

COURT OF APPEAL

ON APPEAL FROM the order of The Honourable Chief Justice Hinkson of the
Supreme Court of British Columbia, pronounced on October 11, 2017

BETWEEN:

Julia Lamb and British Columbia Civil Liberties Association

Appellants
(Plaintiffs)

AND:

Attorney General of Canada

Respondent
(Defendant)

APPELLANTS' FACTUM

**Julia Lamb and British Columbia Civil
Liberties Association, Appellants**

**Attorney General of Canada,
Respondent**

Sheila M. Tucker, Q.C.
Shapray Cramer Fitterman Lamer LLP
670 – 999 Canada Place
Vancouver BC V6C 3E1
Tel: 604.681.0900
Fax: 604.681.0920

B.J. Wray and M.B. Nicholls
Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Tel: 604.666.4304
Fax: 604.666.6258

- and -

**Joseph J. Arvay, Q.C. and
Alison M. Latimer**
Arvay Finlay LLP
1710 – 401 West Georgia Street
Vancouver BC V6B 5A1
Tel: 604.696.9828
Fax: 888.575.3281

INDEX

PART	PAGE
CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION	i
OPENING STATEMENT	iv
PART I. STATEMENT OF FACTS	1
A. Overview	1
B. Rationale for 2016 Law’s Excluded Group	5
C. Relevance of the Carter Findings to 2016 Laws	7
D. The “Consultation” Process and Findings	13
E. The Chambers Judge’s Decision	14
PART II. ERRORS IN JUDGMENT	15
PART III. ARGUMENT	15
A. ABUSE OF PROCESS – CARTER FINDINGS	15
1. Law	15
2. Errors in Application	16
B. ISSUE ESTOPPEL – CARTER FINDINGS	18
1. Law	18
2. Errors in Application	19
C. RESIDUAL DISCRETION – CARTER FINDINGS	20
1. Law	20
2. Errors in Application	21
D. IMPROPER RELIANCE ON <i>STARE DECISIS</i> PRINCIPLES – <i>ALLEN v. ALBERTA</i>	23
E. FAILURE TO CONSIDER RELEVANT CONSIDERATIONS	24
1. Constitutional Dialogue	25

2. Constitutional Accountability	26
3. Public Interest Litigation and Access to Justice	28
F. COLLATERAL ATTACK/ ABUSE OF PROCESS – SCOPE FINDINGS	28
PART IV. NATURE OF ORDER SOUGHT.....	30
APPENDICES	31
Appendix A – <i>Canadian Charter of Rights and Freedoms</i> , ss. 1, 7, 15, and 33, Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c. 11	31
Appendix B – <i>Criminal Code</i> , R.S.C. 1985, c. C-46, ss. 14 and 241 (pre-Carter)	33
Appendix C – <i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 241.2 (Current)	34
Appendix D – <i>Rules of the Supreme Court of Canada</i> , SOR/2002 – 156, s. 76	38
Appendix E – <i>Supreme Court Act</i> , R.S.C. 1985, c. S-26, s. 53.....	39
Appendix F – <i>Supreme Court Civil Rules</i> , R. 9-5.....	41
LIST OF AUTHORITIES.....	42

CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

Carter Proceedings	
November 14-18, 21-25, 28, December 1-2, 5-9, 12-14, 16, 2011, and April 16, 2012	Trial of the matter before Smith J. of the Supreme Court of British Columbia.
June 15, 2012	Reasons for Judgment of Smith J.: <i>Carter v. Canada (Attorney General)</i> , 2012 BCSC 886 [Trial Reasons].
March 18-22, 2013	Appeal hearing before Finch, C.J., Newbury and Saunders, J.J.A. of the Court of Appeal of British Columbia.
October 10, 2013	Reasons for Judgment of Finch, C.J., Newbury and Saunders, J.J.A.: <i>Carter v. Canada (Attorney General)</i> , 2013 BCCA 435 [Carter BCCA Reasons].
January 16, 2014	Order of Abella, Rothstein and Moldaver J.J.A. of the Supreme Court of Canada granting leave to appeal from the decision in <i>Carter v. Canada (Attorney General)</i> , 2013 BCCA 435.
May 16, 2014	Order of Rothstein J.A. of the Supreme Court of Canada granting the Attorney General of Canada's application to adduce new evidence on appeal.
June 17, 2014	Attorney General of Canada filed supplemental record (new evidence).
September 4, 2014	Order of Rothstein J.A. of the Supreme Court of Canada granting the Appellants' application to introduce new reply evidence and reply factum.
September 8, 2014	Appellants filed supplemental record (reply evidence).
September 12, 2014	Appellants filed reply factum.
October 15, 2014	Appeal hearing before McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon J.J.A. of the Supreme Court of Canada.
February 6, 2015	Reasons for Judgment of The Court: <i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5 [Carter #1].

February 6, 2015	Order of McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon J.J.A. of the Supreme Court of Canada making and then suspending <i>Carter #1</i> declaration of invalidity for 12 months.
December 3, 2015	Attorney General of Canada filed motion under SCR Rule 76 (Re-Hearing of Appeal) seeking order extending suspension of declaration of invalidity for a further six months.
December 17, 2015	Attorney General of Canada's motion to re-open <i>Carter</i> appeal granted.
January 11, 2016	Hearing of motion to extend <i>Carter #1</i> suspension of declaration of invalidity before McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown J.J.A. of the Supreme Court of Canada.
January 15, 2016	Reasons for judgment of McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown J.J.A. of the Supreme Court of Canada: <i>Carter v. Canada (Attorney General)</i> , 2016 SCC 4 [Carter #2].
January 15, 2016	Order of Abella, Karakatsanis, Wagner, Gascon and Côté J.J.A. of the Supreme Court of Canada granting the Attorney General of Canada a four month extension of the <i>Carter #1</i> suspended declaration of invalidity, and granting exemptions of this suspension to the province of Quebec, and those persons who wished to exercise their rights by application to the superior court of their jurisdiction for relief in accordance with the criteria set out in paragraph 127 of <i>Carter #1</i> .
June 17, 2016	Bill C-14, <i>An Act to amend to the Criminal Code and make related amendments to other Acts (medical assistance in dying)</i> , received royal assent.
Lamb Proceedings	
June 27, 2016	Plaintiffs filed Notice of Civil Claim: <i>Lamb and BCCLA v. Attorney General (Canada)</i> , BCSC File No. S-165851.
July 27, 2016	Attorney General of Canada filed Response to Civil Claim.
August 3, 2016	Plaintiffs filed their Reply to the Attorney General's Response to Civil Claim.

May 23, 2017	Plaintiffs filed Notice of Application to strike portions of the Attorney General's Response to Civil Claim.
June 12-13, 2017	Hearing of plaintiffs' application to strike before Hinkson, C.J. of the Supreme Court of British Columbia.
June 20, 2017	Consent order of the Supreme Court of British Columbia adding Robyn Moro as a plaintiff and permitting the Plaintiffs to file an Amended Notice of Civil Claim.
June 21, 2017	Plaintiffs filed Amended Notice of Civil Claim.
July 19, 2017	Attorney General of Canada filed Amended Response to Civil Claim.
August 31, 2017	Plaintiff Robyn Moro died.
October 11, 2017	Reasons for Judgment of Hinkson, C.J. denying Plaintiffs' application to strike: <i>Lamb v. Canada (Attorney General)</i> , 2017 BCSC 1802.
October 11, 2017	Order of Hinkson, C.J. of the Supreme Court of British Columbia denying plaintiffs' application to strike.
November 9, 2017	Plaintiffs filed Notice of Appeal from the October 11, 2017 order of Hinkson, C.J.

OPENING STATEMENT

In the *Carter* litigation, the SCC declared the law void insofar as it prohibited physician-assisted death [“PAD”] for decisionally capable individuals suffering unbearably from a grievous and irremediable medical condition. It held that: “the individual assessment of vulnerability (whatever its source) is condoned for life-and-death decision-making in Canada.” Canada enacted a replacement law giving access to *some* of the people coming within the *Carter* declaration. Others (e.g., those whose “natural death” is not “reasonably foreseeable”) remain absolutely prohibited – without individual assessment and regardless of whether they are decisionally capable in fact. The plaintiffs, Julia Lamb and BCCLA (a *Carter* plaintiff), assert the new law fails to meet the constitutional minimums set by the *Carter* declaration and continues the constitutional flaw identified in *Carter*.

The plaintiffs say the factual findings from *Carter* (“Carter Findings”) are binding - by virtue of abuse of process or issue estoppel - unless conclusively impeached by fresh evidence that was unavailable during the *Carter* proceedings. Canada says, and the court below agreed, that the Carter Findings are not binding: *Carter* is merely a legal precedent, and all of its factual issues need to be fully retried.

The Carter Findings – e.g., whether vulnerable persons can be reliably assessed for eligibility; the impact denial of access has on suffering individuals; whether evidence about regimes in foreign jurisdictions provides a basis for inferring how a Canadian system would operate – were fully and forcefully litigated. The Carter Findings do not merely arise in both, and are not merely “connected” to both, but are *fundamental* to *Carter and Lamb*. The doctrines of abuse of process and estoppel should apply to prevent re-litigation in the context of this challenge to replacement legislation: *Lamb*’s primary assertion is that Canada failed in its duty to comply with *Carter*; *Lamb* continues the *same* “constitutional dialogue” started by the *Carter* declaration. Abuse of process exists in order to protect the proper administration of justice: Canada’s position that it is entitled to a complete evidentiary “do-over”, notwithstanding *Carter* and *Lamb* are public interest cases separated in time only by the period of suspension Canada sought, is abusive.

