SCC COURT FILE NO. 35591

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

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

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– and –

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RESPONDENTS

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PARTS I AND II – OVERVIEW AND POSITION

1. This appeal offers an opportunity for this Honourable Court to revisit its earlier decision in *Rodriguez*,[1] which upheld the constitutional validity of the *Criminal Code* prohibition against assisted suicide.

2. No-one doubts the power of the Supreme Court of Canada to reconsider its own precedents. In so doing, "the Supreme Court engages in a balancing exercise between the two important values of correctness and certainty"[2] and may depart from its previous decision if it is "satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled."[3]

3. But there is no similar power for a lower court to reconsider and overrule a decision of the Supreme Court of Canada. It is "fundamental to the due administration of justice" that Supreme Court decisions be "scrupulously respected by all courts upon which they are binding."[4] Nothing in the *Charter* purports to overturn this fundamental principle or to confine its application to non-constitutional cases.

4. Lower courts must faithfully apply this Court's binding *Charter* precedents, even where the lower court would have come to a different conclusion had the issue not been determined by precedent, and even where the lower court believes that the precedent is

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[1] ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 SCR 519 [***Rodriguez***].

[2] ***Canada v. Craig***, [2012] 2 SCR 489 at para. 27 [***Craig***]; ***Canada (Attorney General) v. Bedford***, [2013] 3 SCR 1101 at para. 47 [***Bedford***].

[3] ***Craig*** at para. 25. In ***Sriskandarajah v. United States of America***, [2012] 3 SCR 609 at para. 19 [***Sriskandarajah***], this Court held that "compelling reasons will be found when a precedent has become unworkable, when its validity has been undermined by subsequent jurisprudence or when it has been decided on the basis of considerations that are no longer relevant."

[4] ***Woods Manufacturing Co. v. The King***, [1951] SCR 504 at 515; ***Housen v. Nikolaisen***, [2002] 2 SCR 235 at para. 9 [***Housen***].

ripe for overturning.[5] It follows that, whether or not this Court now departs from its own prior decision in *Rodriguez*, the British Columbia courts had no power to do so. None of the factual or legal bases advanced by the trial judge justified the decision not to follow *Rodriguez*. The British Columbia Court of Appeal was correct to allow the appeal of the trial judge's decision on this basis.

5. The Attorney General of Ontario ["Ontario"] takes no position on whether this Court should overturn *Rodriguez* or whether s. 241 of the *Criminal Code* is constitutionally valid. Nonetheless, Ontario respectfully submits that this Court should make it clear that it is for the Supreme Court – and for this Court alone – to depart from its own *Charter* precedents.

PART III – ARGUMENT

1) VERTICAL *STARE DECISIS* IS FUNDAMENTAL TO CANADA'S SYSTEM OF JUSTICE

6. The vertical doctrine of precedent (or vertical *stare decisis*) requires that courts are bound by and must follow decisions from courts above them in the appellate court hierarchy, even where the lower court believes that the decision was wrongly decided.[6]

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[5] Compare ***Craig*** at paras. 18-22.

[6] ***Canada (Commissioner of Competition) v Superior Propane Inc.***, 2003 FCA 53 at para. 54 per Rothstein J.A. (as he then was): "The principle of *stare decisis* is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher coordinate court. They cannot refuse to follow it."; ***R. v. Arcand*** (2010), 40 Alta L.R. (5th) 199 at para. 184 (CA): "A trial court (and intermediate appeal courts) must follow precedents of appellate courts which hear appeals (directly or indirectly) from those courts. Appellate decisions bind even if the lower court thinks that the higher court's precedent is clearly wrong or that the higher court's decision is wider than its rationale requires. Court of appeal decisions also bind trial judges even if the trial judges think that the court of appeal decisions were based on some reasoning or precedent now shaken or even gone, or that the general trend of higher courts' views is now contrary."; ***R. v. Vu***, 2004 BCCA 230 at para. 27: "In a nutshell, the rule of *stare decisis* is based on hierarchy. Lower courts are bound to follow decisions rendered by the courts that have the power to reverse them." See also Halsbury's Laws of Canada, 1st Ed., Civil Procedure (2012 Reissue) (Markham: LexisNexis) at 272; Debra Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man.L.J. 135 at 138 [Parkes, "Precedent Unbound"].

