] The overlap between the principles of fundamental justice under s. 7 and the question of justification under s. 1 remains a striking feature of current *Charter* law. It is often observed that the Supreme Court has never found an infringement of s. 7 rights to be justified under s. 1: see Stewart, *supra*, at 289. (Indeed, Wilson J. suggested at 523 of the *Motor Vehicle Reference* that this could never happen.) In *New Brunswick (Minister of Health and Community Services) v. G.(J.)* [1999] 3 S.C.R. 46, Lamer C.J.C. suggested two reasons why a limit on a right under s. 7 would be difficult to justify under s. 1:

> First, the rights protected by s. 7 − life, liberty, and security of the person − are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society. [At para. 99.]

[318] Professor Hogg also questions whether a law that violates the principles of fundamental justice could nevertheless be upheld under s. 1 as a reasonable limit demonstrably justified in a free and democratic society. He notes that in *Morgentaler* (1988) the Supreme Court held that the abortion offence in the *Criminal Code* infringed s. 7 and that each of three majority opinions went on to consider whether the law could nevertheless be justified under s. 1. However, Hogg observes:

> I think it is fair to say … that the discussions of s. 1 justification essentially rehearsed points already discussed under fundamental justice. The finding that the abortion law offended fundamental justice virtually entailed a finding that the law was not a “reasonable limit” and was not “demonstrably justified in a free and democratic society”.

> In other cases, the Supreme Court of Canada has usually applied s. 1 before holding that a breach of s. 7 invalidated a law. The s. 1 justification has been upheld in minority opinions, but never by a majority of the Court. [At §38.14(b).]

(On the latter point, the author cites *R. v. Vaillancourt* [1987] 2 S.C.R. 636; *R. v. Logan* [1990] 2 S.C.R. 731; *R. v. Hess* [1990] 2 S.C.R. 906; *Burns* at para. 133; *Suresh* at para. 128; *Demers* at para. 46; *Chaoulli* at para. 155; *Charkaoui v. Canada (Minister of Citizenship and Immigration)* 2007 SCC 9 at para. 66; and *R. v. D.B.* 2008 SCC 25 at para. 89.)

[319] The Court in *Rodriguez* did not find it necessary to apply s. 1 of the *Charter* with respect to s. 7 rights. This was necessary only with respect to s. 15 equality rights, the breach of which was assumed. Applying the *Oakes* factors in a fairly unstructured way, the majority concluded that "any infringement of s. 15 is clearly justified under s. 1 of the *Charter*." (At 615.) Section 241(b) of the *Code* was found to have "'a clearly pressing and substantial legislative' objective grounded in the respect for and the desire to protect human life"; and to be rationally connected to its purpose. (At 613.) In response to the argument that exceptions should be made to the prohibition on the giving of assistance to commit suicide, the majority noted two major difficulties: first, the introduction of an exception for "certain groups" would create an inequality, and second, attempts to create exceptions had been unsatisfactory and tended to "support the theory of the 'slippery slope'." (At 613-14.)

[320] For the same reason, s. 241(b) was also found not to be "overbroad" in the context of the *Oakes* test. Sopinka J. stated:

> … There is no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose; first, because the purpose extends to the protection of the life of the terminally ill. Part of this purpose, as I have explained above, is to discourage the terminally ill from choosing death over life. Secondly, even if the latter consideration can be stripped from the legislative purpose, we have no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death. [At 614; emphasis added.]

Finally, the majority said, it followed that the "final aspect of the proportionality test, balance between the restriction and the government objective" was also met: at 615.

[321] The trial judge was of the opinion in the case at bar that it was open to her to reconsider this "final step" because, she said, the Court had addressed it "only very summarily." (Para. 936; but see also para. 998.) With respect, her opinion of the sufficiency of the Supreme Court of Canada's analysis did not permit her to disregard its conclusion. As we hope we have demonstrated, it is inherent in the law relating to the *Charter* that it is not written in stone and that ways of assessing laws inevitably evolve. Again, the focus for purposes of *stare decisis* should be on what was decided, not how it was decided or how the result was described.