PART I. STATEMENT OF FACTS

A. Overview

1. The first individual plaintiff, Ms. Lamb, has Spinal Muscular Atrophy, Type 2, a hereditary disease that causes weakness and wasting of the voluntary muscles. The second individual plaintiff, Robyn Moro, had Parkinson's disease, a neurodegenerative disease that primarily affects movement.

2. The British Columbia Civil Liberties Association ("**BCCLA**") was granted public interest standing as a party in [*Carter v. Canada \(Attorney General\)*, 2012 BCSC 886 \[Trial Decision\]](#), [*Carter v. Canada \(Attorney General\)*, 2015 SCC 5 \[Carter #1\]](#) and [2016 SCC 4 \[Carter #2\]](#), (collectively, "**Carter**"). BCCLA's standing as a plaintiff on the same basis is unopposed in the present proceedings ("**Lamb proceedings**").

3. The *Carter* plaintiffs challenged the then criminal law ("**Carter Law**")'s prohibition against assisted dying. The prohibition was absolute in that it applied regardless of the fact that it was physician-assisted dying ("**PAD**") and prohibited PAD even where the patient was decisionally capable. It was never asserted by the plaintiffs in *Carter* that there should be no prohibition. The plaintiffs' position was that the prohibition must make a PAD exception for decisionally capable patients, with decisional capability being determined by application of the eligibility criteria identified in *Carter* ("**Carter Criteria**").¹

4. The core² *Charter* claimant group in *Carter* consisted of all requesting individuals satisfying the Carter Criteria: (a) competent (to make a medical decision to die); (b) informed; (c) adult; (d) suffering intolerably from a grievous and irremediable medical condition (illness, disease or disability); and, (e) acting voluntarily.

¹ Affidavit #1 of Jessi Halliday affirmed May 19, 2017 ("**Halliday #1**"), Ex. A (Carter Amended Notice of Civil Claim filed August 15, 2011), Appellants Appeal Book ("**AB**"), Vol. 1, pp. 92-117

² With the s. 15 claimants needing to meet all the *Carter* Criteria, and also to be materially physically disabled such that they could not terminate their lives without assistance.

5. In response, Canada asserted that: (1) no one could be reliably vetted for eligibility using the Carter Criteria; (2) some groups (in particular, the disabled and the elderly) were *especially* incapable of being vetted for eligibility (“**purported vulnerable groups**”) and thus would be at particular risk under a permissive PAD law; and, (3) a permissive PAD law would have negative social consequences (in particular, condoning traditional suicide and negative messaging about the value of the lives of the disabled and elderly) (“**purported social consequences**”).

6. The trial judge found that all persons could, in fact, be reliably assessed for eligibility under the Carter Criteria. All persons were, therefore, constitutionally entitled to seek PAD if assessed as eligible. The trial judge specifically found that *the purported vulnerable groups could be reliably vetted* using the Carter Criteria (and were, in fact, already being vetted for medical decision-making for other potentially life-shortening procedures). The trial judge found the purported social consequences to be unproven, speculative and/or non-compelling. All of these findings were upheld on appeal.

7. The Supreme Court of Canada affirmed the trial judge’s declaration of unconstitutionality based on an unjustifiable infringement of *Charter*, s. 7, and suspended the declaration of invalidity to enable the government to enact replacement legislation. A unanimous SCC framed the declaration in the express terms of the Carter Criteria (emphasis added):

127 The appropriate remedy is therefore a declaration that s. 241(b) and s. 14 of the *Criminal Code* are *void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.* “Irremediable,” it should be added, does not require the patient to undertake treatments that are not acceptable to the individual....³

³ [Carter #1](#), ¶127

8. The *Lamb* proceedings challenge the constitutionality of portions of s. 241.2 of the *Criminal Code*, R.S.C. 1985, c. C-46⁴ (“**2016 Law**”), the replacement legislation enacted following the declaration of unconstitutionality in *Carter*.

9. The 2016 Law permits a *subclass* of persons eligible under the Carter Criteria to legally access PAD: s. 241.2(2). Those persons who are outside that subclass but meet the Carter Criteria (“**Excluded Group**”) remain exactly as they were under the Carter Law – absolutely prohibited from access to PAD regardless of their decisional capability.

10. The Excluded Group will include: (1) persons who *are unbearably suffering* from disabilities, illnesses or diseases that will either not end their lives or not end them for a long time, and whose death from some other cause (e.g., old age) is not reasonably foreseeable; (2) persons who *are unbearably suffering* but who cannot (or at least, cannot yet) be categorized as in “advanced state of irreversible decline in capability”; and, (3) persons who *are unbearably suffering* with medical conditions that are not “incurable”, but for whom the means of cure is personally unacceptable.

11. The primary assertion of the *Lamb* proceedings is that the 2016 Law is unconstitutional because the Excluded Group renders the 2016 Law inconsistent with the constitutional minimums recognized in the *Carter* declaration.

12. In their Civil Claim, the *Lamb* plaintiffs rely on findings on issues of fact (or of mixed law and fact) made in [Carter #1](#), as well as findings on issues of fact (or of mixed law and fact) made in the [Trial Decision](#) (collectively, “**Carter Findings**”).⁵ For example, the plaintiffs rely on findings on fundamental and highly disputed factual issues, such as physicians’ ability to reliably assess decisional capability (including for members of the purported vulnerable groups) using the Carter Criteria, and the impact denial of access

⁴ As amended by Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, 1st Sess., 42nd Parl., 2016

⁵ Amended Notice of Civil Claim, filed 21 June 2017, ¶¶78-95, Appeal Record (“**AR**”), pp. 12-13; Notice of Application, Part 1, ¶2, AR pp. 31-33

has on unbearably suffering persons. In its Response,⁶ Canada conceded the Carter Findings were made, but pled that none were binding in the *Lamb* litigation.

13. In its Response, Canada also asserted that the *Carter* declaration was limited to persons in the factual circumstances of specific individuals (Gloria Taylor, Kay Carter) involved in *Carter*. Canada advanced the same position in individual applications brought under [Carter #2](#). Canada's position was squarely rejected in [E.F.](#) and [I.J.](#) ("**Scope Findings**").⁷ Canada did not appeal those decisions,⁸ nor did it refer the question of law to the SCC for determination.⁹

14. The plaintiffs applied, under Rule 9-5(b) and (d), and/or the court's inherent jurisdiction, to strike the relevant portions of the Response on the basis that Canada's position on the Carter Findings and Scope Findings constituted an abuse of process, and/or that issue estoppel applied to prevent re-litigation of the Carter Findings.

15. The plaintiffs did not assert: that Canada could not defend the 2016 Law; that Canada could not argue that the 2016 Law complied with *Charter* s. 7; or, that Canada could not argue the 2016 Law was reasonable and justified under *Charter* s. 1.

16. The plaintiffs asserted that Canada was not entitled to re-litigate *Carter's* fundamental factual determinations as if the *Carter* litigation had never occurred. The plaintiffs accepted that to the extent Canada could, with regard to a given Carter Finding, meet the established threshold¹⁰ for admitting fresh¹¹ evidence, it was open to

⁶ Part 1, Division 2, ¶¶8-13 of Attorney General of Canada's ("**AGC**" or "**Canada**") Amended Response to Civil Claim filed July 19, 2016 ("**Response**"), AR pp. 21-22

⁷ [Canada \(Attorney General\) v. E.F., 2016 ABCA 155 \[E.F.\]](#); [I.J. v. Canada \(Attorney General\), 2016 ONSC 3380 \[I.J.\]](#)

⁸ *E.F.*; see also Affidavit #2 of Jessi Halliday affirmed May 23, 2017 ("**Halliday #2**"), Ex. E, p. 36, AB Vol. 3, p. 826; *I.J.*; see also Halliday #2, Ex. F, p. 37, AB Vol. 3, p. 807

⁹ *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53

¹⁰ [Toronto \(City\) v. C.U.P.E., Local 79, 2003 SCC 63 \[Toronto\]](#) In *Toronto*, the SCC described the circumstances in which new evidence might warrant re-litigation in the following terms: "when fresh, new evidence, *previously unavailable, conclusively impeaches* the original results" (¶52; emphasis added). An application to admit fresh evidence with regard to a specific Carter Finding would need to be brought and determined before such evidence could be admitted in relation to that Carter Finding.

Canada to seek permission to introduce evidence on that basis. However, Canada was not otherwise permitted to re-litigate or collaterally attack the Carter Findings.

17. Further, the plaintiffs accepted that Canada (and the plaintiffs) could enter evidence on relevant points that did not involve, directly or indirectly, re-litigating or collaterally attacking the Carter Findings. For example, Canada could adduce evidence that it had consulted before enacting the 2016 Laws (if it could establish relevance) and evidence about the medical conditions and ages of persons who were and were not obtaining access to PAD under the 2016 Laws.

18. Canada is entitled to advance legal arguments that the *Charter* analysis results in an affirmation of the 2016 Law because of its objectives (including the “additional” objectives) and/or because the 2016 Law permits access by a subclass of persons eligible under the Carter Criteria. Those legal arguments can be advanced on a record that consists of: (1) the Carter Findings; (2) such additional evidence regarding the Carter Findings that Canada is able to adduce having met the threshold for “fresh evidence”; and, (3) the relevant evidence brought forward by the parties that does not re-litigate or collaterally attack the Carter Findings.

19. To the extent Canada’s Response asserts the same position on the interpretation of [Carter #1](#) already squarely heard and rejected by the courts of other provinces, Canada should be bound by the Scope Findings. It is an abuse of process for Canada to effectively “shop” for a conflicting answer in the courts of yet another province.

