

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF QUEBEC

APPELLANT
(Appellant)

and

JOSEPH-CHRISTOPHER LUAMBA, et al.

RESPONDENT
(Respondent)

FACTUM OF THE INTERVENER
PUBLIC INTEREST LITIGATION INSTITUTE

(Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada*)

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PART I : INTERVENER'S POSITION AND OVERVIEW OF FACTS

A – Intervener's Position

1. Public Interest Litigation Institute's ("PILI") intervention concerns the doctrine of *stare decisis*.
2. At first instance, the Superior Court of Quebec invoked the two exceptions to vertical *stare decisis* articulated in *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) to depart from this Honourable Court's precedent in *R. v. Ladouceur*, [\[1990\] 1 S.C.R. 1257](#). The judge invoked the new legal issues exception to invalidate s. 636 of the *Highway Safety Code*, [CQLR, c. C-24.2](#) under ss. 7 and 15 of the [Canadian Charter of Rights and Freedoms](#) and drew upon evidence of racial profiling as a fundamental shift in the evidentiary matrix to depart from *Ladouceur*'s analysis of whether the infringement of s. 9 satisfied the minimal impairment prong under s. 1. The Quebec Court of Appeal unanimously affirmed the Superior Court's departure from *Ladouceur* under ss. 9 and 15 but held it unnecessary to address s. 7.¹
3. But the discussion of *Ladouceur* and *stare decisis* is not confined to vertical *stare decisis*. Now that the present appeal is before this Honourable Court, considerations pertaining to the horizontal axis of *stare decisis* also become significant. This specific question of constitutional *stare decisis* and the precedent in *Ladouceur* is the specific and narrow issue on PILI intervenes.
4. PILI takes no position as to whether *Ladouceur* should be affirmed, overruled or otherwise departed from. PILI, however, respectfully submits that this Court should revisit *Ladouceur* in light of subsequent legal and factual developments and illuminate the relationship between *stare decisis* and the minimal impairment prong of the *Oakes* test.
5. PILI submits that the standard of appellate review to examine a lower court's departure from this Honourable Court's precedents under the exceptions to vertical *stare decisis* is correctness. PILI further contends that evidence of "significant evolution" in social attitudes or awareness of social phenomena since a precedent was decided can constitute a fundamental shift in the factual matrix authorizing precedential departures. Finally, precedents recognizing police powers under the ancillary powers doctrine are factually-suffused, conceptualized under the common law methodology of precedent, and therefore open to revisitation and possible departure including on the basis of subsequent legal developments.

¹ *Procureur général du Québec c. Luamba*, [2024 QCCA 1387](#), at paras. 2, 38-45, 78-225.

B – Overview of the Facts

6. PILI takes no position as to the facts at issue in the present appeal.

PART II – LEGAL ISSUES FOCUSED ON BY INTERVENER

7. PILI’s intervention focuses on a single issue: should this Honourable Court’s precedent in *Ladouceur* be affirmed, overruled, or otherwise departed from?

PART III – INTERVENER’S ARGUMENTS

I. The standard of appellate review on vertical *stare decisis* is correctness

8. PILI respectfully submits that a lower court’s departure from one of this Honourable Court’s precedents is correctness. This true regardless of whether the lower court invokes either or both of the *Bedford* exceptions to vertical *stare decisis*.
9. *Bedford* identified two exceptions to vertical *stare decisis* authorizing a lower court to depart from this Honourable Court’s precedents: 1) “if new legal issues are raised as a consequence of significant developments in the law”; and 2) when the factual and evidentiary matrix differ significantly from the facts on which the precedent was decided so as to “fundamentally shift the parameters of the debate”² This framework applies in the present case.
10. On its face, the first *Bedford* exception raises a question of law. It must therefore be reviewed for correctness. The second question is also a question of law: the lower court must correctly apply the second exception as a condition precedent to revisiting and possibly departing from this Court’s judgment. No deference is therefore owed to the lower court, even if questions of fact are otherwise reviewed on the standard of palpable and overriding error.
11. This Honourable Court should further clarify that appellate review of whether a lower court correctly departed from one of its precedents follows a two-step inquiry:
- i. The threshold question of whether the lower court correctly found that either or both of the two *Bedford* exceptions applied to authorize it revisit this Court’s precedent;
 - ii. If so, whether the lower court correctly revisited and affirmed or departed from this Honourable Court’s precedent.