[322] In our opinion, exactly the same reasons as Sopinka J. brought to bear under s. 1 could have been made under the rubrics of overbreadth and disproportionality, gross or otherwise, under s. 7 – even though different rights were being considered by Sopinka J. and even though the onus of proof is of course different under the two sections.

[323] In answer, then, to the question posed at the beginning of our legal analysis, we would conclude that *Rodriguez* decided the following:

i) section 241(b) of the *Criminal Code* did not violate s. 7 of the *Charter* as it is now understood;

ii) any (assumed) violation of s. 15 of the *Charter* was justified under s. 1.

We also infer that had it been necessary to consider s. 1 in connection with a violation of s. 7, the s. 1 analysis carried out in under s. 15 would have led to the same conclusion − that a "blanket prohibition" was justified.

[324] It follows in our view that the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*. We would allow the appeal on this basis.

***Remedy***

[325] In the event the Supreme Court of Canada does review *Rodriguez*, the issue of remedy may arise. It is in connection with that possibility that we make the following brief comments.

[326] As the law now stands, there does not appear to be an avenue for relief from a generally sound law that has an extraordinary, even cruel, effect on a small number of individuals. Such individual relief is often referred to as a constitutional exemption. In the past that possibility existed in Canada. It arose in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 and *R. v. Edwards Books and Art Ltd.* [1986] 2 S.C.R. 713, where the Court left open the "possibility that in certain circumstances a 'constitutional exemption' might be granted from otherwise valid legislation to particular individuals". (*Edwards Books* at 783.) The idea was subsequently 'picked up' by some appellate courts in connection with mandatory sentencing provisions that were said to have such harsh application that they raised issues under s. 12 of the *Charter*. An example is *R. v. Chief* (1989) 39 B.C.L.R. (2d) 358 (Y.T.C.A.), where McEachern C.J.Y.T. crafted an exemption from a mandatory prohibition of possession of firearms on an offence committed in the (then) Yukon Territory by a First Nations trapper.

[327] Dissenting in this court in *Rodriguez* [1993] 3 W.W.R. 553, McEachern C.J.B.C. would have provided Ms. Rodriguez an individual exemption from s. 241, so as to give her the opportunity to end her life with assistance. He stated:

> As already mentioned, the declaration granted in this judgment is limited to the Appellant and physicians assisting her, and enures to the benefit of no other person. For the time being, therefore, any other person in the position of the Appellant seeking a similar declaration must make a separate application to the Supreme Court of British Columbia.
>
> I only wish to add that, like Lord Mustill in *Bland*, I must admit to having profound misgivings about almost every aspect of this case. I can only hope that Parliament in its wisdom will make it unnecessary for further cases of this kind to be decided by judges. I accede to this application only because I believe it is a salutary principle that every person who has a right, must also have a remedy. [At paras. 110-11.]

[328] The Supreme Court divided five-to-four in *Rodriguez,* with the majority rejecting relief for Ms. Rodriguez. It is perhaps of interest that Lamer C.J.C. would have declared s. 241(b) unconstitutional, would have suspended his declaration for a period of time and, relying upon the suspended declaration of invalidity, would have given Ms. Rodriguez relief from the law for the interval – that is, he would have ordered a constitutional exemption. Referring to *Osborne v. Canada (Treasury Board)* [1991] 2 S.C.R. 69 and *R. v. Seaboyer* [1991] 2 S.C.R. 477, he observed:

> The scope of the constitutional exemption, then, has been limited by the majority of this Court: an over-broad blanket prohibition should not be tempered by allowing judicially granted exemptions to nullify it, and the criteria on which the exemption would be granted must be external to the *Charter*. That is, the fact that the application of the legislation to the party challenging it would violate the *Charter* cannot be the sole ground for deciding to grant the exemption; rather, there must be an identifiable group, defined by non-*Charter* characteristics, to whom the exemption could be said to apply. [At 576.]

and further:

> I am in agreement with many of the concerns Wilson J. expressed in *Osborne* about constitutional exemptions, and would address them by holding that constitutional exemptions may only be granted during the period of a suspended declaration of invalidity. In this circumstance, the provision is <u>both</u> struck down and temporarily upheld, making the constitutional exemption peculiarly apt, and limiting its application to situations where it is absolutely necessary. [At 577.]

