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COURT OF APPEAL
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Court of Appeal File No. CA44889

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)

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CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

Date	Event
June 15, 2012	*Carter v Canada (Attorney General)*, 2012 BCSC 886 Trial decision rendered.
October 10, 2013	*Carter v Canada (Attorney General)*, 2013 BCCA 435 Appeal decision rendered.
February 6, 2015	*Carter v Canada (Attorney General)*, 2015 SCC 5 SCC decision rendered.
July 17, 2015	External Panel on Options for a Legislative Response to *Carter* appointed.
October 19, 2015	Federal election results in a change of government.
December 3, 2015	Parliament resumed.
December 10, 2015	Quebec's *Act respecting end-of-life* comes in force.
December 11, 2015	Special Joint Committee on Physician-Assisted Dying established. The Committee was made up of 5 Senators and 17 MPs from three political parties.
January 15, 2016	*Carter v Canada (Attorney General)*, 2016 SCC 4 SCC grants an extension of the suspension of the declaration of constitutional invalidity from February 6, 2016 to June 6, 2016, and exempts Quebec from the extension.
January 18, 2016	Final Report of the External Panel on Options for a Legislative Response to *Carter* tabled in Parliament.
January 18, 2016 – February 4, 2016	The Special Joint Committee on Physician-Assisted Dying held 16 meetings, received over 130 written submissions and heard from 61 witnesses.
February 25, 2016	Final Report of the Special Joint Committee on Physician-Assisted Dying tabled in Parliament.
April 1, 2016	*A.A. (Re)*, 2016 BCSC 570 Constitutional exemption decision rendered.
April 14, 2016	Bill C-14 introduced in the House of Commons.
April 22 and May 2-4, 2016	Second reading debates in the House of Commons.
April 22, 2016	At the outset of debate at second reading, the Minister of Justice and Attorney General for Canada tabled *Legislative Background: Medical Assistance in Dying (Bill C-14)*.

Date	Event
May 4, 2016	Second reading passed in House of Commons and Bill C-14 referred to the House Standing Committee on Justice and Human Rights.
May 2-11, 2016	House Standing Committee on Justice and Human Rights held 9 meetings, heard from over 70 witnesses, and received over 200 briefs from organizations and individuals.
May 4-17, 2016	Senate Standing Committee on Legal and Constitutional Affairs conducts a Pre-Study of Bill C-14. The Committee held 5 meetings and heard from 66 witnesses.
May 12, 2016	Bill C-14 sent back to House of Commons from the House Standing Committee on Justice and Human Rights with 16 amendments.
May 17, 2016	*Canada (Attorney General) v E.F.*, 2016 ABCA 155 Constitutional exemption decision rendered.
May 17, 2016	Senate Standing Committee on Legal and Constitutional Affairs released its Pre-Study Report, which recommended 10 amendments to Bill C-14.
May 17-30, 2016	Debate at the report stage of Bill C-14 in the House of Commons. All proposed amendments to the eligibility criteria were rejected by the House of Commons.
May 24, 2016	*I.J. v Canada (Attorney General)*, 2016 ONC 3380 Constitutional exemption decision rendered.
May 31, 2016	Debate at third reading in the House of Commons. Third reading passed.
May 31, 2016	Bill C-14 received first reading in Senate.
June 1, 2016	Senate met as Committee of the Whole and heard from the Minsters of Justice and Health.
June 2-3, 2016	Second reading debate in Senate. Bill C-14 referred to the Senate Standing Committee on Legal and Constitutional Affairs.
June 6, 2016	Suspension of the declaration of constitutional invalidity expired.
June 6-7, 2016	Senate Standing Committee on Legal and Constitutional Affairs held further study, hearing additional testimony from government officials and 7 other witnesses. The Committee agreed that amendments should be considered and debated by the Senate Chamber as a whole at third reading, and reported Bill C-14 back to the Senate without amendment.

Date	Event
June 8-15, 2016	Third reading debate in Senate. Seven substantive amendments were made.
June 15, 2016	Bill C-14 passes third reading in the Senate. The Senate sends a Message to the House of Commons informing it of the Senate's amendments.
June 16, 2016	The House of Commons debated and passed a motion to send a Message to the Senate indicating its agreement or disagreement with its amendments. During debate, the House rejected a sub-amendment that would have replaced the definition of "grievous and irremediable medical condition" with language from paragraph 127 of the Supreme Court of Canada's decision in *Carter* by a vote of 240-54.
June 16, 2016	The Minister of Justice and Attorney General for Canada tabled an addendum to the *Legislative Background: Medical Assistance in Dying (Bill C-14)* that had been tabled on April 22, 2016.
June 17, 2016	The Senate debated and passed a motion to concur with the House of Commons on the content of Bill C-14. Bill C-14 received Royal Assent.
June 27, 2016	Appellants filed notice of civil claim seeking a declaration that certain provisions of Bill C-14 violate ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.
July 27, 2016	Attorney General for Canada filed a response to the notice of civil claim.
May 23, 2017	Appellants file motion seeking to strike portions of the Attorney General of Canada's response to notice of civil claim and seeking to bar the Attorney General from presenting evidence on certain issues.
June 6, 2017	Attorney General for Canada filed application response.
June 12-13, 2017	Hearing of the appellants' application.
October 11, 2017	*Lamb v. Canada (Attorney General)*, 2017 BCSC 1802 Reasons for Judgment on the appellants' application rendered by Chief Justice Hinkson.