Vertical *stare decisis* requires all provincial courts, superior courts, federal courts and federal and provincial appellate courts to follow precedents of the Supreme Court of Canada.[7]

7. Vertical precedent is a fundamental doctrine of the Canadian legal system, one that underpins the authority of appeals and the judicial hierarchy of appellate courts. Vertical precedent is part of the "internal architecture" or "basic constitutional structure" of the Constitution of Canada,[8] because it is concerned with the relationship between and the roles played by the different levels of court recognized under the Constitution. Vertical *stare decisis* is reflected, albeit implicitly, in the provision in s. 101 of the *Constitution Act, 1867* for "a General Court of Appeal for Canada", the reference in the preamble of the *Constitution Act, 1867* to "a Constitution similar in Principle to that of the United Kingdom," and the preamble of the *Charter*, which acknowledges that Canada is founded upon principles that recognize "the rule of law."[9]

8. This Court has recently held that the abolition of appeals to the Judicial Committee of the Privy Council had "a profound effect on the constitutional architecture of Canada."[10] The Privy Council had previously "exercised ultimate judicial authority

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[7] By contrast, "[t]he vertical convention of precedent is not at issue with respect to the decision as to whether the Supreme Court should overrule one of its own precedents:" ***Craig*** at para. 27. Instead, this question engages the *horizontal* convention of precedent: ***Bedford*** at para. 39.
[8] ***Reference re Senate Reform***, 2014 SCC 32 at para. 26: "The notion of architecture expresses the principle that "[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole" [citation omitted]…In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text." These comments, made in relation to the Constitution's provisions concerning the Senate, apply equally to the Constitution's provisions concerning the courts.
[9] Even before the *Charter*, the Supreme Court of Canada held that the rule of law is a "fundamental postulate of our constitutional structure:" ***Roncarelli v. Duplessis***, [1959] SCR 121 at 142.
[10] ***Reference re Supreme Court Act, ss. 5 and 6***, 2014 SCC 21 at para. 82 [***Reference re Supreme Court Act***].

over all legal disputes in Canada, including those arising from Canada's Constitution."[11] As such, the Privy Council's decisions (including its constitutional decisions) were binding on all Canadian courts, including the Supreme Court of Canada.[12]

9. With the abolition of appeals to the Privy Council, the Supreme Court of Canada assumed the powers and jurisdiction "no less in scope than those formerly exercised in relation to Canada by the Judicial Committee."[13] It gained all those powers necessary "to discharge its role at the apex of the Canadian judicial system"[14] and to exercise a "unifying jurisdiction over the provincial courts."[15] These powers of an apex court necessarily include the power to bind all other courts in Canada: without this power, this Court could not truly be said to be "the final word on matters of public law and provincial civil law"[16] or the keystone of "a unified and coherent Canadian legal system."[17]

10. Vertical *stare decisis* is therefore an implicit but integral component of the Supreme Court's constitutional role. All other Canadian courts must ultimately follow decisions of the Supreme Court for it to serve its constitutional role as the "General Court of Appeal for Canada". Section 101 of the *Constitution Act, 1867* compels lower court

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[11] ***Ibid.***

[12] P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., vol. 1. (Toronto: Carswell, 2007) (updated 2013, release 1) at 8-22. See e.g. ***Stuart v. Bank of Montreal***, [1909] 41 SCR 516 at 548 per Anglin J.: "Of course, if the Privy Council should determine that the law is not what this court has declared it to be, the view of this court must be deemed to be overruled. A decision of the House of Lords should, likewise, be respected and followed though inconsistent with a previous judgment of this court"; ***Reference in re Railway Act, s. 189***, [1926] SCR 163 at 168: "the section now in question was…the subject of conclusive determination by decision of the Judicial Committee of the Privy Council which is directly binding upon this court." See also ***Robins v. National Trust Co.***, [1927] AC 515 at 517-519 (JCPC), holding that "Their Lordships wish it to be clearly understood that the rule of conduct [announced in the judgment] is a rule of conduct for the Empire, and will be applied to all the various judicatures whose final tribunal is this Board," and noting further that "the House of Lords [is] the supreme tribunal to settle English law, and that being settled, the Colonial Court which is bound by English law is bound to follow it."; ***Re Canada Temperance Act (The)***, [1939] OR 570 (CA) at 581, aff'd [1946] 2 DLR 1 (JCPC).

[13] ***Reference re Supreme Court Act*** at para. 83; ***Reference re The Farm Products Marketing Act***, [1957] SCR 198 at 212.

[14] ***Reference re Supreme Court Act*** at para. 84; ***R. v. Gardiner***, [1982] 2 SCR 368 at 404.

[15] ***Reference re Supreme Court Act*** at para. 84; ***Hunt v. T&N plc***, [1993] 4 SCR 289 at 318.

[16] ***Reference re Supreme Court Act*** at para. 85 (emphasis added).

[17] ***Ibid.***

adherence to Supreme Court precedents in order to achieve the unified national court system envisaged by the Constitution.