[329] McLachlin J. for herself and L'Heureux-Dubé J. would have found s. 241 unconstitutional and concurred in general terms with the approach of McEachern C.J.B.C. She stated at 629:

> I concur generally in the remedy proposed by the Chief Justice [Lamer] in his reasons, although I am not convinced that some of the conditions laid down by his guidelines are essential. ... What is required will vary from case to case. The essential in all cases is that the judge be satisfied that if and when the assisted suicide takes place, it will be with the full and free consent of the applicant. I would leave the final order to be made by the chambers judge, having regard to the guidelines suggested by McEachern C.J. below and the exigencies of the particular case.

Cory J. agreed with the approach of Lamer C.J.C. and of McLachlin J.

[330] A constitutional remedy as a case-specific, individual response to an exceptional circumstance was still a possibility in 2001. In *R. v. Sharpe* 2001 SCC 2, McLachlin C.J.C. referred to, but did not decide on, the possibility of an individual exemption in the course of discussing alternatives open to a court on a successful constitutional challenge to legislation:

> Confronted with a law that is substantially constitutional and peripherally problematic, the Court may consider a number of alternatives. One is to strike out the entire law. This was the choice of the trial judge and the majority of the British Columbia Court of Appeal. The difficulty with this remedy is that it nullifies a law that is valid in most of its applications. Until Parliament can pass another law, the evil targeted goes unremedied. Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?
>
> Another alternative might be to hold that the law as it applies to the case at bar is valid, declining to find it unconstitutional on the basis of a hypothetical scenario that has not yet arisen. In the United States, courts have frequently declined to strike out laws on the basis of hypothetical situations not before the court, although less so in First Amendment (free expression) cases. While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are "reasonable".
>
> Yet another alternative might be to uphold the law on the basis that it is constitutionally valid in the vast majority of its applications and stipulate that if and when unconstitutional applications arise, the accused may seek a constitutional exemption. Ross, who concludes that s. 163.1(4) is constitutional in most but not all of its applications, recommends this remedy: Ross, *supra*, at p. 58.
>
> I find it unnecessary to canvas any of these suggestions further because in my view the appropriate remedy in this case is to read into the law an exclusion of the problematic applications of s. 163.1, following *Schachter v. Canada*, [1992] 2 S.C.R. 679. … [At paras. 111-14.]

[331] The availability of an individual constitutional exemption in answer to a s. 12 *Charter* challenge continued to be uncertain until *R. v. Ferguson* 2008 SCC 6. In *Ferguson*, McLachlin C.J.C. explored, in the context of s. 12 of the *Charter*, the alternative bases for a constitutional remedy, s. 24(1) and s. 52. She observed:

> When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd*., [1985]1 S.C.R. 295; *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713. Section

> 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: *Big M*; see also Peter Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 *N.J.C.L*. 411, at pp. 432-34; Morris Rosenberg and Stéphane Perrault, "Ifs and Buts in *Charter* Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 S.C.L.R. (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*: see Sankoff, at p. 438.
>
> Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1). [At paras. 59-60.]

[332] Further, concerning the application of s. 52, the Chief Justice noted:

> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies: see *Osborne*, *per* Wilson J. In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend*; *Sharpe*. Where this is not possible – as in the case of an unconstitutional mandatory minimum sentence – the unconstitutional provision must be struck down. The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books. [At para. 65.]