OPENING STATEMENT

The chambers judge rightly held that in order to assess the constitutionality of Canada's new permissive medical assistance in dying legislation, the court must have a full evidentiary record that is specific to the objectives and effects of the new legislation. The chambers judge held that striking the portion of Canada's response dealing with the findings of fact in *Carter* would fail to respect the trial court's essential role in deciding what evidence is relevant and admissible and the weight that should be given to it.

The chambers judge properly concluded that Canada is entitled to mount a full defense of the new medical assistance in dying regime. He held that neither Canada nor the trial judge should be bound by facts found in the *Carter* case, which involved a challenge to a much different legislative regime, one characterized by an absolute prohibition on physician-assisted dying.

Contrary to the appellants' claim, the chambers judge canvassed each of the grounds advanced by the appellants. He found that neither the facts of the present case nor the existing jurisprudence supported their argument that the principles of issue estoppel, abuse of process or collateral attack ought to prevent Canada from defending the case in the manner it proposed. Similarly, the chambers judge properly refused the appellants' attempt to achieve the same result by appealing to the court's inherent jurisdiction. There is no justification for interfering with the chambers judge's careful exercise of his discretionary authority.

PART 1 – STATEMENT OF FACTS

A. The *Carter* Case

1. The *Carter* litigation, which began in April 2011, involved a constitutional challenge to the assisted suicide prohibition in s. 241(b) of the *Criminal Code* as well as several related provisions: s. 14 (consent to death); s. 21 (parties to offences); s. 22 (person counselling offence); s. 222 (homicide); and, s. 241(a) (counselling suicide) (collectively, the "*Carter* Impugned Provisions").[1]

2. The plaintiffs in *Carter* – Gloria Taylor, Lee Carter, Hollis Johnson, Dr. William Shoichet and the British Columbia Civil Liberties Association (the "*Carter* Plaintiffs") – argued that to the extent the *Criminal Code* provisions prohibited physician-assisted dying, those provisions unjustifiably infringed ss. 7 and 15 of the *Charter*.[2]

3. The British Columbia Civil Liberties Association ("BCCLA") argued that it should have standing so that in the event Ms. Taylor's death occurred during the course of the proceedings, the BCCLA could continue representing her interests.[3] The trial judge noted that the BCCLA was involved in the proceeding "in support of plaintiffs who have private standing".[4]

4. Canada defended the absolute criminal prohibition on assisted dying, as did the Attorney General of British Columbia.[5]

5. Gloria Taylor, the lead plaintiff in *Carter*, had a terminal neurodegenerative disease, amyotrophic lateral sclerosis ("ALS") and had been told by her neurologist in

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[1] *Carter* v. *Canada (Attorney General)*, 2012 BCSC 886 at paras. 22 and 100-101 ["*Carter* Trial Decision"].
[2] *Carter* Trial Decision at para. 22.
[3] *Carter* Trial Decision at para. 89.
[4] *Carter* Trial Decision at para. 98.
[5] *Carter* Trial Decision at paras. 30-34.

January 2010 that she would likely die within the year.[6] Ms. Taylor was the only plaintiff whose medical condition was before the Court.

6. For the most part, the expert evidence tendered by the *Carter* Plaintiffs opined on the impacts of lifting an absolute prohibition on physician-assisted dying.[7] Though the consensus of the *Carter* Plaintiffs' experts was that physician-assisted dying should be permitted in Canada in some form, these experts expressed diverging views on the access criteria that would strike the best balance between autonomy and other societal interests, such as the protection of vulnerable groups.[8] For example, some of the *Carter* Plaintiffs' experts were of the view that physician-assisted dying should be limited to the terminally ill and that legalizing assisted dying does not make its extension to non-dying individuals inevitable: "Although it is possible that we may someday decide to legalize voluntary euthanasia under certain circumstances or assisted suicide for patients who are not terminally ill, legalizing assisted suicide for the dying does not in itself make these other decisions inevitable."[9]

7. The expert evidence in *Carter* was tendered prior to the start of the modified summary trial in November 2011. The experts' consideration of, for example, the regulatory regimes for physician-assisted dying in foreign jurisdictions, was limited to studies and reports available at that time.[10]

8. The *Carter* Plaintiffs sought declarations of invalidity under s. 52 of the *Constitution Act, 1982*, suspended for six months. They also sought a constitutional exemption

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[6] *Carter* Trial Decision at paras. 47-48.
[7] Affidavit #1 of Sharleen Hussain sworn June 5, 2017 ["Hussain Affidavit"], Exhibit A, Appellants' Appeal Record ["AAR"], Volume 3, pp. 824-874, and Exhibit B, Volume 3, AAR, pp. 876-1036 and Exhibit C, Volume 4, AAR, pp. 1038-1139.
[8] Hussain Affidavit, Exhibit C, Volume 4, AAR, pp. 1040-1041 at paras.11 and 14, and Exhibit D, Volume 4, AAR, pp. 1145-1146 at para. 15.
[9] Hussain Affidavit, Exhibit A, Volume 3, AAR, p. 829 at para. 16.
[10] Hussain Affidavit, Exhibit B, Volume 3, AAR, pp 876-1036.

for Ms. Taylor and her physician during the period of suspension.[11] The *Carter* Plaintiffs argued that if the Court made declarations of invalidity, it would then be the proper institutional role of Parliament to draft legislation addressing the specific infringements in a constitutional manner.[12]

9. The trial judge rejected Canada's articulation of the objectives of the absolute prohibition and, instead, concluded that "the objective of the legislation is, by imposing criminal sanctions on persons who assist others with suicide, to protect vulnerable persons from being induced to commit suicide at a time of weakness."[13] The trial judge further noted that "[t]he underlying state interest which this purpose serves is the protection of life and maintenance of the *Charter* value that human life should not be taken".[14]

10. On June 15, 2012, the trial judge held that the absolute criminal prohibition on physician-assisted dying was unconstitutional and issued declaratory orders that the *Carter* Impugned Provisions were of no force and effect to the extent that they prohibited physician-assisted suicide.[15] The trial judge suspended her declarations for 12 months but also issued a constitutional exemption to Ms. Taylor so that she could access physician-assisted dying during the suspension if specific criteria were met.[16]

11. Canada appealed the trial decision and, on October 10, 2013, a majority of the Court of Appeal allowed the appeal on the basis that the Supreme Court of Canada's decision in *Rodriguez*[17] was binding.