11. The Supreme Court occupies a double position in our judicial system. As the chronologically last court to review a particular case, looking backwards at the record and court decisions that preceded its final resolution of a specific dispute, its role is essentially retrospective. But as the national arbiter of legal questions of public importance, developing Canadian jurisprudence by setting out standards and tests to be applied by the country's courts, its role is essentially prospective. As the Court's mandate has become "oriented less to error correction and more to development of the jurisprudence"[18] in recent decades, this prospective "recognized law-making role"[19] has come to the fore. The Supreme Court "make[s] law for future cases as well as the case under review."[20] As a result, this Court's decisions are binding on lower courts not just in their dispositive *ratio decidendi* but also in respect of "a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative."[21]

2) VERTICAL *STARE DECISIS* APPLIES NO LESS IN CONSTITUTIONAL CASES

12. The need for a single, authoritative decision-maker is even more pressing in matters of constitutional law, including the interpretation of *Charter* rights and determinations as to the validity of legislation. This Court has held that "an impartial and <u>authoritative</u> judicial arbiter is a necessary corollary of the enactment of the supremacy clause" in s. 52(1) of the *Constitution Act, 1982*.[22] As matters of "central importance to

[18] ***R. v. Henry***, [2005] 3 SCR 609 at para. 53 [***Henry***].
[19] ***Housen*** at para. 9.
[20] Kerans, Hon. Roger P., *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at 5, quoted with approval in ***Housen*** at para. 9.
[21] ***Henry*** at para. 57; see also para. 53.
[22] ***Ibid*.** at para. 89 (emphasis added).

the legal system as a whole," constitutional questions "require uniform and consistent answers"[23] in order to "safeguard a basic consistency in the fundamental legal order of our country."[24] Vertical precedent plays a critical role in ensuring this basic consistency in Canada's constitutional law. As the Court noted in *Henry*,

> …much of the Court's work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. In those circumstances, the Court nevertheless intended that effect be given to the broader analysis. 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.[25]

13. Accordingly, when this Court has "exercise[ed] its power as the ultimate interpreter of constitutional and public law" by deciding a constitutional case, an "interpretation contrary to the one adopted by the Court in that case would have no legal basis in light of the case's status as a precedent."[26]

14. This Court has held that *stare decisis* "promotes predictability, reduces arbitrariness, and enhances fairness, by treating like cases alike."[27] These values are not contrary to but rather wholly consonant with the *Charter* and with the constitutional principle of the rule of law.

15. *Stare decisis* is essential to the rule of law because of the role it plays in ensuring that the law is known and knowable. The measure of certainty afforded by vertical precedent allows people and their governments to know the law, so that they can conduct

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[23] ***Dunsmuir v. New Brunswick***, [2008] 1 SCR 190 at para. 60.

[24] ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***, [2011] 3 SCR 471 at para. 22; ***McLean v. British Columbia (Securities Commission)***, [2013] 3 SCR 895 at para. 27.

[25] ***Henry*** at para. 53.

[26] ***Canada (Attorney General) v. Confédération des syndicats nationaux***, 2014 SCC 49 at para. 23.

[27] ***Sriskandarajah*** at para. 18. See also ***David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.***, [2005] O.J. No. 2436 at paras. 119-120 (CA), leave to appeal ref'd [2005] S.C.C.A. No. 388 [***David Polowin***]; ***Bedford v. Canada***, 2012 ONCA 186 at para. 56, varied [2013] 3 SCR 1101; Gerald Gall, *The Canadian Legal System*, 5th ed. (Toronto: Thomson Carswell) at 450.

themselves in accordance with law and can avoid costly litigation.[28] This is particularly important in constitutional law, where the individual may be in conflict with the state.[29]

16. The US Supreme Court noted in *Planned Parenthood v. Casey* that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[30] Similarly, this Court held in *Woods* that:

> 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.[31]

17. Vertical precedent further promotes the rule of law by promoting access to justice, "the greatest challenge to the rule of law in Canada today."[32] As this Court has recently held, "[j]udicial resources must be husbanded to ensure that the courts function properly and that litigants have access to a justice system that meets the highest possible standards."[33] By foreclosing claims where "an authoritative decision has already

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[28] ***Bedford*** at para. 38: "Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies."

[29] ***R. v. Caron***, 2014 ABCA 71 at para. 91 per Slatter JA concurring; ***Bedford v. Canada***, 2012 ONCA 186 at paras. 83-84, aff'd on this point [2013] 3 SCR 1101 at para. 46.

[30] ***Planned Parenthood of Southeastern Pennsylvania v. Casey***, 505 U.S. 833 (1992) at 854 per O'Connor, Kennedy and Souter JJ. See also Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1964) at 149: "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

[31] ***Woods Manufacturing Co. v. The King***, [1951] SCR 504 at 515, cited with approval in *Housen* at para. 9. See also ***Nechi Investments Inc. c. Autorité des marchés financiers***, 2011 QCCA 214 at para. 22: " Source de stabilité et de structure pour le système juridique, l'autorité du précédent est l'un des fondements de la primauté du droit. Ce principe qui assure au justiciable non seulement une prévisibilité relative par rapport à la prise de décision judiciaire, mais également une protection contre l'arbitraire dans l'exercice de ce pouvoir."; ***R. v. Hummel***, [1987] O.J. No. 763 at paras. 7 and 11 (HC): "To permit individual judges to make separate rulings … without regard to rulings of higher courts would result in palm-tree justice and would displace the rule of law."; ***R. v. Rybansky*** (1982), 36 O.R. (2d) 22 at 25-26 (HC): "The rule of law is not only for citizens; it is for judges as well. It is our obligation to obey the law, not to foment judicial anarchy. The principles of *stare decisis* require us to follow the judgment of superior courts."