[333] On this reasoning, an individual remedy for an extraordinarily harsh consequence of a law appears to be foreclosed, although Kent Roach, in *Constitutional Remedies in Canada* (2nd ed., looseleaf) suggests that *R. v. Nasogalauk* 2010 SCC 6 may open the availability of constitutional exemptions in rare cases. If that is so, one could suggest a distinction between the legislation considered in *Ferguson* and the provision at issue here which could support a

different result than that in *Ferguson*. In the latter case, the Court was concerned with mandatory minimum sentencing legislation. The granting of a constitutional exemption in that context would obviously undermine Parliament's intention and could be seen as an inappropriate intrusion into the legislative sphere. The provision before us, s. 241 of the *Criminal Code*, is directed to the interests of those who are vulnerable. Lifting the prohibition for those who are clear-minded, supported in their life expectancy by medical opinion, rational and without outside influence, and protected by a court process, might not undermine the legislative intention in the sense spoken of in *Ferguson*.

[334] We respectfully raise the remedy of constitutional exemption again, as an alternative to striking down s. 241, in the event that *Rodriquez* is reconsidered. As demonstrated by the history of the issue recounted in *Rodriguez*, and the evidence in this case of still-born legislative initiatives, the issue of physician-assisted suicide has surfaced repeatedly in Parliament without result one way or another. Bearing this history in mind, there is an inherent danger in declaring s. 241 and the related provisions invalid, even with a time delay. Apart from the interference by the judiciary in the agenda of Parliament that would be inherent in a suspended declaration of constitutional invalidity, there is no certainty that Parliament would wish to, or be able to, engage both the public debate and its own debate in the time required to satisfy a deadline. The issue is one that goes to the heart of our democratic compact. We are not confident that a fully rounded, well balanced alternative policy, with comprehensive public support, would or could be developed in the time-frame of any of the suspensions of declaration of invalidity that have been issued hitherto. Striking down s. 241 would call for more than a top-down design of a broadly applicable system for assisted suicide. In that sense, the remedy of a suspended declaration of invalidity presents the spectre of a vacuum in the protection that s. 241 now provides, a danger that would not be present on a more limited remedy.

[335] Last, we note the terms of the constitutional exemption ordered by the trial judge in respect of Ms. Taylor. Her circumstances and clarity of mind were fully

before the judge, who formed a confident view of Ms. Taylor's capacity and consent. Nonetheless, the order crafted by the Court compels a judge, upon being provided with certain evidence, to make an order allowing Ms. Taylor physician-assisted death. There is some technical difficulty with the order in that it appears to direct another judge how to decide an application. Putting that aside, it would in our view be unwise to replicate such an order for others who may wish an exemption from the law. We are not satisfied that the bare requirement of two medical opinions and a request from the patient is sufficient to satisfactorily establish a free will, or to demonstrate the absence of subtle or overt pressures, to choose the route of physician-assisted suicide. At the least, a court of law, unencumbered by previous judicial direction, accustomed to assessing issues of consent and influence, and with a perspective outside the (often overstressed) health care regime, should in our view be required to assess individual cases.

[336] Our comments concerning remedy, of course, are by the way, given our view of the import of *Rodriguez*; however, they may make some contribution to the discussion of remedy in the event *Rodriguez* is reconsidered.

***Costs at Trial***

[337] Smith J. awarded special costs to the plaintiffs, apportioned 90% against Canada and 10% against British Columbia. Canada says that in any event of its appeal, the judge erred in awarding special costs. In Docket CA040454, British Columbia appeals separately from the order for costs.

*Against Canada*

[338] The trial judge made her order for the reasons that are set out by Chief Justice Finch in his reasons. Were we of the same view as the Chief Justice on the disposition of the appeal, we would have agreed with his reasons on the issue of costs in the Supreme Court of British Columbia, against Canada. In other words, we see no error in the reasoning of the trial judge on the issue of costs in relation to Canada.

[339] However, we have come to a different conclusion than the trial judge and the Chief Justice on the applicability of *Rodriguez*. Should the different conclusion result in a different disposition of the costs issue? In our view the answer is yes.

[340] There are two issues considered when determining costs − liability for costs, and if there is liability, the scale of costs that should be awarded. Although it is deciding the second question first, it clears the way, in this public interest litigation, to address the scale of costs awarded in respect to the trial proceedings before addressing liability.