B. Rationale for 2016 Law’s Excluded Group

20. Although the AGC asserted multiple objectives for the Carter Law throughout the *Carter* litigation (as discussed below), the Carter Law was found to have a single

¹¹ “Fresh” in this context means evidence that only became available following the issuance of [Carter #2](#) (January 2016). AGC’s December 3, 2015 application to extend the suspension was a Rule 76 application re-opening the *Carter* appeal. AGC could have applied to supplement the record with any fresh evidence existing at that time, but did not. Notably, AGC did ask the SCC to reopen the record in *Carter #1* to file fresh evidence, was given leave, and did file a supplemental record at the SCC in *Carter #1*.

objective – the protection of the vulnerable who might be induced to end their lives in moments of weakness. The 2016 Law claims “additional” objectives.

21. The Addendum¹² to the AGC’s Legislative Background paper states (emphases added):

The purposes of Bill C-14 differ in important respects from those of the previous legislation. The absolute prohibition was determined to have only one purpose - the protection of the vulnerable who might be induced in moments of weakness to end their lives. Although this remains an important purpose of the proposed legislation, Bill C-14 pursues a number of additional objectives. The Bill aims to recognize the significant and continuing public health issue of suicide, which affects individuals, families and communities, to guard against death being seen as a solution to all forms of suffering, and to counter negative perceptions about the quality of life of persons who are elderly, ill or disabled. The Government’s position is that the restriction of medical assistance in dying furthers these important objectives and does not infringe s. 7 of the Charter.¹³

22. Consistent with that statement, the Preamble to the 2016 Law asserts:

Whereas it is important to affirm the inherent and equal value of every person’s life and *to avoid encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled;*

...

Whereas vulnerable persons must be protected from being induced, in moments of weakness, to end their lives;

Whereas *suicide is a significant public health issue* that can have lasting and harmful effects on individuals, families and communities;

Whereas, *in light of the above considerations, permitting access to medical assistance in dying for competent adults whose deaths are reasonably foreseeable strikes the most appropriate balance* between the autonomy of persons who seek medical assistance in dying, on one hand, *and the interests of vulnerable persons in need of protection and those of society,* on the other;

23. Thus, the AGC has given reasons and objectives for continuing to bar the Excluded Group. These are repeated in its Response.¹⁴ It has also expressly

¹² Affidavit #1 of Nicoleta Badea, sworn April 5, 2017 (“**Badea #1**”), Ex. B (Legislative Background- Addendum), AB Vol. 1, pp. 81-84; Affidavit #2 of Nicoleta Badea, sworn June 8, 2017 (“**Badea #2**”), Ex. A (Legislative Background); 2016 Laws (Preamble), AB Vol. 4, pp. 1293-1321

¹³ Badea #1, Ex. B, p. 80, AB Vol. 1, p. 82

¹⁴ Response, Part 1, ¶¶18 and 33, AR pp. 22 and 24

confirmed that the sole objective of the Carter Law remains “an important purpose” of the 2016 Law.

24. The Addendum also contains a section entitled “Rationale for the approach in Bill C-14”.¹⁵ This section makes it clear that the primary concerns driving the restriction on the Excluded Group did not relate to the “additional” objectives, but rather involved a re-visitation of the “true wishes” and “purported vulnerable groups” points addressed at length in *Carter* and determined by the Carter Findings. For example:

... The second category is based more broadly on providing relief from unbearable suffering, without regard to whether the person is on a path towards death. ... They have argued that such a regime would pose real risks to individuals with disabilities. Many experts have also argued that when medical assistance in dying is available on the basis of suffering alone, eligibility and risks become much more difficult to screen for and to contain. They have pointed to the wide range of circumstances that can cause suffering and that can render individuals vulnerable – social isolation, poverty, grief, discrimination, fears about the future and about being burden on others, etc. Because of the subtle and hard-to-detect ways in which vulnerability can compromise autonomy, these experts have argued that permitting medical assistance in dying as a response to suffering in life would pose unacceptable risks that could not be adequately addressed through any system of safeguards.

C. Relevance of the Carter Findings to 2016 Laws

25. The Carter Findings are equally relevant to the 2016 Law as to the Carter Law with respect to the core objective of “protecting the vulnerable from being induced against their true wishes”. For example, the finding that all persons, including the purported vulnerable groups, can be reliably vetted for decisional capability using the Carter Criteria goes to the heart of the “true wishes” element of the objective. Notably, “vulnerability” was canvassed in a broad sense in *Carter*. Social groups were canvassed, as was the concept of situational vulnerability. The influence of situational factors on decisional capability was also canvassed in evidence and argument under the rubric of “voluntariness”.

¹⁵ Rationale for the approach in Bill C-14, AB Vol. 1, pp. 82-83

26. Further, the “additional” objectives attributed to the 2016 Laws were in fact *also* raised and addressed in *Carter*. Thus, the Carter Findings are equally relevant to the 2016 Law as the Carter Law in this respect as well.

27. In its Response¹⁶ in the *Carter* Proceedings, AGC asserted, in particular, that: (a) disabled people are vulnerable to being persuaded to choose death,¹⁷ and such persuasion may be extremely subtle and unintentional;¹⁸ (b) it is difficult or impossible to assess the voluntariness or quality of PAD decisions made by disabled people;¹⁹ and, (c) *legalizing PAD would suggest that “the government condones and/or encourages people suffering from illness or disability to choose death.”*²⁰

28. *Inter alia*, AGC put into evidence: (a) *testimony from multiple experts in suicide and suicide prevention*: Drs. Mishara,²¹ Heisel²² and Hendin²³; (b) evidence intended to demonstrate that the disabled would be especially vulnerable to being encouraged to, or improperly permitted to, end their lives contrary to their true wishes if PAD was permitted (most significantly, the evidence of Prof. Frazee);²⁴ (c) evidence intended to establish that subtle and situational factors would impact the assessment of decisional capability;²⁵ and, (d) evidence intended to establish that various social groups (e.g., the poor, the uneducated, those with psychiatric illnesses) would be at risk if access was based on decisional capability.²⁶

29. At trial, AGC asserted that the objectives of the *Carter* Law were as follows:

... : (1) *preserving life by not condoning the taking of life*; and (2) preventing harm to individuals and society including: (a) protecting vulnerable individuals from being induced to commit suicide in moments of weakness; (b) preventing

¹⁶ Response, Part 1, Division 3, Halliday #1, pp. 30-32, ¶¶ 11-24, AB Vol. 1, pp. 121-23

¹⁷ Halliday #1, Ex. B, p. 30, ¶12, AB Vol. 1, p. 121

¹⁸ Halliday #1, Ex. B, pp. 30-31, ¶¶13-14, AB, Vol. 1 pp. 121-22

¹⁹ Halliday #1, Ex. B, p. 31, ¶15, AB Vol. 1, p. 122

²⁰ Halliday #1, Ex. B, p. 31, ¶19, AB Vol. 1, p. 122

²¹ Trial Reasons, ¶¶766, 800; Halliday #2, Ex. A, AB Vol. 3, pp. 771-75

²² Trial Reasons, ¶¶768, 812; Halliday #2, Ex. B, AB Vol. 3, pp. 776-80

²³ Trial Reasons, ¶¶794, 796; Halliday #2, Ex. C, AB Vol. 3, pp. 781-91

²⁴ Trial Reasons, ¶¶848-53

²⁵ Trial Reasons, ¶¶799-815

²⁶ Trial Reasons, ¶¶621-645 and 661-672

damage to the doctor-patient relationship; (c) preventing a negative impact on palliative care; and (d) *preventing negative messages about the value of human life, particularly the value of the lives of individuals with disabilities.*²⁷

30. At trial, AGC: (a) argued that PAD was inconsistent with the objective of *reducing suicide*;²⁸ (b) asserted the need to *protect especially vulnerable populations* “such as Aboriginal communities and the elderly” *from the risk of suicide*;²⁹ (c) acknowledged the case was *not restricted to the terminally ill*;³⁰ (d) argued that the absence of a restriction to the terminally ill was relevant to the security of person interest under s. 7;³¹ (e) argued that pre-conceived perceptions could impact the reliability of eligibility assessments for the disabled;³² (f) argued that PAD should not be available *to persons with treatable conditions*;³³ (g) argued that the *Carter Law* was required to protect vulnerable people from inaccurate eligibility assessments and *the harms of negative messaging*,³⁴ *in particular, the elderly*³⁵ *and individuals with disabilities*;³⁶ and, (h) argued that the *Carter Laws* were required to prevent “*negative messaging*”, *including that suicide was an appropriate solution to problems.*³⁷

31. AGC relied on the above points and evidence *again in its s. 1 justification argument*,³⁸ including assertions that “vulnerable people could be induced to commit suicide or consent to euthanasia” and that “no safeguard can address *the negative social messaging that some lives are less valuable than others*”.³⁹

²⁷ Trial Reasons, ¶1187 (emphasis added); see also Halliday #1, Ex. E, pp. 329-30, ¶¶577-79, AB Vol. 2, pp. 420-21

²⁸ Halliday #1, Ex. E, p. 178, ¶¶94-95, AB Vol. 1, p. 269

²⁹ Halliday #1, Ex. E, pp. 183-84, ¶¶106-08, AB Vol. 1, pp. 274-75

³⁰ Halliday #1, Ex. E, pp. 211-13, 215, ¶¶187-90, 196, AB Vol. 1, pp. 302-304, 306

