

## **The Role of Facts in Charter Cases**

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## I. ***Introduction: How and Why Courts Legitimate Decisions***

Some rights cases matter more than others. The Supreme Court of Canada's treatise on constitutional democracy in the *Quebec Succession Reference* is, for example, likely the most important decision in the past 30 years.<sup>i</sup> Celebrated and condemned decisions alike find their way into textbooks, future decisions, popular culture and political discourse. Some even achieve international renown - *Brown v Board of Education's* rejection of *Plessy v Ferguson's* separate but equal doctrine affords a prominent illustration.<sup>ii</sup> Major constitutional cases are mirror-like in capturing who we are, as members of a common political community, at a given moment, whether the reflection is flattering or repellant.

Many key cases are justly famous because they articulate a principle: a right to abortion, a right to not be put to death as punishment for a crime, a right to vote despite having been convicted of a crime, the lack of a right to spew hatred, a right to marry another consenting adult regardless of their gender or sexual orientation. Such cases are understandably important, and, because of their conceptual nature, subject to continual dialogue about what it means to say we are free and democratic. Interestingly, the debate over the "rights" at issue is not particularly fact-sensitive. Instead, there is a dispute over the correct concept, the right theory of rights, the proper understanding of what it means – as a matter of constitutional law – to be treated properly by the state. Certainly that is the focus of constitutional law courses in law school.

Long before the *Charter* was adopted, in the famous *Person's* case, it was held that constitutions are different than ordinary statutes: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."<sup>iii</sup> Keeping with the metaphor, what is the state of the health of the "living tree" of rights planted in Canada's constitutional soil in 1982? Obviously a tree of "rights" could be scrawny and diseased or it could be magnificent and flourishing. The former is just a tree, the latter, a tree that is just.

Describing the tree as "just" or not is, however, a normative exercise, not a neutral exercise. One person's theory of substantive justice could be another's worst-case scenario. We know that debate about substantive justice is important, and hopefully vigorous, in a democracy. Arguing in courts, the legislative arenas, school boards, on twitter and even through youtube videos does not imperil, in any respect, the rule of law; it is consistent with it.

For good or ill, in a constitutional democracy such as Canada, courtrooms are a privileged site for divisive social controversies. The Supreme Court of Canada has, as a practical matter, final say. So the judicial branch has both the burden and power to protect our rights. After 30 plus years, the *Charter* enjoys tremendous popular support throughout Canada, including in Quebec.<sup>iv</sup> The professional participants embrace their post-*Charter* roles. Litigators litigate, praise and condemn; judges decide, follow and critique; academics review, criticize, and teach. Generations of

lawyers in Canada are now fully immersed in constitutional essentials. If rights are infringed the government has to try to justify the law. Grounds that fail to persuade the Court imperil state choices. These developments are no longer controversial.

It is abundantly clear that the Charter has generated what Etienne Mureinik, writing at the change from apartheid to constitutional democracy in South Africa, called a “culture of justification.”<sup>v</sup>

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.<sup>vi</sup>

Reason-giving is, of course, *what judges do* but Mureinik was signalling much more than that. He explained that constitutional rights only fulfil their potential when they engender a cultural shift in which judges demand state action be supported by justifiable reasons. The state’s equivalent of the parent’s “because I said so” is not good enough. Courts want to know *why* someone needs to suffer in the state’s pursuit of the collective good.

But, importantly, it is not only the state that must justify itself. Reasons of the Court that fail to persuade the community on a repeated basis would jeopardize the Court as an effective social institution. The Court cannot be so far ahead of the community that it is not accepted as a fair decision maker with the interests of the community at the centre of its self-understanding and opinions. The Court comes closest to recognition of this delicate task in the momentous *Reference Re Secession of Quebec*, in its discussion of democracy:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between

the rule of law and the democratic principle. *The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.*<sup>vii</sup>

It is this treacherous terrain of the relationship between law, morality, and the community's self-understanding that novel cases must traverse. We suggest that their failure or triumph is not principally determined by the application of a settled understanding of justice; rather they succeed, when they do, because they rely on the force of factual harm to nudge the judiciary into new understandings of what justice can embrace. It is sensible to assume that the judiciary is so moved only in careful alignment with its own acute sense of its limited institutional capital. The act of justification is part of how that capital is preserved. Courts wisely decline to leap too far ahead of where the community can go: if they did, they might find that they lack the earth on which to land.<sup>viii</sup> The Court is, for example, probably well-ahead of the community in protecting unpopular communities such as sexual minorities or prisoners.<sup>ix</sup> Noteworthy, however, is that in opinions of this nature, the Court engages in dense reason-giving with explicit attention to competing political and legal theories, and draws heavily on the need to insulate discrete and unpopular minorities from ideologically-driven majoritarian laws.

The paradox of judicial review of law never goes away: no matter what choice made by the people in 1892 (and reaffirmed by non-amendment thereafter), judges having the final say only works when the people want it to work. As noted, it would appear the Canadian people do. It may be that there are few other options. Professor Habermas, in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, argues that law, and only law, has the ability to integrate the tension between the fact of law and norms in modern (secular) societies.<sup>x</sup> Professor Michelman agrees with this view, but concedes the impossibility of ever finding a perfect theoretical foundation for the judicial enforcement of constitutional rights.<sup>xi</sup> The constitutional rights project is nonetheless capable in theory of securing liberty and equality for all within a political community, even if the result is tantamount to nothing more than "our honest best bet"<sup>xii</sup> of what is right.

So how do we place our honest best bet? Is it - as most legal philosophers assume - a matter of getting our constitutional theory right? Or is it instead a matter of the facts and, if so, how should those facts be established and to what end? Or perhaps both? We suggest that at this point in time it is facts that will drive the creation of new rights, and that it is unlikely any new right can be justified by a court absent compelling facts capable of soliciting genuine empathy; the mere logic of a claim will not be adequate.

We examine the constitutional cases relating to four controversial social acts: euthanasia, prostitution, polygamy and drug addiction, and point out the factual context of the litigation. Parties draw upon substantive theories of rights and justice, using whatever articulation works to advance the claim to protection, but first and foremost these are fact-driven claims. We contrast this with earlier significant cases. We explain how claimants did not need strong facts to win classic rights cases – those in which individual freedoms or the institutional mechanisms enabling rights adjudication were at stake. Facts were largely irrelevant and where they mattered, they were typically undisputed or subject to judicial notice. Commensurately, claimants making novel rights claims without good facts typically failed: a novel claim with little factual context seeking a redistribution remedy always proved fatal.

The new cases we identify in this paper are the opposite: they are massive factual endeavours. It is the facts that carry the weight of the argument and control the trial decision. The legal argument itself revolves about one critical fact - harm: real injury, pain and suffering, blood and guts, cuts and bruises. The point of the marshalling of facts is to make the judges care, to make them imagine, feel and accept as worthy those hurt by state action or inaction, even though they have walked a very different personal path than the harmed persons in these cases. Concepts are relevant of course – there must be a “right” to be claimed (or a compelling “legitimate” state justification in response to an infringed right), but the important argument is whether or not there is reliable evidence of serious harm that can and should be addressed by a court, either by allowing/requiring state action (polygamy, safe injection), or by stopping it because state action makes life, and death, worse (euthanasia, prostitution).