[341] In *William v. British Columbia* 2013 BCCA 1, Groberman J.A., for the Court, summarized the approach to special costs to a public interest litigant at para. 16, citing *Victoria (City) v. Adams* (2009):

> ... the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:
>
> (a) The case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
>
> (b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
>
> (c) As between the parties, the unsuccessful party has a superior capacity to bear the costs of the proceeding; and
>
> (d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner. [At para. 188; emphasis added.]

[342] While this passage is directed to a successful public interest litigant, Groberman J.A. went on to consider the case of an unsuccessful public litigant and special costs, appearing at para. 21 to allow for that possibility in exceptional cases. In the least, special costs for an unsuccessful public interest litigant are reserved for the rarest of cases. In our view, this is not such a case because we cannot say, given our conclusion on *stare decisis*, that the matters of public importance in this instance “have not been previously resolved”. In other words, on our view of *Rodriguez,* this case lacks the exceptionality required for an award of special costs. Accordingly, we consider that the award of special costs cannot be sustained.

[343] What should be done with costs incurred at trial? The usual order is that costs follow the event. However, there is latitude in the application of that rule, particularly in public interest litigation. The latitude admits of two alternatives, an order of costs in favour of an unsuccessful litigant, or an order that there be no costs − that is, that all parties bear their own costs. The first alternative may be made in the interests of ensuring access to justice for impecunious claimants advancing important public interest claims: *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71, citing *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315. In *Okanagan Indian Band* the special place of public interest litigation was put this way:

> One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court. [At para. 39; emphasis in original.]

[344] In *William*, Groberman J.A. said:

> In making this order [granting the unsuccessful litigant costs], we recognize that this case is highly unusual, and that orders that an unsuccessful appellant be granted costs will be extraordinarily rare. Such an order will not be made simply because it is perceived to be in the public interest that jurisprudence develop in a particular area of law. It must, at the very least, be shown that the development of jurisprudence in the area is of a critical public importance. We are satisfied that in the unique circumstances of this case, the Court is justified in taking the extraordinary step of awarding costs to an unsuccessful litigant. [At para. 41.]

[345] The other alternative, that there be no order for costs, is intended to alleviate the severity of an award of costs against unsuccessful parties. In *Guide Outfitters Association v. British Columbia (Information and Privacy Commissioner)* 2005 BCCA 368, Hall J.A. for the Court observed:

> Several judgments of the courts in the province have recognized that questions of whether the public interest is served by the litigation may guide the court in exercising its discretion regarding costs. In *MacDonald, supra*, at para. 13, Mr. Justice Bauman referred to factors the Ontario Law Reform Commission considered may lead a judge to rule the parties should bear their own costs:
>
> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.
>
> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant.
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding.
>
> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.
>
> Although I consider these factors as useful ones to guide the Court in the exercise of its discretion as to costs, the overarching question is still whether the normal rule is unsuitable on the facts of this case. … [At para. 8; emphasis added.]

[346] We have found we are bound by *stare decisis.* As serious as the issue of physician-assisted suicide is, we consider that the fact of a prior binding decision on the constitutionality of s. 241(b) takes this case out of the category in which costs should be awarded against the successful party. We recognize, on the other hand, that the issue presented is of broad public interest, and that the issue of the application of *Rodriguez* was not without uncertainty. Accordingly, although the case is not within all the factors borrowed from the Ontario Law Reform Commission as referred to by Hall J.A. in *Guide Outfitters*, it does in our view come within his overarching description of one in which "the normal rule is unsuitable on the facts of this case." Adopting this relaxed description, we would order that no costs be awarded to any party in the Supreme Court of British Columbia.

*Against British Columbia*

[347] British Columbia appeals separately. It emphasizes that it was joined as a party only by virtue of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, and says it should not have to bear costs.