² *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#), at paras. 42, 44; *Carter v. Canada (Attorney General)*, [2015 SCC 5](#), at paras. 44, 48; *R. v. Comeau*, [2018 SCC 15](#), at paras. 30, 43.

12. If the first question concerns the second *Bedford* exception pertaining to a fundamental shift in the evidentiary matrix, this Court's task is to ensure that the lower court's assessment is not tainted by a palpable and overriding error. The next determination is whether the lower court's assessment of the evidence indeed reaches the threshold of a fundamental shift in the evidentiary matrix. This question is reviewed for correctness.
13. If the first question concerns the first *Bedford* exception, the correctness standard applies to what is fundamentally a question of law. If the lower court erred under either exception, this Court can still choose to revisit the precedent under horizontal *stare decisis* principles – which exceed the *Bedford* exceptions.
14. The second question is concerned with whether the lower court's revisitation exercise was correct in affirming or departing from the given precedent. It may be that the first question is answered affirmatively, but that the lower court exceeded its authority by *overruling* rather than *departing* from precedent – which is not permitted under *Bedford*.³ It may also be that the lower court incorrectly refused to depart from precedent despite finding that either or both *Bedford* exceptions apply. In any case, the standard of review is correctness.
15. Fundamentally, this Honourable Court should not defer to lower courts revisiting its own precedents. Applying the correctness standard reconciles the balance between stability and progress maintained by *stare decisis* and respect for the Canadian judicial hierarchy.⁴
16. In this light, this Court's precedent in *Craig v. Canada*, [2012 SCC 43](#) remains good law. A lower court may depart from – but not overrule – a Supreme Court precedent where either or both of the *Bedford* exceptions are met. If neither exception is met, the lower court must apply the Supreme Court precedent to the letter, but may offer its perspectives on why this Court should overrule its own precedent.⁵ *Bedford* did not overrule *Craig*; both are easily reconciled.⁶
17. In the present case, this Court may revisit and depart from its precedent in *Ladouceur* regardless of whether it concludes that the lower courts correctly invoked the *Bedford* exceptions. On its face, however, *Ladouceur* did not consider s. 15 such that first exception was correctly invoked.

³ [Lawrence David, *Stare Decisis, The Charter and The Rule of Law in The Supreme Court of Canada*, \(LexisNexis, 2020\)](#), at 129. See generally, Part III of the monograph.

⁴ [David, at Part III](#); *Bedford*, at para. 42, 44, 46, 138, 141; *Carter*, at para. 44; *Comeau*, at para. 41.

⁵ *Craig v. Canada*, [2012 SCC 43](#), at paras. 20-23.

⁶ [David, at 142-145](#). See generally, Part III of the monograph.

II. Evidence of significant evolution in social attitudes regarding racial profiling can constitute a fundamental shift in the factual matrix under *Bedford*

18. Evidence of significant evolution in social attitudes or awareness of given social phenomena can constitute a fundamental shift in the factual matrix authorizing revisitation and possible departure from this Honourable Court's precedents as a matter of vertical or horizontal *stare decisis*. This includes evolved attitudes awareness towards racial discrimination and profiling.
19. As a matter of vertical *stare decisis*, "evidence of a significant evolution in the foundational legislative and social facts – 'facts about society at large' – is one type of evidence" falling within the new evidence exception to vertical *stare decisis* identified in *Bedford*.⁷ It is also the type of subsequent factual developments or "social change" warranting precedential revisitation and possible departure as a matter of horizontal *stare decisis*.⁸
20. This is not anomalous: it is reflective of the evolutionary judicial empiricism that has ensured the common law's vitality for centuries and its permeation of constitutional adjudication under the *Charter*.⁹ For example, in *Carter v. Canada (Attorney General)*, [2015 SCC 5](#), "new evidence about... public attitudes toward assisted death" formed part of the unanimous Court's basis for concluding that the trial judge correctly held that the absolute prohibition was overbroad and therefore contrary to the principles of fundamental justice under s. 7 of the *Charter*.¹⁰ (emphasis added) As highlighted in *R. v. Comeau*, [2018 SCC 15](#), at para. 32: "This evidence was unknowable or not pertinent, given the existing legal framework, when *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, was decided."
21. In *United States v. Burns*, [2001 SCC 7](#), the Court's departure from its precedents in *Kindler* and *Ng*¹¹ concerning extradition to face the death penalty was partially justified based on "shifts in society's views regarding capital punishment" and "Canadians' strong aversion to the death penalty"¹² Similarly, shifts in society's views regarding racial profiling by law enforcement and society's "strong aversion" to systemic racism warrants precedential revisitation in this case.