## ***II. Key Cases of the Past and Their Reliance on Norms Rather Than Facts***

The early and “first instance” rights litigation produced grand decisions with expansive reasons that canvass philosophy, political theory, rule and role of law concepts, comparative and international law. The first major decisions on content of freedom of religion, expression, and equality are illustrative. These are well known authorities: *Big M* and *Edwards* develop the classic liberal approach to freedom of religion, *Irwin Toy* and *Ford* adopt expansive liberal protection for freedom of expression, and *Andrews* heralds the court’s rejection of the formalist equality that plagued Bill of Rights jurisprudence and adoption of a very liberal model of equality of opportunity.<sup>xiii</sup> The facts play a very minor role in these cases. What matters is the normative fight: why we protect these classic rights is explained and defended as a matter of principle. In a sense though, these were low-hanging fruit on our constitutional tree. The apples may have been newly imported to Canada, but they are not unfamiliar fruit. Once the norm is accepted, the jurisprudence is typically stable<sup>xiv</sup>, and the focus thereafter is not on defining the norm, but on whether it is *triggered* by the facts.<sup>xv</sup> Horizontal normative fights take

place over whether content of a right should or should not be extended to new claimant.<sup>xvi</sup>

Less obviously, this pattern also exists in what we call structural cases – ones about the form of the state and the role of the executive, legislative and judicial branches. Structural cases are, to stay with the tree metaphor, the roots. These decisions involve the institutional preconditions for rights litigation itself. Facts matter little in structural cases. Rather the cases turn on the Court's understanding of the need for a separation of power between the government and the judiciary as essential to safeguarding of the rights in the constitution. The only facts that mattered were those surrounding confederation in 1867. Tellingly, when the Court reached the extraordinary conclusion that the parties to the original contract of federation could only breakup by following a process that respected the unwritten terms by which the federation had survived thus far, it went no further than that, and refused to define the details of what it said was ultimately a political matter.<sup>xvii</sup>

Judicial remuneration cases, parliamentary privilege, and the validity of judicial reference jurisdiction are further examples.<sup>xviii</sup> In each of these cases the boundaries between what is judicial and what is governmental is delineated. For example, in *Sauve* the Court held that prisoners could not be denied membership in the democratic community regardless of the strength of popular support for withdrawing the right to vote as a form of punishment for their crimes.<sup>xix</sup> The judicial role is embraced but circumscribed in particular ways to ensure a balance of authority and accountability to the public. This is evident in how the Court articulates various interpretation doctrines, for example: the rejection of framers' intent and acceptance of substantive due process: *Ref re s. 94(2) BC MVA*<sup>xx</sup>; adoption of purposive and contextual interpretation: *Hunter, Edmonton Journal*<sup>xxi</sup>; articulation of party burdens and standards of proof: *Oakes*<sup>xxii</sup>; requirement of evidence: *Danson*<sup>xxiii</sup> alongside its acceptance of judicial notice: *Spence*<sup>xxiv</sup>; limitation on review of s. 33 invocation for procedural compliance only: *Ford*<sup>xxv</sup>.

However, the absence of facts that are compelling has been fatal in cases involving a rights claim that is novel and that has a redistributive effect. Two cases can be quickly noted to illustrate this unsurprising point.

In *Gosselin*<sup>xxvi</sup>, the Chief Justice rejected the claim for a right to welfare and admonished counsel:

46 The main difficulty with this argument is that the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect. Reeves J. cautioned against generalizing from Ms. Gosselin's experience, and against over-reliance on opinion statements by experts in this regard, given the absence of any evidence to support the experts' claims about the material situation of

individuals in the under-30 age group. He concluded: [TRANSLATION] "It is therefore highly doubtful that the representative plaintiff, acting on behalf of some 75 000 individuals, has discharged her burden of proof concerning whether the law had adverse effects on them" (p. 1664).

47 I can find no basis upon which this Court can set aside this finding. There is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment. Louise Gosselin, who in fact participated in each of the three programs, was the only witness to provide first-hand testimony about the programs at trial. There is no evidence that anyone who tried to access the programs was turned away, or that the programs were designed in such a way as to systematically exclude under-30s from participating. In fact, these programs were initially available only to people under 30 (and, in the case of the Remedial Education Program, to heads of single-parent households 30 and over); they were opened up to all welfare recipients in 1989. As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-30 class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the Canadian *Charter* and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. Nor does Ms. Gosselin present sufficient evidence that her own situation was a result of discrimination in violation of s. 15(1). The trial judge did not find evidence indicating a violation, and my review of the record does not reveal any error in this regard.

So too in *Christie*. *Christie*, a lawyer tragically killed just before the case was decided, brought an action to have British Columbia's legal services tax (7%) declared unconstitutional on the basis that it operated to preclude access to justice by the poor. The Court noted that the facts were not ample and wholly inadequate to establish this ground-breaking argument:

14 This Court is not in a position to assess the cost to the public that the right would entail. No evidence was

led as to how many people might require state-funded legal services, or what the cost of those services would be. However, we do know that many people presently represent themselves in court proceedings. We also may assume that guaranteed legal services would lead people to bring claims before courts and tribunals who would not otherwise do so. Many would applaud these results. However, the fiscal implications of the right sought cannot be denied. What is being sought is not a small, incremental change in the delivery of legal services. It is a huge change that would alter the legal landscape and impose a not inconsiderable burden on taxpayers. [...]

27 We conclude that the text of the constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.

28 This conclusion makes it unnecessary to inquire into the sufficiency of the evidentiary basis on which the plaintiff bases his claim. However, a comment on the adequacy of the record may not be amiss, in view of the magnitude of what is being sought - the striking out of an otherwise constitutional provincial tax. Counsel for Mr. Christie argued before us that the state cannot constitutionally add a cost to the expense of acquiring counsel to obtain access to justice when that cost serves no purpose in furthering justice. This assumes that there is a direct and inevitable causal link between any increase in the cost of legal services and retaining a lawyer and obtaining access to justice. However, as the Attorney General points out, the economics of legal services may be affected by a complex array of factors, suggesting the need for expert economic evidence to establish that the tax will in fact adversely affect access to justice. Without getting into the adequacy of the record in this case, we note that this Court has cautioned against deciding constitutional cases without an adequate evidentiary record: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68, per Dickson C.J.; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at

p. 361; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

29 Notwithstanding our sympathy for Mr. Christie's cause, we are compelled to the conclusion that the material presented does not establish the major premise on which the case depends - proof of a constitutional entitlement to legal services in relation to proceedings in courts and tribunals dealing with rights and obligations.

Perhaps counsel heeded these results and comments and this explains the contemporary trend to which we draw attention in this paper. As a result of normative stability (at the level of concept), cultural adhesion to the *Charter's* basic doctrines, and institutional legitimacy of the Court as part of a democratic structure, litigation under the *Charter* is about facts, as opposed to norms, when counsel seeks rulings that are novel.

### III. *Current Cases: The Power of Facts*

Four recent *Charter* cases provide a real-life framework for discussing the posited trend towards heavily evidence-based *Charter* litigation. Three took the form of *Charter* challenges: *PHS Community Services Society v. Canada (Attorney General)*<sup>xxvii</sup> ("Insite"); *Bedford v. Canada (Attorney General)*<sup>xxviii</sup> ("Bedford") and *Carter v. Canada (Attorney General)*<sup>xxix</sup> ("Carter"). All involved summary proceedings and all three involved extensive evidence, including vast amounts of expert evidence. As an interesting further illustration, a description of the evidentiary record from the British Columbia Supreme Court's decision in *Reference re: Criminal Code of Canada (B.C.)*<sup>xxx</sup> ("Polygamy Reference") is also provided.