[32] ***Hryniak v. Mauldin***, 2014 SCC 7 at para. 1.

[33] ***Canada (Attorney General) v. Confédération des syndicats nationaux***, 2014 SCC 49 at para. 1.

resolved the issue or issues raised,"[34] vertical *stare decisis* allows scarce judicial resources to be conserved for legal matters that have not been settled by precedent, and allows parties to come to settlements and to avoid relitigating settled issues.

18. Vertical precedent also supports equality before the law, which is an elemental aspect of justice. As the Alberta Court of Appeal has put it, "[u]nprincipled differing results in similar cases are unjust."[35] Parties expect that the same questions will be decided the same way between one set of litigants and another set of litigants. Consistency in decision-making and adherence to precedent supports the values of equality, fairness and justice, as it gives the community faith in the even-handed administration of justice in the courts, and confidence that their legal claims will be treated in the same way as those of their neighbours.[36]

19. In *Bedford*, this Court quoted (without expressly approving) the argument of the David Asper Centre that "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional."[37] But vertical precedent is more than just a common law rule, like the rule against perpetuities or the *res gestae* exception to hearsay. If vertical *stare decisis* were a mere common law principle, it could be amended or repealed by ordinary legislation. It seems impossible that Parliament today could validly provide by statute that Supreme Court decisions were no longer binding on lower courts, or that the Supreme Court was now bound by the judgments of lower courts: any such statutory amendment would surely be precluded by

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[34] ***Ibid.*** at paras. 22-23.
[35] ***R. v. Arcand*** (2010), 40 Alta L.R. (5th) 199 at para. 183 (CA).
[36] ***Sriskandarajah*** at para. 18; ***Housen*** at para. 9: "[T]he principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations."
[37] ***Bedford*** at para. 43.

the "constitutional protection of the essential features of the Supreme Court."[38] If the binding force of Supreme Court precedents on lower courts could not be removed by statute, it must be because vertical *stare decisis* is itself a fundamental organizing principle of Canada's court system and central to our notion of the rule of law. Vertical precedent is not "subordinate to the Constitution" but rather an integral part of it.

20. Equally, it goes too far to say that vertical precedent "cannot require a court to uphold a law which is unconstitutional."[39] The reality is that lower courts are frequently required to put aside their own views as to whether a law is constitutional or unconstitutional and to apply the binding precedents of higher courts.[40] This is not an unwelcome or surprising feature of vertical precedent, but the ordinary and expected outcome of its operation.

21. Nothing in s. 52(1) of the *Constitution Act, 1982* alters the basic hierarchical relationship among Canada's courts.[41] That section states that the Constitution is the supreme law of Canada, but says nothing about which level of court ought to be accepted as the ultimate and authoritative arbiter of what the Constitution requires. Rather than

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[38] ***Reference re Supreme Court Act*** at para. 90.

[39] ***Ibid.***

[40] See e.g. ***Canada (Attorney General) v. Confédération des syndicats nationaux***, 2014 SCC 49 at para. 23; ***R. v. Caine***, [1998] BCJ No. 885 at para. 99 (Prov. Ct.), aff'd [2000] BCJ No. 1095 (CA), aff'd [2003] 3 SCR 571: "In my view, whatever thoughts I had on the above position of the applicant "went up in smoke", so to speak, with the arrival of the February 1998 decision of our Supreme Court in *Melmo-Levine*."; ***Unishare Investments Ltd. v. R.***, [1994] O.J. No. 1079 at paras. 32-36 (Gen. Div.), aff'd [1997] O.J. No. 4009 (C.A.): "Accordingly, in my view, it is not open to me to be persuaded by *Soldal* [*Soldal v. Cook County*, 113 S. Ct. 538 (1992)] because I am bound by the clear decisions of the Supreme Court of Canada."; ***Cosyns v. Canada (Attorney General)***, [1992] O.J. No. 91 at para. 17 (Gen. Div.): "Until the Supreme Court of Canada makes a decision that changes the law, the Divisional Court is bound by the Ontario Court of Appeal decisions and accordingly the plaintiff cannot succeed under [*Charter*] s. 7."; ***Tanudjaja v. Canada (Attorney General)***, [2013] O.J. No. 4078 at paras. 58-59 (SCJ): "Our appreciation of [the *Charter*'s] breadth and its limits will continue to evolve. This is no less the case for s. 7 than any of its provisions. It is not for a lower court to step outside the direction past cases provide."; ***Alberta Provincial Judges' Association v. Alberta***, 2004 ABQB 611 at paras. 113-117.