³¹ Halliday #1, Ex. E, p. 228, ¶240, AB Vol. 1, pp. 319-20

³² Halliday #1, Ex. E, pp. 261-62, ¶¶359-60, AB Vol. 1, pp. 352-53

³³ Halliday #1, Ex. E, pp. 261-62, ¶¶359-60, AB Vol. 1, pp. 352-53

³⁴ Halliday #1, Ex. E, p. 275, ¶402, AB, Vol. 1, p. 366

³⁵ Halliday #1, Ex. E, pp. 275-81, ¶¶403-17, AB Vol. 1, pp. 366-72

³⁶ Halliday #1, Ex. E, pp. 281-87, ¶¶418-37, AB Vol. 1, pp. 372-78

³⁷ Halliday #1, Ex. E, pp. 287-91, ¶¶438-50, AB Vol. 1, pp. 378-81

³⁸ Halliday #1, Ex. E, pp. 329-34, ¶¶577-601, AB Vol. 2, pp. 420-25

³⁹ Halliday #1, Ex. E, p. 334, ¶598, AB Vol. 2, p. 425

32. The purported vulnerability of social groups was a factual issue squarely in dispute in *Carter*. The characteristics of the potential vulnerable groups that were addressed in evidence included: the elderly; women; uninsured persons; persons with AIDs; persons with low educational status; the poor; racial and ethnic minorities; persons with physical or mental illnesses; minors or mature minors; and, persons with psychiatric illnesses, including depression.⁴⁰ After reviewing the evidence and hearing arguments on these points of potential vulnerability, the trial judge found that there was no evidence of risk to these social groups, and that it was possible to have a system (such as the Netherlands) that provides access based on screening for the decisionally capable yet also protects such groups.⁴¹

33. Purported situational vulnerability was also a factual issue in dispute in *Carter*. The trial judge was not persuaded that situational vulnerability posed a problem to a system based on screening for decisional capability.⁴² The *Carter* record included evidence regarding the subtle ways in which social and situational factors might bear on voluntariness.⁴³ The trial judge's finding was that such factors did not prevent reliable vetting under the Carter Criteria.⁴⁴

34. There were also trial intervener submissions that focussed on PAD and the disabled,⁴⁵ including: the devaluation of disabled lives and the impact of negative messaging on the disabled;⁴⁶ and, how it was prejudicial and paternalistic to deem the disabled *per se* vulnerable and unable to make medical decisions for themselves.⁴⁷

35. The trial judge made extensive findings regarding the feasibility of assessing the eligibility of disabled persons, specifically addressing AGC's assertion that the disabled

⁴⁰ Trial Reasons, ¶¶621-645

⁴¹ Trial Reasons, ¶667

⁴² Trial Reasons, ¶¶668-672

⁴³ Trial Reasons, ¶¶799—814

⁴⁴ Trial Reasons, ¶¶815

⁴⁵ Halliday #1, Ex. I and Ex. J, AB Vol. 3, pp. 719-65

⁴⁶ Halliday #1, Ex. I, pp. 634-36, ¶¶26-37, AB Vol. 3, pp. 725-27

⁴⁷ Halliday #1, Ex. J, pp. 662-64, 666-68, ¶¶12-14, ¶¶18-20, AB Vol. 3, pp. 753-55, 757-59

should not be permitted access because of their particular vulnerability.⁴⁸ She specifically concluded that the disabled could be reliably vetted.⁴⁹

36. The plaintiffs argued, among other things, that government was well-placed to carry out “positive messaging” or public education to allay its concerns about “negative messaging” arising from legalized PAD. The trial judge made findings with respect to the purported social consequences of permitting PAD.⁵⁰

37. The trial judge found a breach of s. 7 and s. 15. Regarding s. 7, she found that access for those who were suffering unbearably could and should be granted based on screening for decisional capability under the Carter Criteria, in combination with safeguards. Under s. 1, she found the Carter Laws were both overbroad and disproportionate in terms of salutary versus deleterious effects.

38. A majority of this Court allowed the AGC’s appeal on the basis of *stare decisis*.⁵¹ The SCC granted leave to appeal and also *granted AGC’s motion to enter fresh evidence*. *AGC filed evidence purporting to update the trial record*, putting in evidence about PAD cases in Belgium since the trial.⁵² The plaintiffs filed a response affidavit.

39. AGC’s SCC factum indicated that: (a) the trial declaration was *not* limited to the terminally ill or the “incurable”;⁵³ (b) *AGC put in evidence and argument at trial about the ability to vet disabled individuals and negative social messaging about the disabled*,⁵⁴ and, (c) AGC continued to argue that the objectives of the Carter Laws included *preventing negative social messaging about the value of some lives (particularly of disabled lives), and to guard against social messaging condoning suicide as a solution to suffering*.⁵⁵

⁴⁸ Trial Reasons, ¶¶848-53, 1118-20, 1126-27, 1129

⁴⁹ Trial Reasons, ¶¶853

⁵⁰ Trial Reasons, ¶¶1191, 1252-53, 1265

⁵¹ [Carter v. Canada \(Attorney General\), 2013 BCCA 435](#)

⁵² Badea #2, Ex. C (Excerpt from Montero Affidavit), AB Vol. 4, pp. 1330-38

⁵³ Halliday #2, Ex. D, p. 28, ¶24, AB Vol. 3, p. 798

⁵⁴ Halliday #2, Ex. D, pp. 29, 33, ¶¶43-44, 156, AB Vol. 3, pp. 799, 803

⁵⁵ Halliday #2, Ex. D, pp. 30, 34, ¶¶147, 162, AB Vol. 3, pp. 800, 804

40. On February 6, 2015, the SCC rejected AGC's position that the Carter Laws were justified because there were persons for whom the risk of being allowed to decide for themselves involved too many possible sources of error. The SCC that individual assessments for decisional capability were not only feasible, they were already being carried out in respect of other end-of-life decisions.⁵⁶ The SCC noted the trial judge's factual determinations at length, including her determinations of social and legislative fact, and dismissed all of AGC's challenges to those findings.⁵⁷

41. The SCC also made a finding of first instance: it rejected AGC's claim that its fresh evidence was significant to the issues of compliance or expansion in permitting regimes. It held that Canada's fresh evidence did nothing to undermine the trial findings, and that one reason the fresh evidence was insignificant was that, as concluded by the trial judge, practices in a foreign jurisdiction with a "different medico-legal culture" warranted only "weak inferences" and offered little insight into how a Canadian regime might operate.⁵⁸

42. As outlined above, the "additional" objectives were, in fact, put forward by AGC as objectives of the Carter Law. More significantly, AGC framed *its evidentiary case* at trial on that basis. Factual findings were made on the evidence regarding the "effects" attained under the Carter Law in relation to these "additional" objectives. Ultimately, the trial judge rejected AGC's claim that the "additional" objectives were objectives of the Carter Law. However, as argued by the AGC, the effects achieved through the "additional" objectives were also characterized as "salutary effects" of the Carter Law. The factual findings were relied upon in the trial judge's analysis of the Carter Law under the final step of the *Oakes* analysis.⁵⁹

43. In terms of what was squarely in factual dispute in the *Carter* trial and resulted in factual findings, there is little that is factually new arising in this proceeding by virtue of the "additional" objectives. In any event, there is no reason why the Carter Findings that

⁵⁶ [Carter #1](#), ¶¶114-16

⁵⁷ [Carter #1](#), ¶¶104-109

⁵⁸ [Carter #1](#), ¶¶ 25 and 110-113

⁵⁹ Trial Reasons, ¶¶1252-53 and 1265-1266

are relevant to the “additional” objectives of the 2016 Law should not apply in the same manner and to the same extent that they apply with respect to the repeated objective of preventing the vulnerable from being induced to die in moments of weakness. The binding nature of the factual findings is subject to Canada’s being able to produce fresh evidence admissible in relation to the Carter Findings and without prejudice to its ability to enter new evidence to truly new and relevant issues, provided that it does not thereby attempt to re-litigate or collaterally attack the Carter Findings.

D. The “Consultation” Process and Findings

44. The Legislative Background papers⁶⁰ issued by Canada reveal what informed the decision regarding the Excluded Group.⁶¹ The listed documents, authors and witnesses in Annex E⁶² warrant close examination. Virtually every listing identifies a document that: (1) was in fact before the trial court in *Carter*, (2) existed and could have been put before the trial court in *Carter*, (3) was (in some form) in fact before the SCC in *Carter*, or, (4) existed and could have been put before the SCC prior the issuance of [Carter #1](#). Many of the documents listed are authored or co-authored by *witnesses for Canada* in *Carter*. Two of Canada’s key witnesses in *Carter*, Prof. Frazee and Dr. Chochinov, play recurring roles in the Parliamentary consultations. Representations were also made by groups that intervened in support of Canada in *Carter* and/or and by the legal counsel to and spokespersons associated with those groups.

45. Parliament essentially reconvened the *Carter* trial.⁶³ It then reached a number of findings of its own that are *directly contrary* to the judicial findings in *Carter*.⁶⁴ It concluded that reliable vetting under the Carter Criteria is not feasible for the purported vulnerable groups through any system of safeguards. It concluded that eligibility and risks, in a system using unbearable suffering as the defining criteria, could not be adequately addressed through any system of safeguards. It attributed decisive weight

⁶⁰ Badea #2, Ex. A, AB Vol. 4, pp. 1293-1321; Badea #1, Ex. B, AB Vol. 1, pp. 81-84

⁶¹ Badea #1, Ex. B, pp. 81-82, AB Vol. 1, pp. 83-84

⁶² Legislative Background, AB Vol. 4, pp. 1303-21

⁶³ Badea #2, Ex. A, AB Vol. 4, pp. 1293-1321; Badea #1, Ex. B, pp. 81-82, AB Vol. 1, pp. 83-84

⁶⁴ Legislative Background, AB Vol. 4, pp. 1293-1321; AB Vol. 1, pp. 81-84

to the purported negative social consequences that the *Carter* courts found non-compelling.⁶⁵ It relied heavily on evidence from foreign jurisdictions even though the trial court and SCC in *Carter* both specifically held that such evidence supported only “weak inferences” regarding any Canadian system. It disregarded the Carter Findings and relied on these findings of its own to exclude the Excluded Group.