⁷ *Comeau*, at para. 31, citing *Bedford*, at paras. 48-49; *Carter*, at para. 47.

⁸ *David*, at 56-57; *R. v. Kirkpatrick*, [2022 SCC 33](#), at paras. 224-227.

⁹ *David*, at 69-77; R. Pound, *The Spirit of The Common Law* (1921)).

¹⁰ *Comeau*, at para. 32; [David](#), at 286.

¹¹ *Kindler v. Canada (Minister of Justice)*, [\[1991\] 2 S.C.R. 779](#); *Reference Re Ng Extradition (Can.)*, [\[1991\] 2 S.C.R. 858](#);

¹² *Kirkpatrick*, at para. 227; [David](#), at 287-290.

22. As well, in *R. v. Sheppard*, [2025 SCC 29](#), this Court emphasized that its precedents in *R. v. Friesen*, [2020 SCC 9](#) and *R. v. Bertrand Marchand*, [2023 SCC 26](#) direct that sentences for sexual offences against children must increase and that “courts should depart from precedents that do not reflect society’s current awareness of the impact of sexual violence on children.”¹³
23. Further, *Brooks v. Canada Safeway Ltd.*, [\[1989\] 1 S.C.R. 1219](#) overruled the precedent in *Bliss v. Attorney General of Canada*, [\[1979\] 1 S.C.R. 183](#), “because the impugned decision perpetuated inequities no longer acceptable in Canadian society.” (emphasis added). As cogently summarized in *R. v. Kirkpatrick*, [2022 SCC 33](#), at para. 226:

Bliss held that legislation disentitling pregnant women from receiving certain unemployment benefits did not discriminate against women on the basis of sex. *Bliss* reasoned that the legislation discriminated against pregnancy, not sex, as the legislation treated women differently because they were pregnant, and not because they were women. As more women entered the workforce and suffered the disadvantage sanctioned by *Bliss*, attitudes shifted. It became clear that drawing a distinction between pregnancy and sex was illogical and allowed employers to discriminate against women. Dickson C.J. concluded that *Bliss* “would not be decided now as it was decided then” because it was now “obvious” that those who bear children should not be economically or socially disadvantaged (p. 1243). Society had changed and *stare decisis* did not demand perpetuation of discriminatory practices (pp. 1243-44) (emphasis added)

24. Similarly, it is indisputable that “facts about society at large”¹⁴ referred to in *Bedford* and *Comeau* include social awareness and attitudes of social phenomena such as discrimination and profiling – including on racial grounds. Provided that lower courts commit no palpable and overriding error in their evidentiary assessments, evidence of significant evolution in the factual matrix pertaining to racial discrimination or profiling since a precedent was decided can warrant a lower court departing from this Honourable Court’s precedent under the second *Bedford* exception to vertical *stare decisis*. The evolved factual matrix may demonstrate significant developments from the attitudes animating the relevant precedent and/or illustrate that the precedent disproportionately impacts individuals and groups on the basis of race and other intersecting grounds. This rationale applies to the precedent in *Ladouceur* at issue here.

¹³ *Sheppard*, at para. 79, citing *Friesen*, at paras. 50, 110, 151; *Bertrand Marchand*, at para. 47.