[41] ***Mills v. The Queen***, [1986] 1 SCR 863 at 953: "the *Charter* was not intended to turn the Canadian legal system upside down." See also ***Re Manitoba Language Rights***, [1985] 1 SCR 721 at para 52: "Section 52 of the *Constitution Act, 1982* does not alter the principles which have provided the foundation for judicial review over the years."

requiring each individual judge to consider the demands of the Constitution in isolation from all authority, s. 52(1) addresses its message of constitutional supremacy to the judiciary as a whole:

> [E]very judge, trial and appellate, is a member of a community of judges – the predecessors and successors of the current judges, as well as the current judges themselves. Judicial decision making is collective in a profound sense, and the importance of institutional values in such a setting should be self-evident.[42]

3) HORIZONTAL *STARE DECISIS* ALLOWS THE LAW TO ADAPT

22. Of course, predictability and consistency are not the only important legal values. They must be balanced against countervailing values, such as flexibility, correctness in decision-making, and responsiveness to meet changing circumstances and social values.[43] No-one doubts the importance of ensuring that legal rules correspond to contemporary social realities.[44] Even in the eighteenth century, Lord Mansfield CJ held that "as the usages of society alter, the law must adapt itself to the various situations of mankind."[45]

23. But even if the doctrine of precedent must bend to changing social circumstances, it does not follow that it is *vertical* doctrine, rather than the *horizontal* one, that must give way. The need to ensure that the law does not fall behind present-day realities tells us nothing about which level of court ought to discharge that responsibility. Constitutional decisions of this Court are not immutable,[46] and may in appropriate cases be revisited and overturned by this Court.[47] If the law can be adapted to social change by this Court

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[42] Richard A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge: Harvard UP, 1985) at 258, quoted in Evan H. Caminker, "Why must inferior courts obey superior court precedents?" (1993-1994) 46 Stan. L. Rev. 817 at 858.

[43] ***Henry*** at paras. 44-45; ***Bedford*** at para. 47; ***Craig*** at paras. 25-27. See also Parkes, "Precedent Unbound" at 137.

[44] ***R. v. Salituro***, [1991] 3 SCR 654 at 670: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared."

[45] ***Barwell v. Brooks***, (1784) 3 Doug. 371 at 373, 99 ER 702 at 703 (KB).

[46] ***Clark v. Canadian National Railway Co.***, [1988] 2 SCR 680 at 704.

[47] See e.g. ***Henry*** at para. 44.

revisiting its own prior decisions, that undermines the argument that departure from vertical precedent is necessary in order to keep the law from becoming outdated.[48]

24. The flexibility inherent in horizontal *stare decisis* substantially attenuates any concern about perpetuating an outdated precedent or effecting an unjust outcome for an individual litigant. The precedent may be overruled and corrected through appeal to the higher court that set the precedent where there are compelling reasons to do so, as when "its validity has been undermined by subsequent jurisprudence or when it has been decided on the basis of considerations that are no longer relevant."[49]

25. Even when a lower court is required to follow a precedent that it believes may no longer be well-founded, it can still play an important role in the development of the law by writing a "critical concurrence"[50]: that is, a judgment which follows precedent while simultaneously criticizing it in a manner that may well influence the higher court to overturn its own precedent. This was the approach endorsed by this Court in *Craig*,[51] in effect rejecting "anticipatory overruling" whereby a lower court declines to follow a binding precedent because of the lower court's prediction that the higher court will eventually reverse the precedent itself.[52]

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[48] ***Air Canada Pilots Association v. Kelly***, 2012 FCA 209 at para. 46, leave to appeal ref'd [2012] S.C.C.A. No. 395 [***Kelly***]: "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."

[49] ***Sriskandarajah*** at para. 19.

[50] Evan H. Caminker, "Why must inferior courts obey superior court precedents?" (1993-1994) 46 Stan. L. Rev. 817 at 863. Prof. Caminker writes that "By issuing a critical concurrence, the inferior court can encourage reconsideration without threatening the values served by adherence to hierarchical precedent."

[51] ***Craig*** at para. 21: "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."

[52]Compare ***Rodriguez de Quijas v. Shearson/American Express, Inc.***, 490 U.S. 477 (1989) at 484: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." See also ***Kelly*** at para. 48; ***Saskatchewan v. Saskatchewan Federation of Labour et al.***, 2013 SKCA 43 at paras. 48-50; ***Wakeford v. Canada***

26. An appeal to that higher court will allow a reconsideration of the precedent under the more flexible rules of horizontal *stare decisis*, informed by the record and by the reasons of the court below. The approach endorsed by this Court in *Craig* allows precedents to be carefully reviewed and overturned by this Court when appropriate, without diminishing the benefits that inhere in vertical precedent.

27. Such an approach does not reduce lower courts to "acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis."[53] Lower courts should not act as scribes but rather as *judges*: individual members of a hierarchical judicial system whose task is not merely to do justice according to their own lights but rather to do justice according to law, including the law as pronounced by the Supreme Court. A lower court cannot properly conduct its legal analysis and "perform its full role"[54] without applying the binding precedents of higher courts.