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[11] *Carter* Trial Decision at para. 27.
[12] *Carter* Trial Decision at para. 28.
[13] *Carter* Trial Decision at para. 1190.
[14] *Carter* Trial Decision at para. 1190.
[15] *Carter* Trial Decision at para. 1393.
[16] *Carter* Trial Decision at paras. 1414-1415.
[17] *Rodriguez* v. *British Columbia (Attorney Genera*l), [1993] 3 S.C.R. 519.

12. The *Carter* Plaintiffs sought and were granted leave to appeal to the Supreme Court of Canada. The question on the appeal was whether the absolute criminal prohibition on physician-assisted dying violated ss. 7 or 15 of the *Charter*.[18]

13. On February 6, 2015, the Supreme Court of Canada granted the appeal and declared that s. 241(b) and s. 14 of the *Criminal Code* were void insofar as they prohibited 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.[19] The Court did not define "grievous and irremediable medical condition".

14. The Supreme Court of Canada's finding of unconstitutionality in *Carter* was grounded in the factual circumstances of Ms. Taylor and "people like Ms. Taylor".[20] The Court specified that the scope of its declaration was "intended to respond to the factual circumstances in this case"[21] and that the Court was making "no pronouncement on other situations where physician-assisted dying may be sought."[22] The Supreme Court of Canada suspended its declaration for 12 months.[23]

B. The Exemption Applications

15. On January 15, 2016, in response to an application from Canada, the Supreme Court of Canada granted a four-month extension of the suspension of the declaration of invalidity.[24] A majority of the Court also granted a constitutional exemption to the absolute prohibition on physician-assisted dying during the

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[18] *Carter* v. *Canada (Attorney General)*, 2015 SCC 5 at para. 2 ["*Carter* SCC"].
[19] *Carter* SCC at para. 127.
[20] *Carter* SCC para. 66.
[21] *Carter* SCC at para. 127.
[22] *Carter* SCC at para. 127.
[23] *Carter* SCC at para. 128.
[24] *Carter* v. *Canada (Attorney General)*, 2016 SCC 4 at para. 7 ["*Carter* Suspension Decision"].

extended suspension for individuals who met the criteria set by the Court.[25] The individual exemptions were meant as a stopgap measure "pending Parliament's response" to *Carter*.[26]

16. In her dissenting reasons on the suspension extension decision, McLachlin C.J. acknowledged the complexity of the task facing Parliament and she reiterated that it was the legislature's responsibility to determine the circumstances under which physician-assisted dying would be permitted:

> We add this. We do not underestimate the agony of those who continue to be denied access to the help that they need to end their suffering. That should be clear from the Court's reasons for judgment on the merits. However, neither do we underestimate the complexity of the issues that surround the fundamental question of when it should be lawful to commit acts that would otherwise constitute criminal conduct. The complexity results not only from the profound moral and ethical dimensions of the question, but also from the overlapping federal and provincial legislative competence in relation to it. The Court unanimously held in its judgment on the merits that these are matters most appropriately addressed by the legislative process. We remain of that view. That the legislative process needs more time is regrettable, but it does not undermine the point that it is the best way to address this issue.[27]

17. During the four-month extension period, prior to the enactment of the new medical assistance in dying legislation, individuals in various provinces sought and obtained access to physician-assisted dying on the basis of the individual courts' understanding of the criteria set out in the Supreme Court of Canada's decision in *Carter*.[28]

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[25] *Carter* Suspension Decision at para. 6.
[26] *Carter* Suspension Decision at para. 6.
[27] *Carter* Suspension Decision at para. 14.
[28] See *Canada (Attorney General)* v. *E.F.*, 2016 ABCA 155 ["*E.F.*"]; *I.J.* v. *Canada (Attorney General)*, 2016 ONSC 3380 ["*I.J.*"].

C. The New Permissive Medical Assistance in Dying Regime

18. Following *Carter*, the Government of Canada carried out a comprehensive consultation process involving experts, stakeholders, and other Canadians to explore legislative responses to the Court's declaration of invalidity. This consultation process included an External Panel on Options for a Legislative Response to *Carter* and a Special Joint Parliamentary Committee on Physician-Assisted Dying.

19. On April 14, 2016, the Government introduced in the House of Commons Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*. Bill C-14 proposed, in part, to amend s. 241.2 of the *Criminal Code* so as to permit medical assistance in dying where, among other requirements, an individual's natural death has become reasonably foreseeable.

20. Along with Bill-C-14, the Minister of Justice tabled an explanatory document entitled "Legislative Background: Medical Assistance in Dying (Bill C-14)".[29] The background paper explained that the objectives of Bill C-14 are expressly stated in the Bill's preamble, and include:

    - recognizing the autonomy of persons who have a grievous and irremediable medical condition that causes them enduring and intolerable suffering to seek medical assistance in dying;

    - recognizing that robust safeguards, which reflect the irrevocable nature of ending a life, are essential to: prevent error and abuse in the provision of medical assistance in dying;

    - affirming the inherent and equal value of every person's life and avoiding encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled;

[29] Canada, Minister of Justice and Attorney General of Canada, *Legislative Background: Medical Assistance in Dying (Bill C-14)*, (Ottawa: Department of Justice Canada, 2016) ["Background Paper"].