#### *Insite*

The timeline for the Insite litigation is unique. The central constitutional question raised before the lower courts<sup>xxxi</sup> was whether the trafficking and possession provisions in the *Controlled Substances and Drugs Act*<sup>xxxii</sup> ("CDSA") contravened s. 7 of the *Charter* to the extent that these provisions operated, in their application to a supervised injection services site, to prevent addicted intravenous drug users from accessing critical health care.<sup>xxxiii</sup> At the Supreme Court of Canada, the issue morphed into the further related question of whether the federal Minister of Health's refusal to exercise his discretion under s. 56 of the CDSA in favour of a statutory exemption constituted a breach of s. 7.

In response to historical drug-related problems in Vancouver's Downtown Eastside ("DTES") and to a more recent declaration of a public health emergency relating to an epidemic of overdoses and contagious infectious diseases including HIV/AIDS and hepatitis, provincial health authorities had resolved to open a safe injection site as a component of larger addiction and health services strategy in the DTES. In 2003, the

then federal government issued Vancouver Coastal Health Authority a three year exemption under CDSA s. 56 to enable it to open a site where clients could inject drugs under supervision without risk of being criminally charged while present at the medical facility. From 2003 through 2006, Insite's operations were the subject of extensive academic studies. In September 2006, Health Canada granted Insite a further exemption through to December 31, 2007. The PHS claim was filed in September 26, 2007 in anticipation of the December 31, 2007 expiry date, but was moved to the back burner on October 2, 2007, when Health Canada issued a further exemption allowing Insite to operate through to June 30, 2008. Seeing (correctly) that the likelihood of further renewal was unlikely, the plaintiffs' moved the litigation forward and a summary trial was set for April 28-May 7, 2008. In light of the imminent expiry date, Mr. Justice Pitfield issued his decision shortly thereafter, on May 27, 2008.

The summary trial in Insite proceeded apace. It was conducted on affidavits alone, with neither side seeking to cross-examine on affidavits. No admissibility objections were raised to any of the affidavits, and weight was addressed in the main arguments. Canada raised a preliminary motion to the summary trial procedure, but Pitfield J. reserved on the motion and ultimately concluded, in his reasons for decision, that the procedure was appropriate.

Notwithstanding its extremely expedited hearing timeline, the evidentiary record in Insite comprised almost 4000 pages of materials and the appeal books at the Supreme Court of Canada level constituted 20 volumes. The affidavit materials entered included affidavits from two site users (the individually named plaintiffs, Shelly Tomic and Dean Wilson) detailing their personal histories and their own use of Insite. Extensive affidavit evidence was also provided by various provincial government and Vancouver Coastal Health Authority officials testifying to rampant drug use in the DTES, the trajectories of related diseases and deaths, descriptions of the numerous failed historical attempts to address the problems, the current health strategy for the DTES, and the role of Insite as a specific but critical component of that strategy. Expert evidence was also provided regarding the nature of addiction as a disease and the role of injection drug use in the spread of disease and the development of serious related health risks (e.g., life-threatening infections). Expert evidence was entered regarding safe injection site operations in other jurisdictions. Most significantly, however, considerable expert evidence was entered in form of more than 30 peer-reviewed academic articles flowing from the constant stream of studies that had been carried out on Insite itself since 2003. Further, during its period of Insite's operation, data had also been generated regarding such matters as clientele demographics, impact on users, and impact on the DTES neighbourhood.

The mound of factual information before the Court that was specific to the situation in DTES (e.g., the reality of life and addiction in the DTES and the failure of past attempts to better these) and/or the very matter in dispute - the impact of Insite's actual operation - put the Court in an unusually privileged position for factually assessing the alternatives (Insite or no Insite) on the evidence before it.

As noted above, at the Supreme Court of Canada level, the constitutional question was reframed as a challenge to the Minister of Health's exercise of discretion in refusing to further renew Insite's exemption on a public interest basis. However, the essence of Canada's constitutional failing at the Supreme Court of Canada level remained squarely where it had been firmly planted at the trial level by Pitfield J. - in factual assessments of relative harm. In short, Insite had been proven, on the evidence, to do none and prevent much:

**93** The trial judge made crucial findings of fact that support the conclusion that denial of access to the health services provided at Insite violates its clients' s. 7 rights to life, liberty and security of the person. He found that many of the health risks of injection drug use are caused by unsanitary practices and equipment, and not by the drugs themselves. He also found that "[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals": para. 87. Where 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: *R. v. Morgentaler* (1988), at p. 59, *per* Dickson C.J., and pp. 105-106, *per* Beetz J.; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 589, *per* Sopinka J.; *Chaoulli*, at para. 43, *per* Deschamps J., and, at paras. 118-19, *per* McLachlin C.J. and Major J.; *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.). Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.

[...]

**127** The next question is whether the Minister's decision that the *CDSA* applies to Insite is in accordance with the principles of fundamental justice. On the basis of the facts established at trial, which are consistent with the evidence available to the Minister at the relevant time, I conclude that the Minister's refusal to grant Insite a s. 56 exemption was arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice.

[...]

**131** The trial judge's key findings in this regard are consistent with the information available to the Minister,

and are those on which successive federal Ministers have relied in granting exemption orders over almost five years, including the facts that: (1) traditional criminal law prohibitions have done little to reduce drug use in the DTES; (2) the risk to injection drug users of death and disease is reduced when they inject under the supervision of a health professional; and (3) the presence of Insite did not contribute to increased crime rates, increased incidents of public injection, or relapse rates in injection drug users. On the contrary, Insite was perceived favourably or neutrally by the public; a local business association reported a reduction in crime during the period Insite was operating; the facility encouraged clients to seek counselling, detoxification and treatment. Most importantly, the staff of Insite had intervened in 336 overdoses since 2006, and no overdose deaths had occurred at the facility. (See trial judgment, at paras. 85 and 87-88.) These findings suggest not only that exempting Insite from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them.

[...]

**133** The application of the possession prohibition to Insite is also grossly disproportionate in its effects. Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest: *Malmo-Levine*, at para. 143. Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation. The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.<sup>xxxiv</sup>

### *Bedford*

In *Bedford*, the Ontario Superior Court of Justice found itself faced with a record of vast proportion. The *Bedford* case was filed in 2007 under a notice of application seeking a *Charter* remedy.<sup>xxxv</sup>

The issue in *Bedford* is whether the *Criminal Code*<sup>xxxvi</sup> offences of communicating for purposes of prostitution, keeping a common bawdy-house and living off the avails of prostitution, individually or cumulatively, contravene s. 7 by operating to endanger prostitutes by preventing them from evading violence by, for example, employing security personnel, having an escape route, or being able to effectively pre-screen clientele. The issue of whether the communicating prohibition was an unjustified violation of the s. 2(b) freedom of expression guarantee was also raised and addressed at the Superior Court level.<sup>xxxvii</sup>

The evidence was presented to the court in the form of a joint application record and supplementary joint application record. The evidence, described by the Application Judge, Himel J., as being more than “25,000 pages of evidence in 88 volumes, amassed over two and a half years”, included the following:<sup>xxxviii</sup>

84 ... The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.