46. As is evident from Annex E to the Legislative Background and the citations to the Addendum – Legislative Background⁶⁶ (the latter of which again prominently features Prof. Frazee), Parliament did not discover anything “new” post-*Carter*. It simply *disagreed* with the courts. It continues to do so in the Response - remarkably, the “recent” cases referenced at Part 4, ¶14 of AGC’s Response are essentially the very cases put before the SCC as new evidence in *Carter*,⁶⁷ which evidence the SCC *already* found incapable of undermining the trial findings.⁶⁸

E. The Chambers Judge’s Decision

47. Hinkson C.J. held that it was not an abuse of process for Canada to re-litigate the Carter Findings and that there was no issue estoppel preventing such re-litigation. With regard to the Scope Findings, he concluded that AGC’s position in its Response regarding the scope of the *Carter* declaration⁶⁹ did not amount to a collateral attack. While not express on the face of the decision below, it is apparent that Hinkson C.J. also rejected the argument that the AGC’s position, in light of the Scope Findings, amounted to an abuse of process. The findings are further detailed in the argument below.⁷⁰

⁶⁵ Badea #1, Ex. B, pp. 80-81, AB Vol. 1, pp. 82-83

⁶⁶ Legislative Background, AB Vol. 4, pp. 1299-1321; AB 1293-1321ol. 1, pp. 83-84

⁶⁷ Badea #2, Ex. C, pp. 43-46 (Montero Affidavit – recent Belgium cases re incarcerated individuals, transgendered individual, deaf and blind twins, anorexic individual), AB Vol. 4, pp. 1335-38

⁶⁸ Legislative Background, p. 16 and FN 39, AB Vol. 4, p. 1300; [Carter #1](#), ¶¶25 and 110-13

⁶⁹ Response, ¶¶9-13, AR pp. 21-22

⁷⁰ [Lamb v. Canada \(Attorney General\), 2017 BCSC 1802 \[Chambers Decision\]](#)

PART II. ERRORS IN JUDGMENT

48. The Chambers Judge erred:
- a. in the application of the doctrine of abuse of process with regard to both the Carter Findings and the Scope Findings;
 - b. in the application of the doctrine of issue estoppel;
 - c. in the exercise of his residual discretion under both doctrines; and,
 - d. by improperly relying on the principles of *stare decisis* and by failing to consider the constitutional implications and access to justice issues arising in the circumstances of this case.

PART III. ARGUMENT

A. ABUSE OF PROCESS - CARTER FINDINGS

1. Law

49. Courts have inherent jurisdiction and residual discretion to prevent misuse of the court's procedure in a way that would be manifestly unfair or bring the administration of justice into disrepute.⁷¹ The concerns of abuse of process are "the integrity and the coherence of the administration of justice" and "of judicial decision making."⁷²

50. Abuse of process is flexible and may be applied where further litigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.⁷³ It applies not only to issues litigated, but also to issues that should have been raised in the earlier proceedings.⁷⁴

⁷¹ [Toronto](#), ¶35; [Behn v. Moulton Contracting Ltd., 2013 SCC 26 \[Behn\]](#), ¶39

⁷² [Toronto](#), ¶¶29, 43

⁷³ [Henry v. H.M.T.Q., 2015 BCSC 1798](#), ¶18; [Toronto](#), ¶¶39-42

⁷⁴ [Behn](#), ¶¶37, 43; [Aba-Alkhail v. University of Ottawa, 2013 ONCA 633](#), ¶12 [leave to appeal dismissed: 2014 CanLII 11029 (SCC)]

2. Errors in Application

51. Hinkson C.J. gave two reasons for rejecting the argument that the re-litigation of the Carter Findings constituted an abuse of process. Neither reason given is valid in the circumstances of this case.

52. First, Hinkson C.J. relied upon the proposition that, notwithstanding the obligation on a party to bring the whole of its case forward in the first proceeding, an action should not be struck where “the question of law or fact that is the subject of the later litigation” “is not identical with, or inextricably involved with, the question of law or fact previously decided”.⁷⁵ He stated (emphasis added):

86. I am not persuaded that the assertion by the plaintiffs that their notice of civil claim in these proceedings involves replacement legislation is of no consequence to their application. The present matter is not a re-litigation of *Carter*, or *litigation of an issue that should have been raised in Carter*. In *Carter*, the AGC was not obliged to adduce *evidence on any legislative scheme* other than the one at issue in that proceeding.⁷⁶

53. It was never asserted in these proceedings that *Lamb* is a re-litigation of the *Carter* proceeding. Nor did the plaintiffs assert in these proceedings that anything in *Carter* prevented Canada from arguing in support of the 2016 Law. The plaintiffs asserted only that Canada ought, in the *Lamb* proceedings, to be bound by specific *factual* findings fully litigated and determined in *Carter*. Notably, these factual issues not only *should* have been, they *were*, raised in *Carter*.

54. Further, the factual findings at issue – such as the finding that physicians can reliably vet for decisional capability in the context of PAD – are not findings based on evidence that goes to or is about any particular legislative scheme. To the contrary, they are core constituent factual findings that are equally relevant and fundamental to both the outcome in *Carter* and the current challenge to the 2016 Laws. Nor can it be maintained that the *Carter* and *Lamb* proceedings are not “inextricably involved” with one another: they quite literally are.

⁷⁵ [Chambers Decision](#), ¶84

⁷⁶ [Chambers Decision](#), ¶86

55. Second, noting the plaintiffs' challenge was grounded in non-compliance with the *Carter* declaration, Hinkson C.J. observed that "the potential application of s. 7 and s. 1 to the new legislative scheme and objectives may not be so limited",⁷⁷ and that "the new legislation allows for access to medical assistance in dying subject to certain conditions, and is grounded in potentially different objectives".⁷⁸

56. However, finding that the Carter Findings are binding (subject to the fresh evidence threshold) would *not* prevent Canada from raising or arguing its new objectives in defence of the 2016 Law. Nor would it prevent Canada from adducing evidence about relevant new factual issues relating to the new objectives (providing that did not involve undermining or collaterally attacking the Carter Findings) or from adducing fresh evidence on those Carter Findings relevant to the new objectives.

57. Hinkson C.J. ultimately concluded (emphasis added):

98. In my view, the plaintiffs have failed to demonstrate that it is an abuse of process for the AGC to fully defend the newly enacted legislation or that not permitting them to rely on the findings of fact in *Carter* would amount to an abuse of process. The plaintiffs seek declaratory relief in relation to the constitutionality of the new regulatory regime, a regime that differs from the one that was considered in *Carter*. *While the old legislation imposed an absolute prohibition on medical assistance in dying, the new legislation allows for access to medical assistance in dying subject to certain conditions, and is grounded in potentially different objectives.* Therefore, the new legislation should be examined on as full a factual matrix as reasonably possible.⁷⁹

58. It was not asserted that Canada could not fully defend the 2016 Law, only that in doing so it must accept (or overcome by fresh evidence) the Carter Findings. It was not asserted that Canada could not rely on its "additional" objectives, only that in doing so it must accept or overcome the relevant Carter Findings (as the additional objectives had, in fact, been raised in *Carter* as well). It was not asserted that the *Lamb* proceedings should proceed on less than a full factual matrix – simply that part of that matrix had to include (unless overcome by fresh evidence) the Carter Findings.

⁷⁷ [Chambers Decision](#), ¶183

⁷⁸ [Chambers Decision](#), ¶198

⁷⁹ [Chambers Decision](#), ¶198

59. In further reference to abuse of process and inherent jurisdiction in particular, Hinkson C.J. held that the order requested by the plaintiffs would “improperly limit the role of the trial judge” in making findings of legislative and social facts in the *Lamb* proceedings.⁸⁰ With respect, this finding adds nothing to Hinkson C.J.’s basic findings regarding abuse of process. If it *is* an abuse of process to re-litigate, and thus the Carter Findings are binding, then any resulting limitation on the trial judge’s ability to make findings different from the Carter Findings would be a *proper* limitation.

B. ISSUE ESTOPPEL – CARTER FINDINGS

1. Law

60. The law of issue estoppel is as set out by the SCC in [Danyluk](#):

24 Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [emphasis in original]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, [[1975] 2 S.C.R. 248] at pp. 267-68. This description of the issues subject to estoppel (“[a]ny right, question or fact distinctly put in issue and directly determined”) is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., “all matters which were, or might properly have been, brought into litigation”, *Farwell*, [22 S.C.R. 553], at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle, supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. “It will not suffice” he said, “if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment.” The question out of which the estoppel is said to arise must have been “fundamental to the decision arrived at” in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law (“the questions”) that were necessarily (even if not explicitly) determined in the earlier proceedings.⁸¹

⁸⁰ [Chambers Decision](#), ¶101

⁸¹ [Danyluk v. Ainsworth Technologies Inc.](#), 2001 SCC 44, [[Danyluk](#)] ¶24

2. Errors in Application

61. Hinkson C.J. held that the Carter Findings were fundamental to the *Carter* decision, that the *Carter* proceedings were final, and that privity was arguably established. However, he concluded that “the same question” criteria was not met.