- protecting vulnerable persons from being induced, in moments of weakness, to end their lives; and

- recognizing that suicide is a significant public health issue that can have lasting and harmful effects on individuals, families and communities.[30]

21. The Background Paper also set out the government's rationale with respect to the eligibility criteria contained within Bill C-14:

> The proposed eligibility criteria would enable individuals who are intolerably suffering, in an advanced state of irreversible decline in capability, and who are on a trajectory towards their natural death, to have the option of a peaceful medically-assisted dying process, instead of having to endure a painful, prolonged or undignified one. It would enable them to make a fundamentally personal decision concerning their bodily integrity, autonomy, and dignity, which could also help prevent them from ending their lives prematurely, by providing reassurance that they will have access to medical assistance in dying at a time when they may be unable to end their own life without assistance.[31]

22. More particularly, the Background Paper explained the government's rationale for including the "reasonable foreseeability" criterion in the definition of "grievous and irremediable medical condition" at s. 241.2(2) of the Bill:

> The criterion of reasonable foreseeability of death is intended to require a temporal but flexible connection between the person's overall medical circumstances and their anticipated death. As some medical conditions may cause individuals to irreversibly decline and suffer for a long period of time before dying, the proposed eligibility criteria would not impose any specific requirements in terms of prognosis or proximity to death (e.g., a six month prognosis as the U.S. states' medical assistance in dying laws require). The medical condition that is causing the intolerable suffering would not need to be the cause of the reasonably foreseeable death. In other words, eligibility would not be limited to those who are dying from a fatal disease. Eligibility would be assessed on a case-by-case basis, with flexibility to reflect the uniqueness of each person's circumstances, but with limits that require a natural death to be foreseeable in a period of time that is not too remote. It should be noted that people with a mental illness or physical disability would

[30] Background Paper at page 6.
[31] Background Paper at page 10.

> not be excluded from the regime, but would only be able to access medical assistance in dying if they met all of the eligibility criteria.[32]

23. On June 17, 2016, after extensive parliamentary debate and review by both the House Standing Committee on Justice and Human Rights and the Senate Standing Committee on Legal and Constitutional Affairs, Bill C-14 received Royal Assent.

24. The newly enacted s. 241.2 of the *Criminal Code* allows those with a "grievous and irremediable medical condition" to seek and obtain medical assistance in dying. This is defined in s. 241.2(2) of the *Code* as follows:

> 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.

25. No medical condition is excluded from the medical assistance in dying legislation and anyone may be assessed for eligibility. It is left to individual doctors to evaluate, on a case-by-case basis, whether the totality of the individual's medical circumstances meet the criteria for obtaining medical assistance in dying. The legislation allows those who are suffering intolerably and whose natural death has become reasonably foreseeable the choice of medically assisted death. The criterion of "natural death has become reasonably foreseeable" provides flexibility

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[32] Background Paper at page 9-10.

to medical practitioners when assessing the overall medical circumstances of the patient.

D. The Underlying Litigation

26. On June 27, 2016, ten days after Bill C-14 received Royal Assent, the appellants commenced the underlying action. The appellants challenge the constitutional validity of the newly enacted s. 241.2 of the *Criminal Code* which now permits medical assistance in dying provided certain criteria are met. The appellants take issue with the eligibility requirements for medical assistance in dying set out in s. 241.2(2), including the requirement that an individual's natural death be reasonably foreseeable.[33]

27. In particular, the appellants claim that s. 241.2(2), which defines "grievous and irremediable" medical condition, violates ss. 7 and 15 of the *Charter* and is not saved by s. 1. The appellants seek a declaration that to the extent this provision in the new medical assistance in dying legislation infringes ss. 7 and 15 of the *Charter*, it should be declared unconstitutional and of no force and effect.

E. The Chambers Decision

28. On May 23, 2017, the appellants filed an application to strike several paragraphs from Canada's response to civil claim that addressed the role of the findings of fact made in *Carter*. The appellants argued that Canada should be bound by these findings and that Canada should be estopped from tendering evidence in relation to issues that the appellants say *Carter* previously decided. In support of their application, the appellants relied on Rule 9-5(1)(b) and (d), the law of issue estoppel, and the Court's inherent jurisdiction which includes the issues of abuse of process and collateral attack.[34]

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[33] Amended Notice of Civil Claim, filed June 21, 2017, p. 13-14, Appeal Record ["AR"], p. 13-14.
[34] Notice of Application, filed May 23, 2017, AR, pp. 31-40.

29. In response, Canada contended that the appellant's proposition was inconsistent with the jurisprudence on the binding scope of precedents and would lead to an untenable situation in which a party could circumvent the requirement to prove its case through relevant evidence. Canada argued that the appellants' underlying *Charter* claim, unlike the claim in *Carter*, challenges a newly enacted permissive medical assistance in dying regime. Unlike the absolute prohibition in *Carter*, this new regime has several expressly stated objectives and was developed after a rigorous and comprehensive consultation process with a diverse range of potentially affected Canadians. Canada contended that it was entitled to fully defend this new legislation and that, if granted, the relief sought by the appellants would significantly prejudice this ability.