As further noted by Madam Justice Himel, this immense amount of information came to her unsifted:

104 The procedure used in this application was to place large volumes of expert opinion on the record. Simply placing this evidence before the court does not automatically render it admissible. In a trial, any inadmissible information would be distilled and segregated. The application process is not generally amenable to that same process. It can facilitate a litigation strategy where parties may be more concerned with placing potentially important information on the record, as opposed to engaging in a rigorous admissibility analysis. As an impartial adjudicator, an application judge cannot disregard his or her role as gatekeeper simply because there is no jury.

[...]

113 In the case before me, it is not practicable to engage in an admissibility analysis for each piece of evidence contained in the record. Furthermore, the parties did not object to the opinion evidence tendered by the opposing side. I am aware that in *Charter* cases, judges are also the triers of fact. Judges are expected to disabuse themselves of irrelevant and inflammatory evidence: see *Masters' Association of Ontario v. Ontario (Attorney General)*, [2001] O.J. No. 1444 (Div. Ct.) (QL). While the evidence may be received at the hearing, it may not meet the strict rules of admissibility outlined in the *Mohan* and *Abbey* cases. Rather than engage in a time-consuming analysis of each piece of evidence, I have chosen to exercise the gatekeeper function by assigning little or no weight to evidence which does not meet the *Mohan* and *Abbey* requirements. This is the most practical method to address the concerns raised about the legal relevance and reliability of certain expert opinions in the circumstances of this case.

Notwithstanding the size of the record, the hearing on the *Bedford* application encompassed only seven court days. Realistically, it would appear likely that Madam Justice Himel only received the benefit of a relatively brief guided tour through the materials by the parties. Some 11 months following the hearing, she issued a 541 paragraph decision containing, given the circumstances, a fairly detailed recounting and analysis of the evidence.<sup>xxxix</sup> As was the case in *Insite*, the pivotal findings in *Bedford* focussed on the factual impact of the impugned law:

293 Evidence from nearly all of the witnesses, the government reports, and additional statistical information provided to the court confirms that prostitutes in Canada face a high risk of physical violence. It should be noted, however, that most of the evidence provided was in relation to street prostitutes.

[...]

300 The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is

generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.

301 Factors that may enhance the safety of a prostitute include being in close proximity to people who can intervene if needed, taking the time to screen a client (for example, smelling a potential client's breath, taking credit card numbers, working out expectations and prices), having a more regular clientele, and planning an escape route. While such measures may seem basic in their ability to reduce the risk of danger, the evidence supports these findings on a balance of probabilities.

[...]

359 Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the impugned provisions sufficiently contribute to a deprivation of their security of the person.

360 I accept that there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes, and that the impugned provisions make many of these "safety-enhancing" methods or techniques illegal. The two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute.

These findings provided the basis for Himel J.'s legal conclusions with respect to her s. 7 analysis of overbreadth and gross disproportionality as principles of fundamental justice and, in turn, her conclusion that none of the three provisions could be cured by application of s. 1. Her findings on the point with regard to the common bawdy-house and living off the avails prohibitions were endorsed by the Ontario Court of Appeal.<sup>xi</sup>

The majority of the Court of Appeal did not agree with the Application Judge's conclusion that the communicating provision was grossly disproportionate.<sup>xii</sup> The majority concluded that Himel J. had erred by "simultaneously under-emphasizing

the importance of the legislative objective and over-emphasizing the impact of the communicating provision on the respondents' security of the person".<sup>xlii</sup> With respect to the former, the majority held that Himel J.'s conception of the provision's legislative objective focussed too heavily on social nuisance objectives and failed to give adequate consideration to the fact that street prostitution "is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime".<sup>xliii</sup> In the latter respect, the majority held that there was no evidentiary support for the finding that face-to-face communication with a client is essential to enhancing a prostitute's safety,<sup>xliv</sup> and that the fact that the bawdy-house and avails offences were no longer in force was also a consideration when assessing the impact of the communication provision as prohibition.<sup>xlv</sup> Thus, in essence, the majority simply disagreed with Himel J.'s assessment of harm in relation to the communication offence:

320 So it is with the communicating provision. It is clear that street prostitutes, and particularly survival sex workers, face tremendous disadvantage. It is also clear that the communicating provision prevents street prostitutes from speaking to prospective customers before deciding whether or not to take a job. What is less clear, however, is the degree to which this prohibition actually causes or contributes to the harm this group experiences.

321 The evidence suggests - and the submissions of many of the interveners reinforce - that poverty, addiction, gender, race and age are the primary sources of survival sex workers' marginalization. With that marginalization comes much of the risk associated with street prostitution. For the reasons we have given, we are not persuaded that the communicating provision is a dominant, or even a significant, factor among the many social, economic, personal and cultural factors that combine to place survival sex workers at significant risk on the street.

322 This is not to say that the communicating provision does not contribute to some degree of harm. As we have explained, we are satisfied that it has enough of an impact on prostitutes to engage their s. 7 rights to liberty and security of the person. We are also satisfied that the vulnerability of street prostitutes, and especially survival sex workers who may be unable to move indoors regardless of the fate of the bawdy-house provisions, increases the negative impact of the communicating provision on their s. 7 rights. However, when the weight

of the legislative objective is balanced against the weight of the impact properly attributed to the legislation and not to a myriad of other factors, we cannot say that the scale drops into the range of gross disproportionality.

323 We also conclude that the application judge erred in considering the harm to the wider community in weighing the "impact" factor of the communicating provision. To repeat, the application judge held, at para. 434, that the harm suffered by prostitutes as a result of the challenged provisions, including the communicating provision, "impacts upon the well-being of the larger society." In our view, such considerations are irrelevant at this stage of the gross disproportionality analysis, where the court's sole focus is on the impact on the *claimant's* s. 7 rights.

The minority, which would have upheld Himel J.'s conclusions that the communicating provision was unconstitutional by reason of being grossly disproportionate,<sup>xlvi</sup> would have done so because it reached a different conclusion in weighing the relative harms established on the evidence,<sup>xlvii</sup> especially in terms of the prohibitions impact on street prostitutes:

370 I conclude by recalling this passage from my colleagues' reasons:

When a court is required to decide whether there is a sufficient connection between crime-creating legislation and an alleged interference with an individual's right to security of the person, *the court must examine the effect of that legislation in the world in which it actually operates.* This assessment is a practical and pragmatic one. [Emphasis added.]

371 The world in which street prostitutes actually operate is the streets, on their own. It is not a world of hotels, homes or condos. It is not a world of receptionists, drivers and bodyguards.

372 The world in which street prostitutes actually operate is a world of dark streets and barren, isolated, silent places. It is a dangerous world, with always the risk of violence and even death.

373 My colleagues recognize, correctly, that the effects of two *Criminal Code* provisions that prevent indoor prostitutes' safety measures are grossly disproportionate to their valid legislative objectives. I regret that they do not reach the same conclusion with respect to a third provision that has a devastating impact on the right to life and security of the person of the most vulnerable affected group, street prostitutes.