[348] In *Children's Aid Society*, La Forest J. expressed the reluctance of courts to award costs against an attorney general acting in connection with an issue of constitutionality:

> The order to award costs against an intervening Attorney General, acting as she is statutorily authorized to, in the public interest in favour of a party who raises the constitutionality of a statute, appears highly unusual, and only in very rare cases should this be permitted. Nevertheless, this case appears to have raised special and peculiar problems, and the District Court's exercise of discretion was supported by the Court of Appeal. I am loath to interfere with the exercise of their discretion in this case. [At p. 390.]

Although costs may be awarded against an intervenor (*Evans Forest Products Ltd. v. British Columbia (Chief Forester)* (1995), 40 C.P.C. (3d) 322), there must be a principled reason for departing from the general practice. An example of such circumstances is the intervenor's assumption of carriage of the litigation, as occurred in *Children's Aid Society*.

[349] It cannot be said in this case that British Columbia assumed carriage of the proceeding, which was vigorously defended at all times by Canada. British Columbia's role was limited, on the trial judge' calculation, to 10% of the time taken by Canada, and included such proper steps as placing before the Court the record that had been before the Court in *Rodriguez,* setting out the positions of the medical associations on issues of physician-assisted death, and describing the palliative care system in British Columbia. In other words, British Columbia directed its efforts to placing relevant materials before the Court. One cannot say this limited degree of participation on the part of an intervenor in proceedings challenging federal laws, was improper or otherwise deserving of a costs order against it.

[350] We would allow appeal CA040454 and set aside the order requiring British Columbia to pay trial costs in these proceedings.

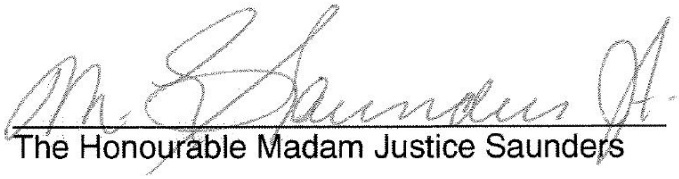
***Costs of the Appeal***

[351] The usual rule in this court is that costs follow the event. However, we recognize the public interest nature of the appeal, and for the reasons expressed in relation to costs in the Supreme Court of British Columbia, we would not make an order for the payment of costs by any party.

***Disposition***

[352] We return, then, to our comprehensive conclusion. In our respectful view, any review of the substantive *Charter* challenges, and the granting of comprehensive or limited relief from the effects of the law, are beyond the proper role of the court below and of this court. If the constitutional validity of s. 241 of the *Criminal Code* is to be reviewed notwithstanding *Rodriguez*, it is for the Supreme Court of Canada to do so. We would allow the appeal, set aside the trial judge's order, and deal with costs as described above.

The Honourable Madam Justice Newbury



The Honourable Madam Justice Saunders

APPENDIX A

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
OCT 29 2012
ENTERED

No. S112688
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

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

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

ATTORNEY GENERAL OF BRITISH COLUMBIA

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

AND:

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

INTERVENORS

**ORDER MADE AFTER APPLICATION**

BEFORE THE HONOURABLE MADAM JUSTICE SMITH ) Friday, June 15 2012

ON THE APPLICATION of the Plaintiffs, Lee Carter, Hollis Johnson, Dr. William Shoichet, the British Columbia Civil Liberties Association, and Gloria Taylor, dated September 1, 2011, coming on for hearing at 800 Smithe Street, Vancouver, British Columbia on November 14-18, 21-25, 28, December 1-2, 5-9, 12-14, 16, 2011, and April 16, 2012, and on hearing Joseph J.M. Arvay, Q.C., Sheila M. Tucker, Alison M. Latimer, and Grace M. Pastine for the Plaintiffs; Donnaree Nygard, Keith Reimer, Toireasa Jespersen, Melissa Nicolls, Megan Volk, and BJ Wray for the Defendant, Attorney General of Canada; George H. Copley, Q.C. and Craig E. Jones, Q.C. for the Attorney General of British Columbia, party pursuant to the *Constitutional Question Act;* Jason Gratl and Marius Adomnica for the Intervenor, Farewell Foundation for the