28. In any event, adherence to vertical precedent very likely prevents more bad decisions than it perpetuates. As Lord Carnwath JSC has commented, *stare decisis* assists judges in making sound decisions: "The existence of a precedent may prevent a judge from making a mistake which he might have made if he had had been left on his own without any guidance."[55]

29. While a litigant may have to wait until the issue reaches the higher court before the precedent can truly be reassessed on its merits, this is not an undue burden given the far-ranging consequences of overturning a higher court precedent – consequences that

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(Attorney General), [2001] OJ No. 390 at paras. 14-15 (SCJ), aff'd (2001), 156 O.A.C. 385 (CA), leave to appeal ref'd [2002] S.C.C.A. No. 72.

[53] ***Bedford*** at para. 43, quoting the factum of the David Asper Centre.

[54] ***Ibid.*** at para. 44.

[55] Lord Carnwath of Notting Hill JSC, "Judicial Precedent – Taming the Common Law", NMLR Annual Lecture Series, 7 June, 2012 at para. 42, online at http://www.supremecourt.uk/docs/speech_120607.pdf.

will be felt not merely by the parties to the litigation but to everyone subject to the higher court's jurisdiction. In any event, such delays may be inevitable, since cases in which lower courts have departed from vertical precedent have not tended to avoid appeals to higher courts or to result in hastened remedies for the successful parties. *Bedford* offers one such example: regardless of what the lower courts held, the case and its reconsideration of the *Prostitution Reference* was ultimately determined by the Supreme Court, and all of the remedies granted by the lower courts were stayed pending this Court's decision.[56]

4) LOWER COURTS MUST NOT TAKE A NARROW APPROACH TO DECIDING "WHAT DID THE CASE DECIDE?"

30. Vertical precedent is a fundamental principle of the Canadian legal system and of the rule of law in Canada. It follows that lower courts must not take a narrow or technical approach in determining the extent to which they are bound by Supreme Court authority.

31. *Henry* instructs lower courts to ask the question "what did the case decide?" in determining the extent to which they are bound by a Supreme Court precedent. The legal point decided by this Court, and therefore intended to be binding on other courts, "may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test."[57] *Henry* adopts a purposive, contextual formulation of vertical precedent that is sensitive to the difference between appeals that seek merely to correct errors in the courts below and appeals that articulate or develop legal principles intended to apply more generally. As the Court of Appeal for Ontario has noted, "the vast majority of Supreme Court of

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[56] See ***Bedford v. Canada (Attorney General)***, 2010 ONCA 814 (staying the trial judge's remedial orders); [2012] S.C.C.A. No. 159 (staying the Court of Appeal's judgment).
[57] ***Henry*** at para 57.

Canada decisions…decide broader legal propositions and, in the course of doing so, set out legal analyses that have application beyond the facts of the particular case."[58]

32. Lower courts must not frustrate this Court's law-making role by narrowly construing the answer to the question "what did the Supreme Court decide?" in order to avoid being bound by the precedent. Rather, lower courts must make a full and substantive assessment of what the precedent decided, bearing in mind the importance of vertical *stare decisis* and of this Court's role as the authoritative constitutional arbiter.

33. This substantive approach to vertical precedent is reflected in *Bedford*. In that case, this Court noted that lower courts "can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue."[59] Plainly, the fact that a higher court upholds a law against a challenge based on one section of the *Charter* does not necessarily preclude lower courts from considering and deciding a challenge based on a different section of the *Charter*. For example, the British Columbia courts were free to consider and decide the *Charter* s. 15 discrimination challenge in *Andrews*, notwithstanding that this Court had upheld a similar law against a *Charter* s. 6 mobility rights challenge in *Skapinker*.[60] This result is not an attenuation of vertical precedent, but rather a sound distinction based on a genuinely "new legal issue".

34. *Bedford* also held that higher court precedents "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a

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[58] ***R. v. Prokofiew***, 2010 ONCA 423 at para. 19, aff'd [2012] 2 SCR 639.
[59] ***Bedford*** at para. 42.
[60] ***Andrews v. Law Society of British Columbia***, [1985] BCJ No. 2983at para. 3 (BCSC), rev'd (1986), 2 BCLR 305 (CA), appeal dismissed [1989] 1 SCR 143: "The present claim has apparent similarities to that advanced in *Skapinker v. Law Soc. of Upper Can.* [[1984] 1 SCR 357]. But the challenge made in *Skapinker* – an unsuccessful attack on a citizenship requirement contained in the equivalent Ontario statute – was based on the guarantee of "mobility rights" under s. 6(2)(b) of the *Charter*. Section 15 was not then in force."

change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[61] But it is clear that this threshold cannot be "an easy one to reach."[62] Changes in legal principles or evidence that might constitute "compelling reasons"[63] for this Court to decline to follow its precedents cannot be sufficient for a lower court to do so: otherwise, there would be no difference at all between horizontal and vertical precedent.[64] Such a result would be incompatible with the role of this Court in our judicial system.