### *Carter*

*Carter* involves a constitutional challenge to the *Criminal Code* provisions that impose an absolute prohibition against assisted suicide and consensual homicide. It is alleged that these provisions contravene s. 7 to the extent they prevent grievously and irremediably ill persons from accessing physician-assisted dying as a medical response to suffering. It is further alleged that the provisions contravene s. 15 by reason of their disproportionate impact on the materially and physically disabled (i.e., those whose disability renders them unable to act on their own to end their lives), whereas the able-bodied may legally act to end their own lives whenever they so choose.<sup>xlvi</sup>

*Carter*, like *Insite*, was filed as a summary trial. Like *Insite*, *Carter* also involved a request for an expedited hearing. However, unlike the unusual expiry/extension facts that introduced the start, stop, start pattern into the *Insite* litigation, the expedited hearing in the *Carter* matter was sought very early on in light of the fact that a named individual plaintiff, Gloria Taylor, was already at an advanced stage of amyotrophic lateral sclerosis (ALS) and there was uncertainty as to how long she might survive. In the end, the matter progressed from filing of Notice of Claim (April 12, 2011) through to the conclusion of the scheduled trial dates (December 16, 2011) in just over seven months' time.<sup>xli</sup>

The affidavits put before Madam Justice Lynn Smith by the plaintiffs comprised more than 15 affidavits by lay witnesses, including individual plaintiffs, ill persons and the friends and family members of ill or dead persons, and more than seventy expert witness affidavits dealing with matters such as general medicine, neurology, psychiatry, ethics, palliative care, and legal and social science evidence regarding permissive regimes in foreign jurisdictions. In turn, more than another 30 lay and expert affidavits were filed in response by Canada and British Columbia.

Unlike *Insite* and *Bedford*, there was cross-examination on affidavits. Following direction from Smith J., the parties were able to select and identify a number of key witnesses for cross-examination. Ultimately, four weeks of cross-examination on affidavits was carried out; with the first two weeks taking place before a court reporter and the remainder taking place in court before the Trial Judge. In all, the plaintiffs cross-examined seven government-side witnesses; the governments' cross-examined 11 plaintiff-side witnesses.

Also unlike the *Insite* and *Bedford* cases, there were a number of applications brought regarding the admissibility of evidence filed.<sup>1</sup> These included an application by Canada seeking to strike all of the plaintiffs' lay evidence, except that given by the named individual plaintiffs, as irrelevant, unnecessary or prejudicial.<sup>li</sup> Canada asserted the impact of the law on third parties did not constitute adjudicative facts and, as such, could only be entered through expert evidence. It further asserted that the lay evidence was unnecessary given the affidavits provided by the individual plaintiffs. Canada also argued that the evidence of the lay witnesses was prejudicial because of the time it would require to address it in the hearing and that the affidavits, which describe, in detail, harrowing experiences and unbearable physical and mental suffering would "focus the evidence on dramatic individual cases and distract the Court from the larger picture".<sup>lii</sup> With the exception of a single affidavit that was struck for hearsay,<sup>liii</sup> Canada's application was denied. The Trial Judge ruled that facts regarding the impact of the law on third parties could be proven through direct as well as by expert evidence, and were clearly relevant to the s. 1 analysis and potentially to s. 7 as well. The Trial Judge further held that the plaintiffs were not obliged to prove that the evidence was "necessary", and that any repetitive evidence issues could be addressed through trial management. With regard to the harrowing nature of the evidence, the Trial Judge concluded there was no basis to exclude such evidence from a trial by judge alone.

Canada's also sought to strike the expert affidavits provided by four British Columbia medical doctors as irrelevant and unnecessary. The opinions expressed in these affidavits "relate[d] to the doctors' experience, in some cases, with end-of-life care, and, in all instances, to their views about the ethical responsibilities of physicians whose patients request assistance in death."<sup>liv</sup> Canada asserted that none of the doctors was qualified in a relevant speciality and that "the affidavits contain personal opinions that are not within the expert's areas of expertise and cannot be taken to reflect the general opinion of the medical community".<sup>lv</sup> The Trial Judge held that the fact that three of doctors were not specialists in palliative care or medical ethics did not render their opinions irrelevant or inadmissible, as their education and life experience entitled them to give opinion evidence in the area, leaving only issue of weight.<sup>lvi</sup> However, the affidavit provided by a gynaecologist, and which supported an analogy between the historical criminalization of abortion and assisted suicide, was struck as irrelevant to the issues raised in the pleadings.

The plaintiffs, in turn, brought an application seeking permission to file an affidavit using only the affiant's initials. The affidavit detailed the affiant's direct, past involvement in physician-assisted suicide. The witness was only willing to provide his evidence anonymously. The plaintiffs also asked that the affidavit be allowed to testify behind a screen if cross-examined and not be asked questions that might lead to his identification. The plaintiffs argued that this was the only means by which the Court could expect to obtain direct evidence of the underground practice of assistance. The affiant's story was against his self-interest and very detailed. While the governments would not have a full right of cross-examination, the plaintiffs asserted he could be meaningfully cross-examined and the value of his evidence

outweighed the prejudice caused. The Trial Judge held there could be no effective cross-examination under the order sought and dismissed the application.<sup>lvii</sup>

During the cross-examinations that took place before the court, admissibility objections were raised at the time each witness was cross-examined. With respect to two of those witnesses, expert qualifications were challenged. In these cases, the witnesses were examined and cross-examined on their qualification in *voir dire*s. In both cases, the witness was found to be qualified.

At the close of the cross-examination portion of the trial, more than two hearing days were allocated to argument on the admissibility of portions of affidavits entered by the various parties. The vast majority of these objections were limited to specific paragraphs or exhibits of the affidavits in question, however, some were challenges to expert qualifications either in part<sup>lviii</sup> or in the whole. The objections were argued on November 24, 25 and 28, 2011. On November 29, 2011, Madam Justice Smith provided a two page memorandum and an attached six page chart setting out her rulings on the various objections. The majority of the portions struck were struck on the basis that they were outside the scope of the affiant's expertise, constituted impermissible opinion or fell outside the scope of proper reply. A few were struck on the basis that they involved subjects inappropriate for expert evidence at all. As a result of the memorandum, the parties were in possession of the Trial Judge's rulings prior to preparation of their written arguments.

The reasoning and legal findings set out in *Carter* trial decision<sup>lix</sup> are permeated with evidentiary references and factual findings. For example, in her s. 15 analysis about the burden of the impugned laws on materially disabled individuals, the Trial Judge states as follows:

1041 The plaintiffs provide evidence that some individuals who wish to end their lives are unable to do so without assistance because of grievous and irremediable illness, and that some individuals, including Ms. Taylor, face the prospect of becoming unable, because of grievous and irremediable illness, to end their lives at the time of their choosing. The illnesses they point to include ALS, Huntington's disease, locked-in syndrome and severe inoperable spinal stenosis.

1042 The evidence shows that for some individuals, the knowledge that they will be able to receive assistance in dying when they feel that they need such assistance allows them to continue living longer, and to continue to enjoy their lives while they can. Further, people with physical disabilities who are unable to end their lives themselves are forced into the dilemma of either continuing to suffer or exposing other persons to

criminal sanctions. Some resolve this dilemma by taking their lives before their illnesses progress to a point where they are no longer able to do so.<sup>lx</sup>

...

1158 The law, viewed as a whole, embodies the following principles: (1) persons who seek to take their own lives, but fail, are not subject to criminal sanction because there is no longer a criminal offence of suicide or attempted suicide; (2) persons who are rendered unable, by physical disability, to take their own lives are precluded from receiving assistance in order to do so by the Criminal Code offence of assistance with suicide. Those principles create a distinction based on physical disability.