¹⁴ *Comeau*, at para. 31, citing *Bedford*, at paras. 48-49; *Carter*, at para. 47.

25. This Court’s sensitivity to evolving social conditions in its definition and application of both horizontal and vertical *stare decisis* reflects and furthers two fundamental pillars of its adjudicative ethos in both constitutional and non-constitutional cases.
26. The first is the affirmation that “*stare decisis* is not a straitjacket that condemns the law to stasis.”¹⁵ The second is that adherence to precedent can generate injustice – a compelling reason this Court has identified as warranting precedential departure as a matter of horizontal *stare decisis*.¹⁶ Evidence of significant evolution of social attitudes or awareness can assist in identifying when precedent leads to injustice – including racial injustice – and thus warrant its revisitation and departure. In this light, *Ladouceur* is ripe for revisitation.

III. The minimal impairment prong of the *Oakes* test is fertile ground for precedential revisitation and departure

27. The minimal impairment prong of the *Oakes* test is fertile ground for revisitation and departure from this Honourable Court’s precedents as a matter of vertical and horizontal *stare decisis*. As noted by this Court, a fresh application of the *Oakes* test can yield different conclusions “when that template is applied... in a different historical context and based on different findings supported by a different record at a different time.”¹⁷
28. Indeed, it is trite law that “the application of s. 1 of the *Charter*... is always a complex factual and legal analysis.”¹⁸ Under the *Oakes* test, a pressing substantial objective requires evidence that the objective may be so characterized and is not colourable.¹⁹ Empirical or other evidence is often required to show a rational connection.²⁰ Minimal impairment requires evidence that the impugned law limits rights no more than necessary to achieve the objective.²¹ The final balancing assesses proportionality between the law’s salutary and deleterious *effects* – a necessarily factual inquiry.²² This makes this Honourable Court’s conclusions of mixed fact

¹⁵ *Carter*, at para. 44; *R. v. Sullivan*, [2022 SCC 19](#), at para. 66.

¹⁶ *Sullivan*, at para. 66; *Michel v. Graydon*, [2020 SCC 24](#), at para. 107.

¹⁷ *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007 SCC 30](#), at para. 11; *Carter*, at para. 46; *Re: Anti-Inflation Act*, [\[1976\] 2 S.C.R. 373](#), at 427, 499.

¹⁸ *Harper v. Canada (Attorney General)*, [2000 SCC 57](#), at para. 4.

¹⁹ *R. v. Oakes*, [\[1986\] 1 S.C.R. 103](#), at pp. 138-39; *R. v. Appulonappa*, [2015 SCC 59](#), at para. 79.

²⁰ *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services*, [2018 SCC 17](#), at para. 58; *Frank v. Canada (Attorney General)*, [2019 SCC 1](#), at para. 63.

²¹ *RJR-MacDonald, Inc. v. Canada (Attorney General)*, [\[1995\] 3 S.C.R. 199](#), at para. 160.

²² *Oakes*, at 138-139; *R. v. Brown*, [2022 SCC 18](#), at paras. 164-165; *Bedford*, at para. 126.

and law under s. 1 fertile ground for precedential revisitation and departure. This includes conclusions under the minimal impairment prong of the *Oakes* test.²³

29. In the present case, the Court of Appeal affirmed the Superior Court’s departure from this Court’s minimal impairment analysis in *Ladouceur* on the basis of the second *Bedford* exception to vertical *stare decisis* – a fundamental shift in the evidentiary and factual matrix.²⁴ This is constitutionally and legally unobjectionable.
30. It is true that this Court has never departed from a prior conclusion finding that a law is minimally impairing or affirmed a lower court judgment having done so under the *Bedford* exceptions.²⁵ However, as noted, the minimal impairment stage is a question of mixed fact and law and evolution in the evidentiary and factual matrix since a precedent was decided is a permissible basis for precedential revisitation and departure. The evidence may, for example, consist of policy alternatives having emerged since a law was upheld as minimally impairing that are significantly less impairing than the law being challenged.
31. For example, in *Carter* – which did not involve revisitation of minimal impairment analysis²⁶ – the impugned *Criminal Code* provisions failed minimal impairment in part based on policy alternatives other than an absolute prohibition on medical assistance in dying adopted in other jurisdictions since *Rodriguez* was decided.²⁷
32. Revisitation of this Court’s prior conclusions on minimal impairment should not be surprising nor unexpected – from its adoption, the *Oakes* test has been applied in a contextual and flexible manner sensitive to “the knowledge, social conditions and regulatory environment revealed by the evidence presented...”²⁸ In turn, social conditions are “inherently evolutive [in] nature,”²⁹ such that the minimal impairment analysis is itself best understood as dynamic. Indeed, an