35. The trial judge in *Bedford* gave several reasons why she felt that she was not bound by this Court's *Charter* s. 1 analysis in the *Prostitution Reference*, including "the breadth of evidence that has been gathered over the course of the intervening 20 years," the possibility that "the social, political and economic assumptions underlying the *Prostitution Reference* are no longer valid today," the fact that "several western democracies have made legal reforms decriminalizing prostitution to varying degrees," her finding that "the type of expression at issue in this case is different from that considered in the *Prostitution Reference*," and the fact that the record contained "a substantial amount of research that was not before the Supreme Court in 1990."[65] But this Court rejected all of these reasons, and held that the trial judge was bound by this Court's s. 1 analysis in the *Prostitution Reference*:

> [T]he question of whether the communication provision is a justified limit on freedom of expression…was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue,

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[61] ***Bedford*** at para. 42.
[62] ***Ibid.*** at para. 44.
[63] ***Sriskandarajah*** at para. 19.
[64] ***Kelly*** at para. 46; ***Bedford v. Canada***, 2012 ONCA 186 at para. 81, aff'd on this point [2013] 3 SCR 1101 at paras. 46-47: "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."
[65] ***Bedford v. Canada***, 2010 ONSC 4264 at para. 83, rev'd in part 2012 ONCA 186, varied [2013] 3 SCR 1101.

> nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate. [66]

36. It follows from *Bedford* that, even in relation to s. 1 of the *Charter*, the binding force of a Supreme Court precedent on lower courts is not attenuated by the mere passage of time, or by the introduction of new or evolving evidence, or by law reform activities in other jurisdictions, or by different characterizations of essentially the same legal issues, or even by all of these factors taken together. Supreme Court decisions are inevitably rooted in the particularity of the case before them and the legal and factual context in which they were decided.[67] But it is an error for lower courts to focus too closely on this particularity, and thereby to distinguish Supreme Court decisions as essentially historical documents of limited application outside of the specific evidence and arguments raised before that Court. Lower courts that do so ignore the intended generality and prospectivity of Supreme Court decisions and diminish the "recognized law-making role"[68] of the Court.

5) THE BRITISH COLUMBIA COURTS WERE BOUND TO FOLLOW *RODRIGUEZ*

37. Ontario submits that, applying the foregoing principles, the British Columbia courts were bound to follow *Rodriguez*. The trial judge failed to give due effect to vertical precedent when she invalidated a statutory provision that this Court had previously upheld against a challenge brought by a plaintiff in indistinguishable

[66] ***Bedford*** at para. 46.
[67] ***Bedford*** at para. 46. See also ***Kelly*** at para. 47: "The fact that there are differences in the evidentiary records in this case and in [the prior Supreme Court case] cannot justify departing from established jurisprudence. If it did, every case would be binding only on the parties to that case since, with rare exceptions, no two cases are decided on the same evidentiary record. Such a result, particularly in *Charter* litigation, is at odds with the values of certainty and finality which underlie the doctrine of *stare decisis*."
[68] ***Housen*** at para. 9; ***Henry*** at para. 53.

circumstances[69] and based on the same provisions of the *Charter*. The British Columbia Court of Appeal was correct to hold that it was "bound by *stare decisis* to conclude that the plaintiffs' case had already been determined by the Supreme Court of Canada."[70]

38. In considering the question "What did *Rodriguez* decide?", the trial judge gave a formalistic answer rather than a substantive one. While acknowledging that *Rodriguez* had decided that *Criminal Code* s. 241(b) was not arbitrary and that she was bound by that determination,[71] the trial judge held that she was not so bound with respect to the principles of overbreadth and gross disproportionality,[72] as these principles "had not yet been specifically identified as part of s. 7 analysis" at the time *Rodriguez* was decided.[73]

39. With respect, this characterization of what *Rodriguez* decided is unduly narrow, focussing more on the choice of words used to label the principles of fundamental justice rather than on the substantive reasoning employed by the Supreme Court in reaching its conclusion. It is true that the majority in *Rodriguez* did not expressly state that s. 241(b) was consistent with the principles of fundamental justice that laws must not be overbroad or grossly disproportionate. Instead, Sopinka J. articulated and rejected the challenger's s. 7 argument in the following terms:

> The complaint is that the legislation is <u>over-inclusive</u> 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 <u>arbitrary and unfair</u> 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,

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[69] **Reasons of Smith J.** at para. 941 [Joint Record, Vol. 2, p. AR 67]: "The adjudicative facts in this case, however, do not distinguish it in any meaningful way from *Rodriguez*."
[70] **Reasons of Newbury and Saunders JJA** at para. 316 [Joint Record, Vol. 3, p. AR 137].
[71] **Reasons of Smith J.** at paras. 1331 [Joint Record, Vol. 2, p. AR 172].
[72] ***Ibid*.** at paras. 982-985 [Joint Record, Vol. 2, p. AR 78].
[73] ***Ibid*.** at para. 1338 [Joint Record, Vol. 2, p. AR 174]; see also paras. 13 and 1002 [Joint Record, Vol. 1, p. AR 10 and Vol. 2, pp. AR 83-84].