62. The plaintiffs sought an issue estoppel only with regard to findings on factual issues: the Carter Findings. The proper legal analysis asks whether the “same question” was asked in both proceedings in the sense of “was the same ... fact distinctly put in issue and directly determined”. That is, where the issue estoppel alleged is with respect to a factual issue, the question is whether the *same question of fact* arises in both proceedings. Thus, the quote above from *McIntosh* reads that issue estoppel can apply to a “*fact* distinctly put in issue and directly determined” and such “cannot be retried in a subsequent suit ... *though for a different cause of action*” (emphasis added).

63. Hinkson C.J. erred in treating the requirement that the doctrine of issue estoppel apply with regard to the “same question” as requiring the legal issues or cause of action to be the same, even where the estoppel alleged was on a factual issue (emphases added):

63. The evidence, argument and factual disputes that were before the Court in *Carter* were adduced, made and resolved in the context of specific statutory wording, provisions, and objectives. *While I accept that the findings cited in paras. 49-64 of the notice of civil claim in these proceedings were fundamental to the Carter decision, those findings were made with respect to a different legislative scheme.*

...

70. *I find that while medical assistance in dying is the general subject of both Carter and the present case, the constitutional issues in each case differ because the respective claims challenge two different pieces of legislation with arguably different objectives, purposes and effects, as raised by the AGC. These objectives, purposes and effects are consequential in determining the legislation’s constitutional validity in both the s. 7 Charter analysis and s. 1 Charter analysis. As a result, the constitutionality of the eligibility criteria in Canada’s newly permissive regime remains to be decided.⁸²*

⁸² [Chambers Decision](#), ¶¶63, 70

64. As discussed above under abuse of process, the *Lamb* plaintiffs do not seek to prevent AGC from defending the law, nor do they assert that *Lamb* and *Carter* are identical causes of action, nor that the constitutionality of the 2016 Law was adjudicated on in *Carter* – by inference or otherwise.

65. There is no requirement that the cause of action or legal issues be precisely the *same* for issue estoppel to apply with respect to findings on factual issues. If it were otherwise, there would be no room for issue estoppel to apply to factual issues – it would always be subsumed by either issue estoppel on a question of law, or cause of action estoppel.

C. RESIDUAL DISCRETION – CARTER FINDINGS

1. Law

66. The court has a residual discretion not to apply issue estoppel or abuse of process. As noted in [Toronto](#), the exercise of discretion is guided by the same factors for both issue estoppel and abuse of process:

The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).⁸³

67. However, in [Danyluk](#), the Court confirmed that the discretion is very limited (emphasis added):

62 The appellant submitted that the Court should nevertheless refuse to apply estoppel as a matter of discretion. There is no doubt that such a discretion exists. In *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, Estey J.

⁸³ [Toronto](#), ¶53

noted, at p. 101, that *in the context of court proceedings* “such a discretion must be very limited in application”....

...

67 The list of factors is open.... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice *but not at the cost of real injustice* in the particular case....⁸⁴

2. Errors in Application

68. Hinkson C.J. further held that, even if issue estoppel applied, he would exercise his residual discretion to decline to apply it (emphasis added):

72 Despite the allure of shortening these proceedings by adopting the findings of fact made in the *Carter* proceedings, I have concluded that *the issues decided in Carter differ from at least some of those raised in the proceedings before me, and that given the new focus that may have to be brought to those issues, I should not deprive the defendant from creating the full factual matrix that the Supreme Court of Canada has stated should be available for constitutional challenges ...*

73 Some of the findings in *Trial Reasons* that the plaintiffs wish to fix as binding upon the AGC may satisfy the *Danyluk* test. They include (with reference to the *Trial Reasons*) the following:

- a) findings relating to general ethical responsibilities of physicians to act in the best interest of their patients and not break the law (para. 311);
- b) cultural and historical differences between jurisdictions in Europe, the U.S., and Canada and how that relates to the ability to transpose the experiences of one system to another (para. 683);
- c) the feasibility of properly-qualified and experienced physicians to assess patient competence to give informed consent (e.g., paras. 795, 798, 831).

74 I find, however, that the AGC *would suffer prejudice if the plaintiffs were allowed to rely on findings that were collateral to the earlier proceeding, and are unconnected to the matters in issue in these proceedings, or which are out of date*. For example, I agree that expert evidence about the regimes in foreign jurisdictions should be updated, as well as the impacts of the eligibility criteria on individuals seeking assistance and on society in general. To deny such updates could cause prejudice to the AGC.⁸⁵

⁸⁴ [Danyluk](#), ¶¶62-63, 67

⁸⁵ [Chambers Decision](#), ¶¶71-74

69. The finding set out in paragraph 72 replicates the basic flaw outlined above with regard to the Court's application of issue estoppel. The application of issue estoppel to factual issues does not depend on sameness, nor even similarity, among causes of action or legal issues. To the contrary, it applies regardless of how different those may be, provided the factual issues were distinctly put in issue and directly determined in the earlier proceeding. There can be no question that the Carter Findings meet that test and, as above, that these Findings were both fully and forcefully litigated as well as fundamental to the *Carter* decision.

70. A "new focus" is not a proper basis for declining to apply the estoppel. In any event, because the legislation at issue is replacement legislation, the nature of the challenge made to this legislation, and the fact that the "additional" objectives and their effects were in fact litigated at trial in *Carter*, whatever "new focus" there may be is relatively slight. Consequently, the application of the estoppel in spite of that "new focus" could not result in any "real injustice".

71. With regard to the concerns about prejudice expressed in paragraph 74, both in general and in respect of the three findings listed in paragraph 73, these are without foundation. First, concern about reliance on findings "collateral to the earlier proceeding" is flatly inconsistent with Hinkson C.J.'s earlier finding that the Carter Findings "were fundamental to the Carter decision".⁸⁶ In any event, the Carter Findings were fundamental to the *Carter* decisions. That is evident not only on review of the decisions themselves (and the Trial Reasons in particular), but from the fact that AGC consistently sought to set them aside on appeal.

72. Second, concern about prejudice arising from reliance on findings "unconnected to the matters at issue in this proceeding" is without merit. Prejudice could not arise if the Carter Findings were truly unconnected to the Lamb proceeding. A lack of connection would make them irrelevant and thus, by definition, not prejudicial to either parties' position. In any event, the proceedings are connected. Contrary to Hinkson C.J.'s assertion, the necessary connection *is* established by the common

⁸⁶ [Chambers Decision](#), ¶63

subject matter of access to medical assistance in dying. For example, it cannot be said that the Carter Finding that all persons, including the members of the purported vulnerable groups, are capable of being reliably vetted for decisional capability using the *Carter* Criteria, is unconnected to the matters at issue in *Lamb* (especially given that the AGC's own documents indicate that the Excluded Group was excluded from access because of the risks involved in assessing the eligibility of members of the purported vulnerable groups).

73. Third, concern about prejudice arising from reliance on findings that “should” be updated is without merit.⁸⁷ This point is fully addressed by the allowance for fresh evidence under the established threshold for admission. Notably, Canada updated its trial record before the SCC. It could have applied to do so again at any time before issuance of [Carter #1](#) had there been any new evidence of significance. It could have applied to admit fresh evidence when it successfully applied to re-open Carter #1 hearing. If evidence meeting the threshold for admission of fresh evidence has come to Canada's attention since the SCC rendered judgment in [Carter #2](#), then Canada can apply to admit fresh evidence regarding specific Carter Findings. What is more, given the SCC's specific agreement that foreign jurisdiction evidence at best supports a weak inference, an inability to enter yet more evidence of that nature, as set out in paragraph 73(b), could not cause Canada any “real injustice”.

74. There is no valid basis for declining to apply the Carter Findings. Treating them as binding will not result in any “real injustice” to Canada. The points raised in paragraph 74 do not merit declining to apply the doctrine of issue estoppel to the Carter Findings either in general, or to the points listed in paragraph 73 in particular.

D. IMPROPER RELIANCE ON *STARE DECISIS* PRINCIPLES – *ALLEN V. ALBERTA*

75. In coming to his conclusion, Hinkson C.J. compared the plaintiffs' position to the “similar” position advanced in [Allen v. Alberta](#) [[Allen](#)]:

⁸⁷ [Chambers Decision](#), ¶74

36 At para. 21, the Alberta Court of Appeal agreed with the chambers judge and noted that “[t]he ultimate problem underlying this appeal is that the appellant attempted to shortcut the normal procedures followed in constitutional challenges, undoubtedly in an effort to preserve resources and time.” At para. 28, the Court of Appeal stated that “the basic premise of the doctrine of *stare decisis*” is that “prior decisions are at best binding on points of law, not questions of fact.” The Court of Appeal affirmed that constitutional judgments are highly dependent on contextually-specific factual findings and factual findings in one case cannot simply be transposed onto a contextually-distinct case.⁸⁸

76. He later concluded that “the principles discussed ... in [Allen](#) apply with equal force to these proceedings” (emphasis added).⁸⁹

77. [Allen](#) was a challenge to an Alberta prohibition on private health insurance. Mr. Allen sought to rely on the facts found in [Chaoulli](#).⁹⁰ [Chaoulli](#) was a challenge to a Quebec law, and the impact that related waiting times were having on people in the Quebec health regime. The court held that [Chaoulli](#) could not be relied upon to bridge the evidentiary gaps in Mr. Allen’s case.⁹¹ Neither abuse of process nor issue estoppel were even raised in *Allen* (none of the parties were in both proceedings).