1159 The effect of the distinction is felt particularly acutely by a subset of persons with physical disabilities represented by the plaintiff Gloria Taylor and others such as Mr. Fenker (now deceased), Mr. Morcos and Ms. Shapray - persons who are grievously and irremediably ill and physically disabled or will soon become so, are mentally competent, have full cognitive capacity, and wish to have a measure of control over their circumstances at the end of their lives. They may not wish to experience prolonged pain. They may wish to avoid the anxiety that comes with fear that future pain will become unbearable at a time when they are helpless. They may not wish to undergo palliative sedation without hydration or nutrition for reasons including concern for their families, fear for themselves or reaction against the total loss of independence at the end of their lives.<sup>lxi</sup>

Similarly, the Trial Judge's findings on minimal impairment for purposes of s. 1 and overbreadth for purposes of s. 7<sup>lxii</sup> are constructed on a foundation of detailed, concrete evidentiary findings:

1238 I have reviewed the evidence regarding the inherent challenges in creating and enforcing safeguards that depend upon physicians' assessment of matters such as competence, voluntariness and non-ambivalence. As well, I have reviewed the evidentiary record, particularly regarding Oregon, the Netherlands and Belgium, where much research has been done and

data accumulated. This Court has had the benefit of the opinions of respected scientists, medical practitioners and other persons who are familiar with the end-of-life decision-making both in Canada and in other jurisdictions.

1239 The evidence shows that the effectiveness of safeguards depends upon, among other factors, the nature of the safeguards, the cultural context in which they are situate, the skills and commitment of the physicians who are responsible for working within them, and the extent to which compliance with the safeguards is monitored and enforced.

1240 In my view, the evidence supports the conclusion that the risks of harm in a regime that permits physician-assisted death can be greatly minimized. Canadian physicians are already experienced in the assessment of patients' competence, voluntariness and non-ambivalence in the context of end-of-life decision-making. It is already part of sound medical practice to apply different levels of scrutiny to patients' decisions about different medical issues, depending upon the gravity of the consequences. The scrutiny regarding physician-assisted death decisions would have to be at the very highest level, but would fit within the existing spectrum. That spectrum already encompasses decisions where the likely consequence of the decision will be the death of the patient.

1241 Further, the evidence from other jurisdictions shows that the risks inherent in legally permitted assisted death have not materialized in the manner that may have been predicted. For example, in both the Netherlands and Belgium, the legalization of physician-assisted death emerged in a context in which medical practitioners were already performing life-ending acts, even without the explicit request of their patients. After legalization, the number of LAWER deaths has significantly declined in both jurisdictions. This evidence serves to allay fears of a practical slippery slope.

1242 The evidence does not support the conclusion that, since the legalization of physician-assisted death, there has been a disproportionate impact, in either Oregon or the Netherlands, on socially vulnerable groups

such as the elderly or persons with disabilities. While there is some evidence of a heightened risk to persons with HIV/AIDS, that evidence pre-dates the development of highly effective antiretroviral medications.

1243 A less drastic means of achieving the objective of preventing vulnerable persons from being induced to commit suicide at times of weakness would be to keep the general prohibition in place but allow for a stringently limited, carefully monitored system of exceptions. Permission for physician-assisted death for grievously ill and irremediably suffering people who are competent, fully informed, non-ambivalent, and free from coercion or duress, with stringent and well-enforced safeguards, could achieve that objective in a real and substantial way.

1244 I conclude that the defendants have failed to show that the legislation impairs Ms. Taylor's Charter rights as little as possible.<sup>lxiii</sup>

### *Polygamy Reference*

The *Polygamy Reference* arose out of the following two reference questions posed for answer by the Attorney General of British Columbia ("AGBC"):

1. Is section 293 of the [*Criminal Code*] consistent with the [*Charter*]? If not, in what particular or particulars and to what extent?
2. What are the necessary elements of the offence in section 293 of the [*Criminal Code*]? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?<sup>lxiv</sup>

British Columbia's *Constitutional Question Act*<sup>lxv</sup> expressly permits a reference to be made to the Supreme Court (as opposed to the Court of Appeal), but this marked the first time the option had been exercised. It also marked the first time a Canadian constitutional reference had ever been referred for hearing under a trial process.<sup>lxvi</sup>

The "parties" to the reference consisted of the Attorneys General for British Columbia and Canada and the Reference Amicus appointed by the Court at the request of the AGBC.<sup>lxvii</sup> The *Constitutional Question Act* also provides for participation by "persons interested".<sup>lxviii</sup> Twelve applicants were granted interested person standing on terms

that included the right to adduce affidavit evidence, expert reports and “Brandeis brief” materials, and to “participate in the evidentiary phase of the hearing if, and to the extent, permitted by further direction of the Court.”<sup>lxix</sup>

The combined record created by the parties and interested persons was massive. It included *viva voce* testimony, including testimony given anonymously by persons living a polygamous lifestyle. In its decision on the merits, the Court described the record in the following terms:

27 A reference in this forum enables the participants to create an evidentiary record impossible in the typical appellate reference. The participants in the present proceeding embraced that opportunity and compiled a record that is remarkable not only for its size, but also for the breadth and diversity of its contents. Indeed, it is no exaggeration to say that the record embodies the bulk of contemporary academic research into polygamy.

28 Much of the evidence comprises affidavits and expert reports. Over 90 such are before me. In large measure, these were exchanged and filed with the Court in advance of the hearing according to a schedule directed by the Court. Approximately 22 of the affiants and experts were then examined and cross-examined during the hearing phase of the proceeding.

29 The expert witnesses represent a broad range of disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology. ... Some undertook original research specifically for this reference. Others are clinical experts who offer case study observations from their practices. Yet others have studied aspects of polygamy relevant to their particular disciplines for years.

30 The lay witnesses are largely individuals who have lived - and in some cases continue to live - in polygamous families in both Canada and the United States. Most have experience with polygamy in the context of fundamentalist Mormonism, and they spoke of those experiences, both positive and negative. Other witnesses described their involvement with polyamory.

31 Unusually, most of the FLDS's lay witnesses gave their evidence, both written and *viva voce*, under cover of anonymity pursuant to an order I granted earlier in the

proceeding (indexed at 2010 BCSC 1351). Also somewhat unusually, the AGBC tendered the evidence of many of his lay witnesses by video affidavits which were played in Court during the hearing.<sup>lxx</sup>

32 In addition to the affidavits and expert reports, the participants also filed and exchanged an extensive collection of Brandeis Brief materials. These comprise several hundred legal and social science articles, books and DVDs. An index of these materials is attached as Appendix A to these reasons.

The Brandeis Brief materials listed in Appendix A include, among others things, articles by legal academics; articles and book excerpts by social science academics; books providing journalistic, historical and autobiographical accounts of polygamy; numerous reports and surveys; and popular books and magazine articles touching on the subject matter.

Out of that mass, it appears that only one expert's evidence was challenged as inadmissible. The point was argued during the evidentiary phase of the hearing and the evidence was ruled admissible.<sup>lxxi</sup> The Court specifically noted that it had adopted a very lenient approach to admissibility, given the nature of the proceeding as a reference:

46 I have taken a liberal approach to admissibility in this proceeding, admitting all the evidence tendered. This approach accords with the Supreme Court of Canada's emphasis on the importance of a proper evidentiary foundation in *Charter* litigation. It also maximizes the trial reference's potential in terms of creating an evidentiary record.