30. On October 11, 2017, the chambers judge issued reasons for judgment dismissing the appellants' application. The chambers judge held that "striking the AGC's response to the notice of civil claim with respect to the findings of fact in *Carter* fails to respect this Court's essential role in deciding what evidence is relevant and admissible and what weight should be given to it."[35] He also concluded that the application to strike "seeks to ignore the fact that Parliament's decision to enact the new law was informed by an extensive Parliamentary record."[36]

31. The chambers judge was not persuaded by the appellants' arguments and found that "[t]he present matter is not a re-litigation of *Carter*, or a 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."[37] The appellants did not satisfy the chambers judge that the principles of issue estoppel, abuse of process or collateral attack had been made out.

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[35] *Lamb v. Canada (Attorney General)*, 2017 BCSC 1802 [“Chambers Decision”] at para. 107.
[36] Chambers Decision at para. 107.
[37] Chambers Decision at para. 86.

32. The chambers judge also agreed with Canada's submissions on the importance of assessing the constitutionality of the new medical assistance in dying legislation "on relevant, current evidence that is specific to the objectives and effects of the legislation and that is properly tested through the normal processes of tendering evidence."[38]

PART 2 – ERRORS IN JUDGMENT OR ISSUES ON APPEAL

33. The only issue on appeal is whether the chambers judge properly exercised his discretion not to strike portions of Canada's defense and not to bind Canada to findings of fact made in *Carter*. Canada submits that he did.

PART 3 – ARGUMENT

A. The Standard of Review

34. This Court will not lightly interfere with a discretionary order to strike out pleadings: "[o]n appeal, a decision made on a pre-trial application to strike pleadings is entitled to deference as it involves the exercise of judicial discretion."[39] Whether or not a party should be estopped from leading relevant evidence to defend itself at trial is a discretionary determination that ought to be granted a high level of deference.

35. Recently, this Court held that the standard of review may vary depending on the ground on which an application to strike has been brought. Applications brought under Rule 9-5(1)(a) involve pure questions of law and, as such, orders that strike a claim or defense because it contains no reasonable cause of action may be accorded less deference by the Court on appeal. On the other hand, applications brought under Rule 9-5(1)(b) or (d) are not concerned with pure questions of law and orders made under these sub-paragraphs to strike because a claim or defense

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[38] Chambers Decision at para. 107.
[39] *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91 at para. 11.

is vexatious, frivolous or an abuse of process, generally attract a higher level of deference on appeal.[40]

36. In the present appeal, a higher level of deference is warranted because the application to strike portions of Canada's defense was brought under Rule 9-5(1)(b) and (d). The appellants' argument was primarily concerned with aspects of the abuse of process doctrine, including the principles of issue estoppel and collateral attack. The chambers judge's consideration of these arguments necessarily involved an assessment of the background facts that gave rise to the new medical assistance in dying legislation. His dismissal of the application is grounded in his central factual finding that the present case concerns new legislation with specific objectives and effects and is, therefore, not a re-litigation of *Carter*. As such, the chambers decision is entitled to deference.

B. The Binding Scope of Precedents

37. The chambers judge began his analysis of the merits of the application by noting the parallels between the appellants' arguments and the arguments rejected by the Alberta Court of Appeal in *Allen v. Alberta*.[41] In that case, the plaintiff, Dr. Allen, applied for a declaration that the prohibition on private health insurance in Alberta was unconstitutional because it infringed his s. 7 *Charter* rights.[42] Dr. Allen argued that his security of the person was violated but rather than tender evidence to support this argument, he relied on the Supreme Court of Canada's findings of fact in *Chaoulli* and *PHS*.[43] The chambers judge in *Allen* rejected Dr. Allen's claim and held that he was "not bound to apply a conclusion of mixed fact and law from a

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[40] *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 41; *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19; *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at paras. 20-21.
[41] Chambers Decision at para. 34; *Allen v. Alberta* 2015 ABCA 277 ["*Allen* Appeal"].
[42] *Allen* v. *Alberta*, 2014 ABQB 184 at para. 1 ["*Allen* Trial Decision"].
[43] *Allen* Trial Decision at para. 39; *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35; *Canada (Attorney General)* v. *PHS Community Services Society*, 2011 SCC 44.

Supreme Court of Canada case to another case that merely shares a similar allegation but offers no evidence to establish the allegation in fact."[44]

38. The 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."[45] The Court further noted that the basic premise of *stare decisis* is that "prior decisions are at best binding on points of law, not questions of fact."[46]

39. In accordance with *Allen*, the chambers judge in the case at bar agreed with Canada that the appellants' proposition that the trial court should be bound by the findings of fact in *Carter* is inconsistent with the jurisprudence on the binding scope of precedents and, if granted, would lead to an untenable situation in which a party could circumvent the requirement to prove their case through relevant evidence.[47]

40. The appellants argue the chambers judge erred in relying on *Allen* because that case "dealt with the doctrine of *stare decisis* as between complete strangers in different jurisdictions" whereas the present case involves similar parties in the same jurisdiction and replacement legislation.[48] This argument overlooks the fact that the basic principles of *stare decisis* articulated in *Allen* do not change based on the parties or the nature of the litigation. As the chambers judge correctly held, findings of fact made in one constitutional challenge are not binding in subsequent constitutional challenges even if they deal with the same issue. This is especially true when those subsequent constitutional challenges involve the consideration of different legislation with different objectives and effects.

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[44] *Allen* Trial Decision at para 48.
[45] *Allen* Appeal at para. 21.
[46] *Allen* Appeal at para. 28.
[47] Chambers Decision at para. 36.
[48] Appellants' Memorandum of Fact and Law, filed February 7, 2018 ["Appellant's Memorandum"] at para. 78.