78. Hinkson C.J. erred in treating [Allen](#) as authoritative. [Allen](#) dealt with the doctrine of *stare decisis* as between complete strangers in different jurisdictions. This case involves not only the same parties/privies and the same jurisdiction, but also replacement legislation consequent to the earlier proceedings. (The distinct nature of this case in the latter respect is addressed further below.)

E. FAILURE TO CONSIDER RELEVANT CONSIDERATIONS

79. The plaintiffs’ application submissions raised, as relevant considerations, several points that Hinkson C.J. failed to address. We submit that that failure is an error in law. These points were (and are) relevant to how abuse of process and issue estoppel should apply in the circumstances of this case, and also to the proper exercise of the residual discretion under those doctrines.

⁸⁸ [Allen v. Alberta, 2015 ABCA 277](#), ¶¶34-36

⁸⁹ [Chambers Decision](#), ¶75

⁹⁰ [Chaoulli v. Quebec \(Attorney General\), 2005 SCC 35](#) [[Chaoulli](#)]

⁹¹ [Allen](#), ¶47

80. The points raised were: (1) constitutional dialogue and the unique role of a challenge to replacement legislation; (2) constitutional accountability and Canada's failure to accept the Carter Findings as binding in drafting replacement legislation; and, (3) access to justice in the context of public interest *Charter* litigation.

1. Constitutional Dialogue

81. Hinkson C.J. failed to consider the specific context of replacement legislation as a consideration in the proper application of abuse of process and issue estoppel. The decision below fails to recognize that a challenge to replacement legislation following a declaration of unconstitutionality is a thing unique. It is neither a re-litigation of the first constitutional challenge *per se*, nor a circumstance where the first decision carries nothing more than the weight of *stare decisis*.

82. The nature of a given challenge to replacement legislation will impact the relevance and import of findings made in the original proceedings. Replacement legislation may be challenged on the basis that, in enacting new legislation, the government made an entirely "new" mistake. Such was the case, for example, when the replacement medical marijuana laws addressed the earlier declaration by providing a means for legal access, but then introduced a new constitutional flaw because access under the regulations was unworkable in practical terms and effectively thwarted, procedurally, the substantive access that had been ostensibly granted. Thus, the challenge to the replacement law was grounded in evidence about how the procedural regulations worked (or did not work) in practice.⁹²

83. Or a challenge may instead be, in whole or in part, founded on an alleged failure to comply with the constitutional minimums established in the earlier declaration.⁹³ The

⁹² [R. v. Parker, \(2000\), 146 C.C.C. \(3d\) 193 \(ONCA\)](#); [R. v. Hitzig, \[2003\] O.J. No. 3873 \(ONCA\)](#).

⁹³ Such as, for example: [British Columbia Teachers' Federation v. British Columbia, 2011 BCSC 469](#); [British Columbia Teachers' Federation v. British Columbia, 2014 BCSC 121](#); [British Columbia Teachers' Federation v. British Columbia, 2015 BCCA 184](#); [British Columbia Teachers' Federation v. British Columbia, 2016 SCC 49](#) (where the government, in part, effectively re-enacted the same legislation that had been struck down); [Canada \(Attorney General\) v. JTI-Macdonald Corp., 2007 SCC 30](#); [J.T.I.](#)

Lamb challenge asserts that the 2016 Law’s provision of access to only a subclass of those satisfying the Carter Criteria is inconsistent with the *Carter* declaration.⁹⁴ The challenge asserts that the 2016 Law fails to meet the substantive constitutional minimums established by the *Carter* declaration.⁹⁵ The replacement law re-enacts and perpetuates, for the Excluded Group, the very constitutional flaws already litigated.

84. The latter form of challenge occupies a special space and role in the constitutional dialogue between court and legislature. The challenge is not to the “same” law *per se*, but it *is* clearly a continuation of the *same* constitutional conversation. Replacement legislation is inherently meant to be responsive. It exists in, and can and should be evaluated in terms of, the conversation it continues.

2. Constitutional Accountability

85. First, Parliament *chose*, during the suspension period, *to re-tread evidence and factual determinations already litigated in Carter*.⁹⁶ Parliament adopted a process – a process that was nothing like a trial – and revisited the merits of the *Carter* case and concluded that the *Carter* courts were wrong. It flatly rejected core findings made in *Carter* – and embodied in the *Carter* declaration – in favour of its own views.

86. The Federal Court of Appeal has commented on the interplay between government response and judicial declarations. Most recently, in [Assiniboine](#), (In Chambers, Mainville J.A.), that Court held as follows (emphases added):

13. Declaratory relief is particularly useful when the subject of the relief is a public body or public official entrusted with public responsibilities, because it can

[Macdonald Corp. v. Canada \(Attorney General\) \(2002\), 102 CRR \(2d\) 189 \(SCQ\); RJR-MacDonald Inc. v. Canada \(Attorney General\), \[1995\] 3 S.C.R. 199](#) (where the replacement legislation was, in part, a response to an earlier declaration regard tobacco advertising and, in part, entirely new law addressing sponsorships and both aspects of the new law were challenged in the second proceeding).

⁹⁴ Notably, no issue is taken with the procedures the permitted subclass must follow to gain access to PAD.

⁹⁵ To make the medical marijuana cases comparable to *Carter/Lamb*, Canada would have had to respond to the *Parker* declaration by making medical marijuana legally accessible only for people with epilepsy.

⁹⁶ “Rationale for the approach in Bill C-14”, AB Vol. 1, pp. 82-83

be assumed that such bodies and officials will, without coercion, comply with the law as declared by the judiciary. Hence the inability of a declaration to sustain, without more, an execution process should not be seen as an inadequacy of declaratory orders against public bodies and public officials.

14. As aptly noted by MacGuigan J.A. in *LeBar v. Canada* (F.C.A.), [1989] 1 F.C. 603, 90 N.R. 5, the proposition *that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law*, which is enshrined in the Constitution of Canada by the preamble to the *Canadian Charter of Rights and Freedoms*. Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. The rule of law can mean no less.

15. As further noted in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, (“*Doucet-Boudreau*”) at par. 62, *the assumption underlying the choice of a declaratory order as a remedy is that governments and public bodies subject to that order will comply with the declaration promptly and fully.*⁹⁷

87. In the circumstances of this case – where replacement legislation enacted following a declaration of unconstitutionality fails to accord with the minimum terms of the declaration, and fails to do so because Parliament refuses to accept the courts’ findings – this application raises issues of Parliamentary accountability under our constitutional order and the rule of law. Parliament has a *duty* to comply with the *Carter* declaration. The suspension of a declaration of unconstitutionality is an indulgence, born of practicality, granted to government in order to *respond* to the declaration.

88. Second, the AGC sought, over objections, a full year suspension of the declaration. It then obtained, over objections, a further fourth-month extension. Having updated the trial record with fresh evidence before the SCC in [Carter #1](#) and then obtained the longest period of suspension that it possibly could, it lies ill in the mouth of Canada to claim that it is somehow prejudiced by a holding that the Carter Findings are binding. Essentially, Canada’s position amounts to it saying that the Carter Findings are generally “stale-dated” by passage of the period of suspension *it sought*, and that the Carter Findings should now be entirely disregarded on that basis.

⁹⁷ [Assiniboine v. Meeches, 2013 FCA 114](#) [[Assiniboine](#)], ¶¶13-15

89. A period of suspension enables a law that is known to be unconstitutional to nonetheless remain in effect. A suspension period operates to the direct prejudice of the plaintiffs and all Canadians concerned with the exercise of the still impaired constitutional right. It turns the meaning and purpose of the suspension period on its head to allow the government that sought the suspension to claim that it is somehow prejudiced by the effluxion of the time granted under its own request.

3. Public Interest Litigation and Access to Justice

90. The fact that both *Carter* and *Lamb* involve public interest litigation cannot be disregarded. In general, such cases are ones in which the pre-challenge *status quo* existed because the majority favoured compromising the rights of a minority. Where that is the case, a governmental failure to comply or fully comply with a declaration is also likely to enjoy majority support. Thus, the government has a political incentive to be non-compliant in such cases, and to take a “wait and see” approach to whether the minority can or will muster the money and time required to assert the right again. Few minorities will do so knowing that the government can demand a full evidentiary “do-over”. An approach that allows a government to force repeated public interest *Charter* litigation encourages, for lack of a better term, the “gaming of the system”. This is precisely the sort of affront to the proper administration of justice that abuse of process is intended to address.

91. Further, *Carter* and *Lamb* are both *pro bono* public interest litigation cases, pursued in the context of a legal system heavily weighted against access to justice, and against a limitlessly resourced opposing party. Abuse of process and issue estoppel are about fairness. Goliath should not lightly be permitted to insist that David start over.

F. COLLATERAL ATTACK/ ABUSE OF PROCESS – SCOPE FINDINGS

92. Although not reflected in the decision below, at the hearing of this application the plaintiffs submitted that the paragraphs of Canada’s Response that were inconsistent with the Scope Findings were an abuse of process *akin* to a collateral attack, citing the following passage from [Toronto](#) (emphasis added):

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

*The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.*⁹⁸

93. The plaintiffs cited [Krist](#)⁹⁹ that “to determine whether a claim constitutes a collateral attack, the court should inquire into whether the claim, or any part of the claim, is ‘in effect’ an appeal of an order”¹⁰⁰ and asserting that it is “in effect” a collateral attack for the AGC to re-litigate the Scope Findings when it failed to appeal the Ontario and Alberta decisions.¹⁰¹

94. Hinkson C.J. held (emphasis added):

104 The plaintiffs contend that the determination as to of the scope the declaration in *Carter #1* was a question of law to be answered based on the decisions made in *E.F.* and *I.J.* where the AGC had a fair hearing before both the Alberta and Ontario Courts and therefore should be called upon to accept the result. *But those cases concerned whether or not certain individuals met the exemption criteria* for medical assistance in dying during the period of time that the declarations of invalidity in *Carter* were suspended, prior to the introduction of the new regime. In *E.F.*, the Alberta Court of Appeal expressly noted at para. 72 that, “issues that might arise regarding the interpretation and constitutionality of eventual legislation should obviously wait until the legislation has been enacted.”