Right to Die; Hugh R. Scher, Joel V. Payne, and John A. Campion for the Intervenor, Euthanasia Prevention Coalition; Gerald Chipeur, Q.C., Bradley Miller, and Michael Morawksi for the Intervenor, Christian Legal Fellowship; Tim Dickson and Brent L. Rentiers for the Intervenor, Canadian Unitarian Counsel; and Angus M. Gunn Jr. and Sarah F. Hudson for the Intervenor, Ad Hoc Coalition of People with Disabilities Who are Supportive of Physician-Assisted Dying;

**AND JUDGMENT** being reserved to June 15, 2012;

**THIS COURT ORDERS** that:

1. Sections 14, 21, 22, 222, and 241 of the *Criminal Code* [the "impugned provisions"] unjustifiably infringe s. 15 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the *"Charter"*], and are of no force and effect to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult patient who: (a) is free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) is materially physically disabled or is soon to become so, has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.

2. The impugned provisions unjustifiably infringe s. 7 of the *Charter*, and are of no force and effect to the extent that they prohibit physician-assisted suicide or consensual physician-assisted death by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult person who: (a) is free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.

3. The effect of the declarations in paragraphs 1 and 2 is suspended for one year.

4. The Plaintiff, Gloria Taylor, is granted a constitutional exemption to obtain physician-assisted death during the period of suspension of the declarations upon meeting the following conditions and in accordance with the process set out in paragraph 5:

   (a) Ms. Taylor provides a written request.

   (b) Ms. Taylor's attending physician attests that Ms. Taylor is terminally ill and near death, and there is no hope of her recovering.

   (c) Ms. Taylor's attending physician attests that Ms. Taylor has been:

      i. informed of her medical diagnosis and prognosis;

      ii. informed of the feasible alternative treatments, including palliative care options;

      iii. informed of the risks associated with physician-assisted dying and the probable result of the medication proposed for use in her physician-assisted death;

      iv. referred to a physician with palliative care expertise for a palliative care consultation; and

      v. advised that she has a continuing right to change her mind about terminating her life.

   (d) Ms. Taylor's attending physician and a consulting psychiatrist each attest that Ms. Taylor is competent and that her request for physician-assisted death is voluntary and non-ambivalent. If a physician or consulting psychiatrist has declined to make that attestation, that fact will be made known to subsequent physicians or consulting psychiatrists and to the Court.

   (e) Ms. Taylor's attending physician attests to the kind and amount of medication proposed for use in any physician-assisted death that may occur.

   (f) Unless Ms. Taylor has become physically incapable, the mechanism for the physician-assisted death shall be one that involves her own unassisted act and not that of any other person.

5. Once the conditions in paragraph 4 are met, Ms. Taylor may then make an application to the British Columbia Supreme Court, without notice to any other party, and upon proof to the Court's satisfaction that the conditions in paragraph 4 are met, the Court shall order that:

   (a) a physician may legally provide Ms. Taylor with a physician-assisted death at the time of her choosing provided that Ms. Taylor is, at the material time:

(i) suffering from enduring and serious physical or psychological distress that is intolerable to her and that cannot be alleviated by any medical or other treatment acceptable to her; and

(ii) competent, and voluntarily seeking a physician-assisted death, in the opinion of the assisting physician and a consulting psychiatrist.

(b) notwithstanding any other provision of law, should Ms. Taylor seek and obtain a physician-assisted death, the assisting physician is authorized to complete her death certificate indicating death from her underlying illness as cause of death.

6. The parties may speak to the form of the Order and may make submissions as to costs.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of SHEILA M. TUCKER
☒ lawyer for the Plaintiffs, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor

Signature of MELISSA NICOLLS
☒ lawyer for the Defendant, Attorney General of Canada

Signature of
☒ lawyer for the Attorney General of British Columbia, Party pursuant to the *Constitutional Question Act*

By the Court

Registrar