> the existence of a criminal prohibition on assisting suicide for one in the appellant's situation is contrary to principles of fundamental justice.[74]

40. The import of this passage is unambiguous. *Rodriguez* rejected the argument that *Charter* s. 7 was infringed because the blanket prohibition on assisted suicide unfairly caught individuals who were legally permitted to take their own lives but factually unable to do so without calling on the assistance of others. Whether this claim is phrased in the language of arbitrariness (the law includes people like the appellant for no reason), or rephrased in the language of overbreadth (the law goes too far by including people like the appellant) or gross disproportionality (the cost of including people like the appellant is too extreme when balanced against the purpose for so including them), the essential and substantive content is the same.[75] What *Rodriguez* decided was that this argument was insufficient to demonstrate a breach of fundamental justice.

41. The Court's analysis under *Charter* s. 1 must also be taken into account determining what the Court decided in *Rodriguez*. Sopinka J. held that the fact that there was "no halfway measure that could be relied upon with assurance to fully achieve the legislation's purpose" was the "answer to the submission that the impugned legislation is overbroad."[76] He further held that "the final aspect of the [*Oakes*] proportionality test, balance between the restriction and the government objective, is also met."[77] As the BC Court of Appeal held below, "exactly the same reasons as Sopinka J. brought to bear

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[74] ***Rodriguez*** at 590 [underlining added].
[75] See **Reasons of Newbury and Saunders JJA** at paras. 289 and 313 [Joint Record, Vol. 3, pp. AR 125 and 136]: "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…[I]f 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" [citation omitted] 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*."
[76] ***Rodriguez*** at 614.
[77] ***Ibid.*** at 615.

under s. 1 could have been made under the rubrics of overbreadth and disproportionality, gross or otherwise, under s. 7."[78]

42. The binding force of a Supreme Court precedent does not depend on a narrow parsing of the exact words used, but rather on the substantive principles applied and decision reached. This is particularly so in the *Charter* context, where the formal articulation of legal tests and concepts tends to shift over time, even as the substantive content remains more or less the same.[79] The particular words and phrases used by this Court in expressing its decision may be the result of how the parties chose to frame their arguments or the legal backdrop provided by other cases decided at the time of the precedent.[80] But undue focus on this particularity of expression minimizes the rule-setting function of Supreme Court decisions and frustrates the purposes of vertical precedent. The question for lower courts is not "How did the Court express its decision?" but rather "What did the case decide?"

43. Neither could the trial judge's finding of "notable difference[s] between the records in this case and in *Rodriguez*," including new "opinion evidence from medical ethicists and practitioners" and "the experience with legal physician-assisted death in Oregon, Washington, Belgium, Luxembourg and the Netherlands,"[81] justify her departure from binding precedent. It is not surprising that, on contentious and morally-laden issues

[78] **Reasons of Newbury and Saunders JJA** at para. 322 [Joint Record, Vol. 3, p. AR 140].
[79] Compare e.g. the essentially consistent content of the test for discrimination under s. 15(1) of the *Charter* as variously articulated in cases such as ***Andrews v. Law Society of British Columbia***, [1989] 1 SCR 143, ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 SCR 497, ***R. v. Kapp***, [2008] 2 SCR 483, ***Withler v. Canada (Attorney General)***, [2011] 1 SCR 396 and ***Quebec (Attorney General) v. A***, [2013] 1 SCR 61.
[80] **Reasons of Newbury and Saunders JJA** at para. 271 [Joint Record, Vol. 3, p. AR 117]: "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." See also para. 321 [Joint Record, Vol. 3, p. AR 140].
[81] See **Reasons of Smith J.** at paras. 942-944 and 998 [Joint Record, Vol. 2, pp. AR 67-68 and AR 82].

like the one raised here, experts will continue to express sincere but divergent opinions after a Supreme Court decision, or that some jurisdictions will undertake law reform through their legislative processes. Just as in *Bedford*, while such new developments may influence this Court to revisit its earlier decision, they cannot be said to "fundamentally shift[] the parameters of the debate" in a way that would justify a lower court's failure to adhere to vertical precedent.[82]

44. The Court of Appeal concluded its judgment by holding that "[i]f 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."[83] Whatever the outcome of the appeal in this Court, Ontario submits that the Court of Appeal was correct to come to this conclusion. Whether or not this Court decides to follow *Rodriguez*, Ontario submits that this Court should make it clear that its *Charter* precedents must be given full binding authority by all other courts in Canada unless and until they are set aside by this Court.

PARTS IV AND V – COSTS AND REQUEST FOR ORAL ARGUMENT

45. Ontario does not seek costs. Ontario requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 5, 2014

S. Zachary Green
Of counsel for the intervener,
The Attorney General of Ontario

[82] ***Bedford*** at para. 46.
[83] **Reasons of Newbury and Saunders JJA** at para. 352 [Joint Record, Vol. 3, p. AR 151].

PART VI – TABLE OF AUTHORITIES

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