The Court concluded that this approach was appropriate on the basis that all of the evidence entered in a reference is evidence of "legislative facts" and thus warranted the application of less stringent admissibility requirements.<sup>lxxii</sup>

As with the cases above, the ultimate determination both under s. 2(b) and s. 7 turned on factual findings with regard to relative harm. Contrary to the case in *Insite*, where the courts concluded that the allowing the conduct in question would result in no harm to the governmental objective, in the *Polygamy Reference*, the Court held that the governments had not only proven harm, but proven significant and concrete harm:

485 It remains to be seen, however, whether laws against polygamy address conduct that gives rise to harm. Is polygamy inherently harmful?

492 The AGBC referred on a number of occasions to the remarkable convergence of the evidence on the question of harm, from high level predictions based on human evolutionary psychology, to the recurring harms identified in intra-cultural and cross-cultural studies, to the "on the ground" evidence of polygyny in contemporary North America. As I proceed through the evidence, this convergence becomes increasingly striking.

1044 On the whole of the evidence here, I conclude that the Attorneys General have certainly demonstrated a reasoned apprehension of harm associated with polygyny. Indeed, they have cleared the higher bar: they have demonstrated "concrete evidence" of harm. I have detailed that evidence at length. I have discussed the varied nature of the harms associated with polygyny and highlighted their coincidence across nations, cultures and socio-economic units.

The following points can be validly made about the rather extraordinary nature of these four cases. It could be supposed that two have substantial evidentiary records specifically because they are attempts to reverse prior Supreme Court of Canada decisions (*Bedford* and the *Prostitution Reference*; *Carter and Rodriguez*<sup>lxxiii</sup>). Insite's remarkable evidentiary record owes much to the fact that it had been operated experimentally for the purposes of study with government permission for almost seven years by the time the litigation proceeded. The *Polygamy Reference* is, most obviously, unique by virtue of not actually being a "trial" at all. However, notwithstanding these various idiosyncrasies, these cases can also be seen as marking the onset of a logical and foreseeable trend in *Charter* litigation.

The overwhelming objective of the evidence is to demonstrate harm: not harm to concepts, not harm to ideals - harm to people. The legal claim is that the harm can be avoided by state decisions. Sex trade workers could be safer if the laws didn't drive them into danger. Women and girls can be protected by law from polygamous unions that operate in a manner consistent with gender equality only in the realm of fantasy. Drug addicted users could be enabled to deal with addiction with a vastly lower risk of death. And the ill and suffering could access a legal right that would permit them the assistance required to enable them to die with dignity. Claimants of rights need strong factual evidence of harm to litigant to succeed with these new norm claims. In an important sense, the facts are driving the norms. These are not cases where there is a classic readily understood norm that is either triggered or not and in which facts play only that threshold role: these are cases where without facts there is no hope of the proposed norm being capable of comprehension.

Empathy is the necessary condition to recognition of novel or controversial claims. To win recognition, these claims must first win on the facts; judges need to feel empathy before they will be willing to offer claimants constitutional protection. Without emotional engagement judges can default to rules that permits dismissal of claims by deferring to the state's view of evidence or by application of traditional theories of justice, most of which do not even aspire to protect the activities of the addict, the prostitute, the suffering and dying. It is not a question of judges identifying with the claimant. Identity claims are claims *of* a group or individual: sexual or religious minority rights, aboriginal rights, women's rights, disability rights. The litigants stand in place of any of us who could have been any of the litigants but for a circumstance which we have limited ability to alter. Basic liberal rights trade on this deep sense of symmetry and reciprocity: I recognize the rights claimed as mine even though another asserts it. Identity *with* a constitutional claimant can be understood as a form of constitutional narcissism, as in "*There but for the grace of God go I.*" By empathy *for* a constitutional claimant we mean the moment when, despite not having felt or expecting ever to feel what the claimant is experiencing, the claim of the other for our attention and protection feels worthy. It is the emotional and legal decision to judicially recognize a claim despite non-identification with the claimant, and it is the belief that claim can be justified to the community in turn.

#### IV. *Conclusion*

We argue success in future novel claims will be a function of facts. In all such cases, we believe the critical factor is the tendering of detailed evidence of the factual harm engulfing those affected by the law. We argue that facts ultimately have legal persuasive value because of their intrinsic moral persuasive value. These cases will succeed because they are able generate empathy *and then* to apply rights concepts from the perspective of that borrowed experience. We argue early and first instance rights cases did not turn on facts beyond the reality that facts were required trigger the logical application of the dominant understanding of the norm at issue. Reasoning did the heavy lifting. Facts matter more now because controversial claimants are seeking new normative ground. Unlike rights already understood as definitional to a free life in a constitutional democracy and the celebrated outcome of social and intellectual struggles past, new normative claims have to fight for legal legitimacy. They must do so in an evidentiary framework that was not designed for such cases and while trial judges have been innovative in response, we will need to see how the Supreme Court of Canada feels, as well as how it thinks.

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<sup>i</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 67

<sup>ii</sup> 347 US 483 (1954)

<sup>iii</sup> *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136.

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- iv Canwest newservice, April 15, 2007 see: [www.sesreserach.com/library/polls/IRPP%20February%207%202007.pdf](http://www.sesreserach.com/library/polls/IRPP%20February%207%202007.pdf); see also: [http://www.huffingtonpost.ca/2011/10/12/30-years-later-vast-majority-support-constitution-charter-of-rights-and-freedoms-poll\\_n\\_1007121.html](http://www.huffingtonpost.ca/2011/10/12/30-years-later-vast-majority-support-constitution-charter-of-rights-and-freedoms-poll_n_1007121.html)
- v Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *SAJHR* 31
- vi Mureinik at 32
- vii *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 67
- viii This is a slight revision of the metaphor made famous by Alexander M. Bickel in *The Least Dangerous Branch - The Supreme Court at the Bar of Politics*, New York, The Bobbs-Merrill Company Inc., 1962, p. 184
- ix *Labaye*, 2005 SCC 80; *Sauve*, 2002 SCC 68
- x Habermas (1992)
- xi Frank Michelman, *How Can the People Ever Make Laws? A Critique of Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY* (James Bohman and William Rehg eds., 1998) at pgs. 145-171.
- xii Michelman
- xiii *Big M*, [1985] 1 S.C.R. 295; *Edwards*, [1986] 2 S.C.R. 713; *Irwin Toy*, [1989] 1 S.C.R. 927; *Ford*, [1982] 2 S.C.R. 712; *Andrews*, [1989] 1 S.C.R. 143.
- xiv There are exceptions. The SCC openly acknowledges its own remarkable jurisprudential confusion the equality test (reviewed in *Kapp*, 2008 SCC 41) and association rights (reviewed in *Fraser*, 2011 SCC 20)
- xv *Multani*, 2006 SCC 6; *SL*, 2012 SCC 7.
- xvi e.g. *Reference re Same Sex Marriage*, 2004 SCC 79 (equality); *Little Sisters*, 2007 SCC 2 (expression); *City of Montreal*, 2005 SCC 62 (noise on street)
- xvii *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217
- xviii *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3; *Vaid*, 2005 SCC 30; *Reference re Same Sex Marriage*
- xix *Sauve*
- xx *Refre s. 94(2) BC MVA*, [1985] 2 S.C.R. 486
- xxi *Hunter*, [1984] 2 S.C.R. 145; *Edmonton Journal*, [1989] 2 S.C.R. 1326
- xxii [1986] 1 S.C.R. 103
- xxiii *Danson*, [1990] 2 S.C.R. 1086
- xxiv *Spence*, 2005 SCC 71
- xxv *Ford*, [1988] 2 S.C.R. 712
- xxvi *Gosselin*, 2002 SCC 84
- xxvii Supreme Court of British Columbia, October 31, 2008 (*PHS Community Services Society v. Canada (Attorney General)*, Docket No. S075547) and May 27, 2008 and February 19, 2009 (*Vancouver Area Network of Drug Users (VANDU) v. Canada (Attorney General)*, Docket No. S065587); British Columbia Court of Appeal, January 15, 2010: 2010 BCCA 15, [2010] B.C.J. No. 57; Supreme Court of Canada, September 30, 2011: 2011 SCC 44, [2011] 3 S.C.R. 134.
- xxviii Ontario Superior Court of Justice dated September 28, 2010, with reasons reported at 2010 ONSC 4264, (2010), 102 O.R. (3d) 321; Ontario Court of Appeal, March 26, 2012: 2012 ONCA 186, [2012] O.J. No. 1296, 109 O.R. (3d) 1. Notice of

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application for leave to appeal to the SCC filed by Canada, April 25, 2012 (SCC Case 34788).