²³ [David, at 292-306.](#)

²⁴ *Procureur général du Québec c. Luamba*, [2024 QCCA 1387](#), at paras. 128-138.

²⁵ [David, at 302.](#)

²⁶ No s. 1 analysis was conducted in *Rodriguez v. British Columbia*, [\[1993\] 3 S.C.R. 519](#)

²⁷ *Carter*, at paras. 8, 104-113.

²⁸ *Oakes*, at 138-138; *Thomson Newspapers Co. v. Canada (Attorney General)*, [\[1998\] 1 S.C.R. 877](#), at para. 125; *R. v. K.R.J.*, [2016 SCC 31](#), at paras. 59, 77;

²⁹ [David, at 293-294.](#)

evolved factual matrix can “fundamentally shift[] how the Court... assess[es] the nature of the competing interests in issue,”³⁰ and the analysis into whether a measure is minimally impairing.

33. The evolved “knowledge” and “social conditions” warranting a precedent’s revisitation and departure must necessarily include evidence of a greater incidence, occurrence, awareness, and impact of racial discrimination, including racial profiling in the deployment of police powers. Fundamentally, a law that results in discriminatory outcomes – such as racial profiling – is not minimally impairing when policy alternatives achieving the legislative objectives without producing such consequences are available.
34. It is from this vantage point that the Superior Court’s revisitation of the minimal impairment analysis in this Honourable Court’s precedent in *Ladouceur* should be evaluated.

IV. Ancillary powers are not immune from precedential revisitation and departure

35. This Court’s precedents recognizing new police powers under the ancillary powers doctrine are not immune from revisitation and departure under the vertical and horizontal axes of *stare decisis*. This includes ancillary powers recognized or affirmed in *Ladouceur*.
36. The ancillary powers doctrine – also known as the *Waterfield* doctrine – is used to recognize new common law police powers to interfere with an individual liberty or property. Such powers include random roadside testing, investigative detentions, searches incidental to lawful arrest, sniffer dog searches, and safety searches.³¹
37. The second step of the ancillary powers test asks whether the conduct proposed to be recognized as a new power “involve a justifiable use of police powers” associated with their common law or statutory duties. Justifiability is based on whether the conduct is necessary having regard to, *inter alia*, “the necessity of the interference with an individual’s liberty or property for the performance of the duty” and “the extent of the interference with individual liberty” involved.³² “Liberty” encompasses *Charter* rights and common law protections.³³
38. Both criteria are questions of mixed fact and law: necessity must be evidentially demonstrated, and the level of interference – the impact on individuals³⁴ – is necessarily factually-suffused.

³⁰ *Comeau*, at para. 132; [David](#), at 294.

³¹ *Fleming v. Ontario*, [2019 SCC 45](#), at paras. 5, 41-43, 49, citing several precedents.

³² *Fleming*, at paras. 46-49, citing *R. v. MacDonald*, [2014 SCC 3](#), at paras. 35-37,

³³ *Fleming*, at para.

³⁴ *Fleming*, at para. 76.

As such, significant evolution in the factual matrix since a precedent first recognized an ancillary power can and should constitute grounds to revisit the precedent.