C. Issue Estoppel Does Not Apply

41. The chambers judge properly rejected the appellants' argument that issue estoppel ought to bind Canada to the *Carter* findings of fact. He found that two of the three preconditions set out in the leading case of *Danyluk*[49] were met: the judicial decision which is said to create the estoppel is final and the parties to the judicial decision or their privies were the same. However, the chambers judge was not persuaded that the appellants met the first precondition, namely, that the same question had been decided.[50] He also concluded that even if all of the preconditions had been met, he would exercise his residual discretion not to apply issue estoppel because it would be highly prejudicial to preclude Canada from mounting a full defense of the new permissive regime.[51]

42. The appellants allege that the chambers judge 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.[52] The appellants' argument creates an artificial and unsustainable distinction between legal and factual issues in the context of *Charter* litigation. As the chambers judge noted, while *Carter* dealt with the same general subject matter (assisted dying), the legislation at issue was not the same as in the present case and, as a result, the questions before the Court in *Carter* were different than they will be the present case.[53]

43. The differences in the legislative regimes and the different legal questions raised by constitutional challenges to those different regimes necessarily inform and provide context for the factual findings. While the appellants argue that they ought to be able to rely on findings made by the trial judge on issues such as physicians' ability to

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[49] *Danyluk v. Ainsworth Technology*, 2001 SCC 44.
[50] Chambers Decision at para. 58.
[51] Chambers Decision at para. 76.
[52] Appellants' Memorandum at para. 63.
[53] Chambers Decision at para. 70.

reliably assess decisional capability,[54] they overlook the context in which these findings were made. For example, one of the factual questions in *Carter* was whether it is possible to reliably assess capacity in relation to a request for medical assistance in dying. The evidence on that point concerned the decisional capability of those who were in end of life situations and their capability to refuse or withdraw treatments that could lead to death.[55] The evidence did not focus on the ability of physicians to judge the capacity of a non-dying person to choose a medical procedure intended to cause death. Unlike *Carter*, a central question in the present case is whether and to what extent capacity assessment is different when a person is dying versus not dying.

44. Given that *Carter* was a challenge to the absolute criminal prohibition on assisted dying rather than a challenge to the specific eligibility requirements for assisted dying, the trial judge held only that *some form* of an assisted dying regime could be safely implemented and administered. She made no pronouncements on the relative safety of regimes that require an individual to be, for example, within six months of death before being eligible for medical assistance in dying, such as those in Oregon and Washington State, versus regimes that do not have this requirement, such as those in Belgium and the Netherlands. Furthermore, given that the current permissive regime was not yet in place, the trial judge made no pronouncements on the relative safety of the regime adopted by Canada whereby evaluations of the reasonable foreseeability of death are left to the best judgment of medical professionals.

45. *Carter* was about whether medical assistance in dying should be permitted in Canada at all. In *Carter*, Canada was under no obligation to defend a particular model of medical assistance in dying because the question before the court was the constitutionality of the absolute prohibition. Notably, the *Carter* Plaintiffs did not advocate for a particular model of assisted dying but instead relied on evidence from

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[54] Appellants' Memorandum at para. 12.
[55] See, for example, *Carter* Trial Decision at paras. 762-763 and 787-789.

both the American and European regimes to advance their case against the absolute prohibition.[56]

46. The chambers judge recognized the inherent connection between findings of fact and the particular legislation or legal question at issue when he held that "[t]he 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."[57] Broadly stated findings of fact must be read in the context of the case in which they were made, with a view to the specific question that was before the court. Furthermore, in enacting the new legislation, Parliament is entitled to weigh and consider all of the evidence heard during its extensive consultation process with individuals and organizations who represent a broad spectrum of Canadian society. Parliament should not be bound to evidence that may be out of date or that happened to be adduced in the context of the *Carter* litigation. The chambers judge properly concluded that the findings made in *Carter* were with respect to a different legislative scheme, and it is the new scheme that is challenged in the present litigation. On that basis, he reasonably held that the first precondition of *Danyluk* was not satisfied.[58]

47. The chambers judge correctly observed that the Court retains discretion not to apply issue estoppel even if all three preconditions are met.[59] After weighing competing considerations, the chambers judge exercised his discretion and held that even if the first precondition had been met, he would still have declined to apply issue estoppel. The chambers judge concluded that Canada was entitled to create a full factual matrix in defense of the new legislation and that the prejudice that would accrue to Canada if issue estoppel were applied outweighed the temptation to

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[56] See, for example, the experts relied upon by the plaintiffs as listed by the trial judge in *Carter*, *Carter* Trial Decision at para. 160.
[57] Chambers Decision at para. 63.
[58] Chambers Decision at para. 70.
[59] Chambers Decision at para. 71.

shorten the proceedings.[60] Since findings of fact in *Charter* challenges are made in the context of the legislation at issue, it would be inappropriate to bind Canada to findings made in the context of an absolute prohibition on the basis of evidence that was available and before the court at that time. The chambers judge recognized that findings of fact should not be, as the appellants suggest, de-coupled from the specific legislative regime at issue.

48. In *Lehndorff*,[61] this Court declined to strike pleadings even though the parties and some of the general issues in the cases were the same because the new proceedings raised issues not adjudicated upon by the previous judge.[62] Relying on *Lehndorff*, the chambers judge noted that the trial judge retains the discretion to apply the principle of *res judicata* after the trial of the issues in the final judgment.[63] It is only at that point in the litigation, rather than at the pleadings stage, that a court will be able to consider whether the principle ought to apply in light of the issues raised and evidence adduced.