105 In *Carter #1* the Supreme Court of Canada specified at para. 127 that the scope of their declaration was “intended to respond to the factual circumstances in this case” and expressly noted that it was making “no pronouncement on other situations where physician-assisted dying may be sought.”¹⁰²

95. With respect, this holding fails to address the fact that the “exemption criteria” were set solely by reference to the declaratory paragraph of the decision in [Carter #1](#).¹⁰³

⁹⁸ [Toronto](#), ¶40

⁹⁹ [Krist v. British Columbia, 2017 BCCA 78](#) [[Krist](#)]

¹⁰⁰ [Krist](#), ¶47

¹⁰¹ [Krist](#), ¶49

¹⁰² [Chambers Decision](#), ¶¶104-105

¹⁰³ [Carter #1](#), ¶127

The Scope Findings address the issue of the proper interpretation of the *Carter* declaration. The objectionable paragraphs in Canada's Response do not address the 2016 Laws, but rather the scope of the *Carter* declaration. Further, the points noted by Hinkson C.J. at para. 105 are precisely the arguments Canada advanced in the cases giving rise to the Scope Findings. Hinkson C.J.'s answer simply fails to grapple with the legal issue raised by the plaintiffs, either as an abuse of process or collateral attack.

PART IV. NATURE OF ORDER SOUGHT

96. An order is sought that:

- a. the appeal be allowed; and,
- b. the plaintiffs' application be granted with costs, including special costs of the application and this appeal in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this February 7, 2018.

Sheila Tucker, Q.C.
Lawyer for the Appellants

Joseph J. Arvay, Q.C.
Lawyer for the Appellants

Alison Latimer
Lawyer for the Appellants

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, and 33, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11

Rights and Freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

...

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Criminal Code, R.S.C. 1985, c. C-46, ss. 14 and 241 (pre-Carter)

Consent to death

14 No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.

Suicide

Counselling or aiding suicide

241 Every one who

- (a) counsels a person to commit suicide, or
- (b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Criminal Code, R.S.C. 1985, c. C-46, s. 241.2 (Current)

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

- (a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;
- (b) they are at least 18 years of age and capable of making decisions with respect to their health;
- (c) they have a grievous and irremediable medical condition;
- (d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
- (e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

- (a) they have a serious and incurable illness, disease or disability;
- (b) they are in an advanced state of irreversible decline in capability;
- (c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and
- (d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

Safeguards

(3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

- (a) be of the opinion that the person meets all of the criteria set out in subsection (1);

- (b) ensure that the person's request for medical assistance in dying was
 - (i) made in writing and signed and dated by the person or by another person under subsection (4), and
 - (ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;
- (c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before two independent witnesses who then also signed and dated the request;
- (d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;
- (e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);
- (f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;
- (g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or — if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;
- (h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and
- (i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

Unable to sign

- (4) If the person requesting medical assistance in dying is unable to sign and date the request, another person — who is at least 18 years of age, who understands the nature of the request for medical assistance in dying and who does not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death — may do so in the person's presence, on the person's behalf and under the person's express direction.

Independent witness

(5) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an independent witness, except if they

- (a) know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;
- (b) are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;
- (c) are directly involved in providing health care services to the person making the request; or
- (d) directly provide personal care to the person making the request.

Independence — medical practitioners and nurse practitioners

(6) The medical practitioner or nurse practitioner providing medical assistance in dying and the medical practitioner or nurse practitioner who provides the opinion referred to in paragraph (3)(e) are independent if they

- (a) are not a mentor to the other practitioner or responsible for supervising their work;
- (b) do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; or
- (c) do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Reasonable knowledge, care and skill

(7) Medical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards.

Informing pharmacist

(8) The medical practitioner or nurse practitioner who, in providing medical assistance in dying, prescribes or obtains a substance for that purpose must, before any pharmacist dispenses the substance, inform the pharmacist that the substance is intended for that purpose.

Clarification

(9) For greater certainty, nothing in this section compels an individual to provide or assist in providing medical assistance in dying.

Rules of the Supreme Court of Canada, SOR/2002 – 156, R. 76

Re-Hearing of Appeal

- 76.** (1) At any time before judgment is rendered or within 30 days after the judgment, a party may make a motion to the Court for a re-hearing of an appeal.
- (2) Notwithstanding the time referred to in subrule 54(1), the other parties may respond to the motion for a re-hearing within 15 days after service of the motion.
- (3) Within 15 days after service of the response to the motion for a re-hearing, the applicant may reply by serving on all other parties and filing with the Registrar the original and 14 copies of the reply.
- (4) Notwithstanding subrule 54(4), there shall be no oral argument on a motion for a re-hearing unless the Court otherwise orders.
- (5) If the Court orders a re-hearing, the Court may make any order as to the conduct of the hearing as it considers appropriate.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 53

Special Jurisdiction

References by Governor in Council

Referring certain questions for opinion

53 (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

- (a) the interpretation of the Constitution Acts;
- (b) the constitutionality or interpretation of any federal or provincial legislation;
- (c) the appellate jurisdiction respecting educational matters, by the Constitution Act, 1867, or by any other Act or law vested in the Governor in Council; or
- (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

Other questions

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

Questions deemed important

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

Opinion of Court

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

Notice to be given to provinces interested

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

Notice to interested persons

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

Appointment of counsel by Court

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

Supreme Court Civil Rules, Rule 9-5

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

- (a) the registrar may, despite any other provision of these Supreme Court Civil Rules,
 - (i) retain the document and all filed copies of it, and
 - (ii) refer the document to the court, and
- (b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

- (a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,
- (b) the person who filed the document may, within 7 days after being notified, apply to the court, and
- (c) the court may confirm, vary or rescind the order

LIST OF AUTHORITIES

Authorities	Paragraph(s)
<i>Aba-Alkhalil v. University of Ottawa</i> , 2013 ONCA 633, leave to appeal dismissed 2014 CanLII 11029 (SCC)	50
<i>Allen v. Alberta</i> , 2015 ABCA 277	75, 76, 77, 78
<i>Assiniboine v. Meeches</i> , 2013 FCA 114	86
<i>Behn v. Moulton Contracting Ltd.</i> , 2013 SCC 26	49, 50
<i>British Columbia Teachers' Federation v. British Columbia</i> , 2011 BCSC 469	83
<i>British Columbia Teachers' Federation v. British Columbia</i> , 2014 BCSC 121	83
<i>British Columbia Teachers' Federation v. British Columbia</i> , 2015 BCCA 184	83
<i>British Columbia Teachers' Federation v. British Columbia</i> , 2016 SCC 4	83
<i>Canada (Attorney General) v. E.F.</i> , 2016 ABCA 155	13
<i>Canada (Attorney General) v. JTI-Macdonald Corp.</i> , 2007 SCC 30	83
<i>Carter v. Canada (Attorney General)</i> , 2012 BCSC 886	2, 12
<i>Carter v. Canada (Attorney General)</i> , 2013 BCCA 435	38
<i>Carter v. Canada (Attorney General)</i> , 2015 SCC 5	2, 7, 12, 16, 19, 40, 41, 44, 46, 73, 88, 95
<i>Carter v. Canada (Attorney General)</i> , 2016 SCC 4	2, 13, 16, 73
<i>Chaoulli v. Quebec (Attorney General)</i> , 2005 SCC 35	77
<i>Danyluk v. Ainsworth Technologies Inc.</i> , 2001 SCC 44	60, 67
<i>Henry v. H.M.T.Q.</i> , 2015 BCSC 1798	50
<i>I.J. v. Canada (Attorney General)</i> , 2016 ONSC 3380	13

<i>J.T.I. Macdonald Corp. v. Canada (Attorney General)</i> (2002), 102 CRR (2d) 189 (SCQ)	83
<i>Krist v. British Columbia</i> , 2017 BCCA 78	93
<i>Lamb v. Canada (Attorney General)</i> , 2017 BCSC 1802	47, 52, 55, 57, 59, 63, 68, 71, 73, 76, 94
<i>R. v. Hitzig</i> , [2003] O.J. No. 3873 (ONCA)	82
<i>R. v. Parker</i> , (2000), 146 C.C.C. (3d) 193 (ONCA)	82
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 S.C.R. 199	83
<i>Toronto (City) v. C.U.P.E., Local 79</i> , 2003 SCC 63	16, 49, 50, 66, 92
Legislation	
<i>Canadian Charter of Rights and Freedoms</i> , ss 1, 7, 15 and 33, Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (U.K.)</i> , 1982, c. 11	4, 7, 15, 18, 30, 31, 37, 55, 80, 90
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, ss. 14 and 241 (Carter Law)	3, 9, 20, 23, 25, 26, 29, 30, 37, 39, 40, 42
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 241.2 (2016 Law)	8, 9, 11, 15, 17, 18, 20, 21, 22, 23, 25, 26, 43, 53, 54, 56, 58, 64, 83, 95
<i>Rules of the Supreme Court of Canada</i> , SOR/ 2002 – 156, R. 76	
<i>Supreme Court Act</i> , R.S.C. 1985, c. S-26, s. 53	13
<i>Supreme Court Civil Rules</i> , Rule 9-5	14