<sup>xxix</sup> *Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor v. Attorney General of Canada and Attorney General of British Columbia*, 2011 BCSC 1371

<sup>xxx</sup> 2011 BCSC 1588

<sup>xxxi</sup> The Insite litigation actually involved two matters that were consolidated for purposes of hearing. A writ was filed by the Vancouver Area Network of Drug Users (VANDU) on August 30, 2006. The second action was filed by the PHS Community Services Society on August 17, 2007. The matter proceeded to hearing almost entirely on the evidentiary record entered in the PHS matter. As this paper focuses on evidentiary issues, we will refer to the matter as being based on the case advanced by PHS.

<sup>xxxii</sup> S.C. 1996, c. 19, s. 4(1) and 5(1)

<sup>xxxiii</sup> The case also included a division of powers constitutional challenge to the application of the CDSA to Insite based on the doctrine of interjurisdictional immunity. The division of powers argument was accepted by the British Columbia Court of Appeal, but the Supreme Court of Canada held that the operation of Insite was not a core exercise of the provincial power over health matters. As none of the evidence entered was uniquely directed to the division of powers argument, the existence of the alternative argument did not impact the size or breadth of the trial record.

<sup>xxxiv</sup> SCC (per McLachlin C.J. for the Court)

<sup>xxxv</sup> *Ontario Rules of Civil Procedure*, rule 14.05(3)(g.1)

<sup>xxxvi</sup> R.S.C. 1985, c. C-46, ss. 210 [keeping a common bawdy-house], 212 [living off the avails of prostitution] and 213 [communicating in public for the purpose of engaging in prostitution].

<sup>xxxvii</sup> The Ontario Court of Appeal held that the application judge ought not to have addressed the s. 2(b) issue on the basis that the issue was *res judicata* by reason of the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (“*Prostitution Reference*”).

<sup>xxxviii</sup> SC, para. 84

<sup>xxxix</sup> On appeal, Canada submitted that the application judge erred by failing to properly exercise the role of “gatekeeper” regarding the admissibility of the expert evidence. The Ontario Court of Appeal held that Canada had agreed to the procedure below and, further, that Himel J.’s reasons demonstrated both that she was alive to the proper principles and that she had carefully assessed the evidence: Appeal Decision, paras. 136-138.

<sup>xl</sup> Appeal Decision, paras. 172, 213, 221 and 256.

<sup>xli</sup> Appeal Decision, paras. 279-280

<sup>xlii</sup> Appeal Decision, para. 280

<sup>xliii</sup> Appeal Decision, para. 307

<sup>xliv</sup> Appeal Decision, para. 310

<sup>xlv</sup> Appeal Decision, Para. 317

<sup>xlvi</sup> Appeal Decision, para. 333

<sup>xlvii</sup> Appeal Decision, paras. 335-337

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<sup>xlviii</sup> As with *Insite*, the pleadings in *Carter* raised a division of powers challenge, but the existence of that alternative claim did not have an impact on the record as none of the evidence entered was uniquely directed to that ground.

<sup>xlix</sup> Judgment was reserved on December 16, 2011, subject to the Court's determination to call the parties back to address any further matters, if necessary. The parties were subsequently asked to provide additional submissions on April 16, 2012, regarding the Ontario Court of Appeal's decision in *Bedford*.

<sup>l</sup> *Carter v. Canada (Attorney General)*, 2011 BCSC 1371 ("Affidavit Decision")

<sup>li</sup> Affidavit Decision, paras. 6-24

<sup>lii</sup> Affidavit Decision, para. 21

<sup>liii</sup> Affidavit Decision, paras. 24-28. The affidavit in question related to an affidavit that had been sworn in support of a different, earlier proceeding. The plaintiffs' sought to enter the earlier affidavit as an attachment to a new affidavit indicating that the original affiant was now too ill to swear a further affidavit. The information provided as to the state of the original affiant's present condition was found to be hearsay.

<sup>liv</sup> Affidavit Decision, para. 29

<sup>lv</sup> Affidavit Decision, paras. 29 and 30

<sup>lvi</sup> Affidavit Decision, para. 36

<sup>lvii</sup> Affidavit Decision, paras. 80-86 The plaintiffs also brought an application seeking to enter a DVD recording of a lay witness's testimony into evidence. The issue was not determined in the Affidavit Decision, and the plaintiffs ultimately filed the transcript alone by way of affidavit: Affidavit Decision, paras. 40-58

<sup>lviii</sup> Several objections to expert qualifications arose in cases where at least some aspect of the asserted expertise was accepted.

<sup>lix</sup> *Carter v. Canada (Attorney General)*, 2012 BCSC 886 ("Trial Decision")

<sup>lx</sup> Trial Decision, paras. 1041 and 1042. This finding is then illustrated in the reasons by a selection of the evidence given by the Plaintiffs' lay witnesses on these points. This evidence also provided the foundation for the Trial Judge's conclusion that the life interest was engaged for purposes of s. 7: see Trial Decision, para. 1322.

<sup>lxi</sup> Trial Decision, paras. 1158 and 1159. The evidence referenced in these paragraphs is set out in considerable detail elsewhere in the Trial Decision, often by reproduction of the affiant's own words. For example, Mr. Fenker's evidence is referenced at paras. 1277-78; Ms. Shapray's at para. 1145; and, that of Ms. LaForest, at para. 1279.

<sup>lxii</sup> Trial Decision, para. 1322

<sup>lxiii</sup> Trial Decision, para. 1238-42 (minimal impairment) and 1367 (overbreadth) The evidence and factual findings supporting these conclusions are set out in great detail in the Trial Decision: paras. 160 through 883.

<sup>lxiv</sup> Order in Council no. 553/09

<sup>lxv</sup> R.S.B.C. 1996, c. 68

<sup>lxvi</sup> *Criminal Code of Canada (Re)*, 2009 BCSC 1688, para. 36

<sup>lxvii</sup> *Criminal Code of Canada (Re)*, 2009 BCSC 1668 at paras. 37-40, 45 and 66-67

<sup>lxviii</sup> *Constitutional Question Act*, s. 5

<sup>lxix</sup> *Criminal Code of Canada (Re)*, 2010 BCSC 517 at para. 4.

<sup>lxx</sup> *Polygamy Reference*

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lxxi *Polygamy Reference*, paras. 77-78

lxxii *Polygamy Reference*, paras. 60-63

lxxiii *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519