49. The constitutional challenge raised in the case at bar will require the trial judge to answer a different set of questions than in *Carter*. For that reason, the chambers judge reasonably held that the appellants' argument that the trial court "should be bound by findings of fact made in a previous case involving a different legal regime and a different set of issues should be rejected."[64] The chambers judge also noted that Canada's full defense "may go so far as questioning certain findings of fact in *Carter* because those findings were based on evidence that was adduced in the context of a challenge to the absolute prohibition, which was also grounded in distinct legislative objectives."[65]

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[60] Chambers Decision at para. 74.
[61] *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*, 1980 CanLII 393 (BC CA) at para. 20.
[62] Chambers Decision at para. 84.
[63] Chambers Decision at para. 85.
[64] Chambers Decision at para. 76.
[65] Chambers Decision at para. 77.

50. The appellants agree that residual discretion lies with the chambers judge to refuse to apply issue estoppel, but they contend that the chambers judge erred in the exercise of that discretion.[66] In effect, they ask this Court to re-weigh the competing considerations set out by the chambers judge and come to a different conclusion. The chambers judge took into consideration the preservation of resources and time that would be achieved by granting the application and weighed that against the significant prejudice that would accrue to Canada if findings of fact in *Carter* were binding in *Lamb*.[67] This careful balancing exercise is the purview of the chambers judge and should be accorded deference by this Court.

D. No Abuse of Process

51. The chambers judge did not accept the appellants' arguments with respect to abuse of process and held instead that "[t]he 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."[68] He was reasonable in doing so.

52. The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its procedure to bring the administration of justice into disrepute.[69] The doctrine is intended to preserve the integrity of the court's process and is concerned with fairness and the proper administration of justice.[70] This Court has recently held that restraint is to be exercised when applying the doctrine of abuse of process to strike pleadings.[71] The chambers judge considered the relevant jurisprudence,

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[66] Appellants' Memorandum at paras. 71-73.
[67] Chambers Decision at para. 75.
[68] Chambers Decision at para. 86.
[69] *Toronto (City)* v. *C.U.P.E., Local 79*, 2003 SCC 63 at paras. 37-38 ["*Toronto*"].
[70] *Toronto* at paras. 42 and 44; *Behn* v. *Moulton Contracting Ltd.*, 2013 SCC 26 at paras. 39-41.
[71] *Glover v. Leakey*, 2018 BCCA 56, at para. 40.

including the cases relied upon by the appellants, and found that the appellants "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 in *Carter* would amount to an abuse of process."[72]

53. Central to the chambers judge's conclusion on abuse of process was his finding that in the underlying litigation, the appellants "seek declaratory relief in relation to the constitutionality of the new regulatory regime, a regime that differs from the one considered in *Carter*."[73] The appellants do not challenge this finding but assert that Canada can be bound by the *Carter* findings of fact and still argue the law's new objectives or adduce evidence that meets the "fresh" evidence threshold.[74]

54. The appellants' assertion glosses over the crucial importance of adducing evidence in *Charter* litigation that is specific to the objectives of the legislation. The Supreme Court of Canada has held that the *Charter* analysis of legislation enacted in response to a finding of unconstitutionality must proceed on the basis of the structure and wording of the new legislation, not on the basis of different facts and different definitions of concepts used in the previous legislation.[75] The chambers judge accepted that the underlying litigation was "limited to challenging the narrower prohibition in the present provisions" but also noted that "the potential application of s. 7 and s. 1 of the *Charter* to the new legislative scheme and objectives may not be so limited" as to be restricted to testing them against the findings in *Carter* which pertained to the previous legislative regime.[76]

55. The chambers judge held that unlike cases, such as the *British Columbia Teachers*

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[72] Chambers Decision at para. 98.
[73] Chambers Decision at para. 98.
[74] Appellants' Memorandum at paras. 55-58.
[75] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at paras. 11 and 106.
[76] Chambers Decision at para. 83.

Federation,[77] in which abuse of process claims arose because the government re-enacted virtually identical legislation in response to a declaration of unconstitutionality, the present case involves a regime that significantly differs from the one 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."[78] That full factual matrix includes understanding the new legislation in the context of other international medical assistance in dying regimes. That evidence demonstrates, for example, that the new legislation is more permissive than the American assisted dying regimes which were relied on by the *Carter* Plaintiffs as part of their case against the absolute prohibition.

E. No Collateral Attack

56. The chambers judge properly rejected the appellants' contention that by refusing to admit that the Court in the case at bar is bound by the findings of fact made in *Carter*, Canada is collaterally attacking decisions made by various courts regarding individual exemptions to access medical assistance in dying during the period of time that the suspension of the declaration of invalidity in *Carter* was extended.[79] The appellants claimed that the determination as to the scope of the declaration in *Carter* was a question of law that had already been answered by decisions of the Alberta and Ontario courts in two exemption cases: *E.F.* and *I.J.* and Canada should not be permitted to collaterally attack those decisions in the present litigation.[80]

57. In dismissing the appellants' collateral attack argument, the chambers judge relied on this Court's recent decision in *Krist*,[81] which held that "[t]o determine whether a claim constitutes a collateral attack, the court should inquire into whether the claim,

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[77] *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121.
[78] Chambers Decision at para. 98.
[79] Chambers Decision at para. 106.
[80] Chambers Decision at para. 104.
[81] *Krist v. British Columbia*, 2017 BCCA 78 ["*Krist*"].

or any part of the claim, is 'in effect' an appeal of an order."[82] Savage J.A. explained that a claim is "in effect" a collateral attack where a party attempts to re-litigate the same issues upon which a decision it failed to appeal was already based.[83] The chambers judge properly found that not to be the case here.