39. Fascinatingly, the reasonable necessity criterion is functionally equivalent to the minimal impairment stage of the *Oakes* test, as it “requires that other, less intrusive means not be valid options in the circumstances.”³⁵ Indeed, “if the police can reasonably attain the same result by taking an action that intrudes less on liberty, a more intrusive measure will not be reasonably necessary no matter how effective it may be.”³⁶
40. However, as under the minimal impairment, the existence of alternative measures is a question of fact. If the evidentiary record in a subsequent case includes alternative measures not available at the time an ancillary power was first recognized, this may justify revisitation and possible departure from the relevant precedent. In other words, a precedent crystallizing an ancillary power may be overruled or otherwise departed from if the power it recognizes is no longer reasonably necessary. The common law must keep pace with technological development,³⁷ and an evolution in police tools or techniques may render an ancillary power obsolete.
41. The level of interference identified at the stage of recognizing a new ancillary power may also come to be undermined by a subsequent significant evolution in the factual matrix. The evidence may, for example, show that the interference is more significant than initially expected. This is – to use former Harvard Law School Dean Roscoe Pound’s phrase – a function of “experience developed by reason and reason tested by experience.”³⁸
42. And, most directly relevant to this appeal, evidentiary developments may show that the ancillary power has a disparate and disproportionate impact on individuals and communities characterized by one or more enumerated and/or analogous grounds of discrimination.³⁹ The ancillary power may, in other words, generate discriminatory and unjust outcomes, thereby warranting the precedent’s revisitation *and* departure.⁴⁰ In the present case, the fundamental question is whether “the police can reasonably attain the same result” as that achieved by

³⁵ *Fleming*, at para. 54.

³⁶ *Fleming*, at para. 98.

³⁷ See e.g., *R. v. Kirkpatrick*, [2022 SCC 33](#), at paras. 219, 222, 229, 230.

³⁸ e.g., *R. Pound*, “What of *Stare Decisis*?” (1941) 10 *Ford. L. Rev.* 1, at 5; *R. Pound, Social Control Through Law* (New Haven: Yale University Press, 1942), at 50-51. See also *David*, at 69-72.

³⁹ *R. v. Le*, [2019 SCC 34](#), at paras. 89-97.

⁴⁰ *R. v. Sullivan*, [2022 SCC 19](#), at para. 66; *Michel v. Graydon*, [2020 SCC 24](#), at para. 107.

random, warrantless and suspicionless roadside stops without engaging in racial profiling. If so, then measures exist that “intrude[] less on liberty,” such that the “more intrusive measure [is] not be reasonably necessary no matter how effective it may be.”⁴¹

43. A precedent crystallizing an ancillary power of this nature does not necessarily need to be overruled in its entirety. In each case involving the recognition of an ancillary power, “the Court has endeavoured to define the power at issue and to clearly specify the particular conditions for its use.”⁴² (emphasis added)
44. As such, revisitation of such cases based on evolved evidentiary records can include adding conditions to using the relevant power to prevent the abuses, and unjust and/or discriminatory outcomes that could not have been foreseen when first recognized.
45. Further, as ancillary powers cannot be recognized in respect of authorities conferred under statute under a higher legal standard,⁴³ the enactment of statutory authority subsequent to a precedent recognizing an ancillary power is a new legal issue warranting its revisitation and possible departure as a matter of horizontal and vertical *stare decisis*.
46. Note as well that the revisitation and departure from a precedent concerning statutory powers also recognized as ancillary powers in jurisdictions without particular statutory authority will necessarily impact the precedent recognizing the relevant ancillary power. The opposite is also true if departure concerns precedent recognizing an ancillary power. If both powers are identical or functionally equivalent, departure from the relevant precedent will constitute a new legal issue warranting its counterpart’s revisitation under horizontal or vertical *stare decisis*.
47. As such, if *Ladouceur* is departed from, it will necessarily impact on the ancillary powers identical or equivalent their statutory counterparts, such as s. 636 of the *Highway Safety Code*.
48. Overall, precedents recognizing ancillary powers are not immune from revisitation or departure.

THE WHOLE RESPECTFULLY SUBMITTED THIS 26th DAY OF SEPTEMBER 2025



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⁴¹ *Fleming*, at para. 98.

⁴² *Fleming*, at para. 49, citing *MacDonald*, at paras. 39-40, among others.

⁴³ *Fleming*, at paras. 62, 95.

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