58. Contrary to the appellants' contention in their application and in the present appeal, the scope of the declaration of invalidity in *Carter* is not a settled issue. The chambers judge rejected the appellants' characterization of the exemption decisions, one which they reiterate again on appeal. He found that the exemption 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."[84] He further noted that in *E.F.*, the Alberta Court of Appeal expressly stated that "issues that might arise regarding the interpretation and constitutionality of eventual legislation should obviously wait until the legislation has been enacted."[85]

59. In addition to rejecting *E.F.* and *I.J.* as supportive of the appellants' argument, the chambers judge correctly focused on the last two sentences of the Supreme Court of Canada's declaration in *Carter*: "The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought."[86] Furthermore, the new permissive legislation replicates the order pronounced by the Supreme Court of Canada in *Carter*, but also seeks to define key terms of that order which the Court did not define.

60. The fact that Canada did not dispute that the exemption decisions rendered by the courts of Alberta and Ontario had legal force for the individuals involved and in the

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[82] Chambers Decision at para.103, citing *Krist* at para. 47.
[83] *Krist* at para. 49.
[84] Chambers Decision at para. 104.
[85] Chambers Decision at para. 104, citing *E.F.* at para. 72.
[86] *Carter* SCC at para. 127.

context within which they were made is not relevant to the appellants' application to preclude Canada from leading evidence in support of the constitutionality of the new legislation that is impugned in the case at bar. The chambers judge properly concluded that Canada "does not seek to overturn any previous judicial orders, and the doctrine of collateral attack cannot be used to prevent her from mounting a full defense to the constitutionality of newly enacted federal legislation that has not yet been the subject of judicial consideration in any forum."[87]

F. Consideration Was Given to the Appellants' Arguments

61. The appellants' contention that the chambers judge failed to give consideration to several of their arguments below is unfounded. While the appellants have added to and changed the focus of these arguments on appeal, the chambers judge considered and rejected each of the arguments in his reasons for judgment.

62. With respect to constitutional dialogue, the appellants assert that the chambers judge failed to consider the unique context of "replacement legislation" when applying the principles of abuse of process and issue estoppel.[88] As noted above, the chambers judge did not accept the appellants' position that the legislation at issue is duplicative replacement legislation. Rather, he properly held that the new legislation has different objectives and effects. Various statements throughout his reasons highlight the distinct nature of the legislative prohibition that was in issue in *Carter* and the permissive legislative regime that is in issue in the case at bar, and demonstrate that the chambers judge rejected the appellants' characterization of both the new legislation and the nature of their underlying constitutional claim.[89] The chambers judge also distinguished the appellants' authorities on replacement legislation.[90] The appellants have suggested no new grounds on appeal as to why those authorities ought to have been found to be determinative of this application.

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[87] Chambers Decision at para. 106.
[88] Appellants' Memorandum at paras. 81-84.
[89] See, for example, Chambers Decision at paras. 55, 63, 70, 72, 76-77 and 83-97.
[90] Chambers Decision at paras. 87-88.

63. The appellants also raise the issue of constitutional accountability and say that the chambers judge should have considered their argument that Parliament has a duty to comply with the *Carter* declaration.[91] Again, the chambers judge did not accept their characterization of the underlying litigation as being simply an assessment of Parliament's compliance with the *Carter* findings. Accordingly, the chambers judge properly refused to adopt the appellants' argument on this issue.

64. Instead, the chambers judge agreed with Canada's submission that striking Canada's response to civil claim with respect to the findings of fact in *Carter* fails to respect the Court's role in evidentiary matters.[92] The chambers judge was not prepared to ignore the fact that Parliament's decision to enact the new law was informed by an extensive Parliamentary record and that evidence, which is specific to the objectives and effects of the legislation, must be "properly tested through the normal processes of tendering evidence."[93]

65. Finally, the appellants' assertion that the chambers judge disregarded the public interest nature of this litigation when adjudicating the appellants' abuse of process and issue estoppel arguments is belied by the balancing of competing interests set out in his reasons for judgment.[94] The chambers judge expressly considered the issue of access to justice but weighed that against the fact that constitutional litigation is highly dependent on contextually-specific factual finding and the potential prejudice to Canada if bound by findings of fact made in a case involving different legislation with different objectives and effects.[95]

66. The public interest is also served by Parliament hearing from and considering the views of a diverse range of stakeholders, public interest groups and potentially impacted individuals in drafting the eligibility criteria in the new legislation. Contrary to the appellants' submissions, this legislative process was not an abuse of process

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[91] Appellants' Memorandum at para. 87.
[92] Chambers Decision at para. 107.
[93] Chambers Decision at para. 107.
[94] Appellants' Memorandum at para. 90-91.
[95] Chambers Decision at paras. 75-76.

but, rather, was reflective of Parliament's role in balancing competing interests and in protecting vulnerable groups.[96] The Supreme Court of Canada in *Carter* expressly noted the complexity of this task: "Parliament faces a difficult task in addressing this issue; it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying."[97]

G. Conclusion

67. In sum, the chambers judge properly dismissed the appellants' novel and unprecedented application. The underlying litigation challenges certain provisions of the new permissive medical assistance in dying regime and, as such, Canada must be permitted to fully defend this legislation based on evidence that goes to the legislation's objectives and effects. The chambers judge held that the principles of fairness, the proper administration of justice, and the integrity of the court's process do not support the appellants' position. It is not in the interests of justice to decide constitutional cases on a record that is not specific to the matters at issue in that proceeding.

PART 4 – NATURE OF ORDER SOUGHT

68. Canada seeks an order dismissing the appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 9th day of March 2018.

Jan Brongers
Counsel for the Attorney General of Canada

BJ Wray
Counsel for the Attorney General of Canada

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[96] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R., 927, at para. 79; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 58.
[97] *Carter* SCC at para. 98.

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