IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lamb v. Canada (Attorney General),* 2017 BCSC 1802

Date: 20171011
Docket: S165851
Registry: Vancouver

Between:

Julia Lamb and British Columbia Civil Liberties Association

Plaintiffs

And

Attorney General of Canada

Defendant

Corrected Judgment: The text of the judgment was corrected at page 1 where changes were made October 23, 2017

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:	Sheila M. Tucker, Q.C. and Alison M. Latimer
Counsel for the Defendant:	B. J. Wray and M. A. Nicolls
Place and Date of Hearing:	Vancouver, B.C. June 12 and 13, 2017
Place and Date of Judgment:	Vancouver, B.C. October 11, 2017

The Parties

[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.

[2] The second individual plaintiff, Robyn Moro, has Parkinson's disease, a neurodegenerative disease that primarily affects movement.

[3] The institutional plaintiff, the British Columbia Civil Liberties Association ("BCCLA"), often participates as an intervener in public interest litigation and was granted public interest standing as a party in *Carter v. Canada (Attorney General)* indexed at 2012 BCSC 886 [*Trial Reasons*], *Carter v. Canada (Attorney General)* 2015 SCC 5 [*Carter #1*] and 2016 SCC 4 [*Carter #2*], (collectively, "*Carter*"). It is a plaintiff in these proceedings, and no objection has been taken to its standing as such.

[4] The plaintiffs challenge the constitutionality of certain portions of s. 241.2 of the *Criminal Code*, R.S.C. 1985, c. C-46 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, following the decision of the Supreme Court of Canada in *Carter #1*.

[5] The Minister of Justice is the Minister of the Crown who is responsible for the Department of Justice, is the chief federal legal adviser and is also the Attorney General of Canada ("AGC"). The statutory responsibilities of the Minister are found in s. 4 of the *Department of Justice Act*, R.S.C., 1985, c. J-2 which states:

> The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall
>
> > (a) see that the administration of public affairs is in accordance with law;
> >
> > (b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces;
> >
> > (c) advise on the legislative Acts and proceedings of each of the legislatures of the provinces, and generally advise the

> Crown on all matters of law referred to the Minister by the Crown; and
>
> (d) carry out such other duties as are assigned by the Governor in Council to the Minister.

Relief Sought

[6] On the application presently before me, the relief sought includes:

> 1. An order under Rule 9-5(1)(b), (d) and/or the inherent jurisdiction of the court striking Part 1, Division 2, paras. 8-13 of AGC's Response to Civil Claim ("Response");
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> 2. An order that AGC is estopped and/or barred, by the operation of principles of issue estoppel and/or abuse of process, from re-litigation in the action herein of the matters determined by the BCSC in *Carter v. Canada (Attorney General)*, 2012 BCSC 886 ("Trial Reasons") and the SCC in *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter #1*"), specifically, factual and legal conclusions as to:
>
> a. when palliative sedation is available to patients, as found at Trial Reasons;
>
> b. what symptoms may cause suffering and whether palliative care can or will alleviate all suffering, as found at Trial Reasons;
>
> c. whether presently available end-of-life practices are legal and ethical, as found at Trial Reasons;
>
> d. whether palliative care is universally available, as found at Trial Reasons;
>
> e. medical ethics and in particular, the role the principles of autonomy, compassion and non-abandonment play in medical ethics, concerning whether physicians esteem and value life and whether physicians are ethically required to act in the best interests of their patients and in accordance with the law, as found at Trial Reasons;
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> f. whether there is a clear societal consensus about physician-assisted death as found at Trial Reasons;
>
> g. the level of success achieved by permissive jurisdictions in the protection of vulnerable individuals, as found at Trial Reasons;
>
> h. whether safeguards in foreign jurisdictions operate to prevent abuse of vulnerable individuals, as found at Trial Reasons;
>
> i. what inferences can be drawn with respect to the likely effectiveness of comparable safeguards in Canada, as found at Trial Reasons;
>
> j. the impact that legalization of physician-assisted dying will have on palliative care, as found at Trial Reasons;

k. the impact that legalization of physician-assisted dying will have on the physician-patient relationship, as found at Trial Reasons;

l. whether it is feasible for a physician to reliably assess patient competence, informed consent and ambivalence in medical decision-making, including for physician-assisted death, as found at Trial Reasons;

m. whether decision-making to seek medically hastened death is akin or analogous to decision-making to commit suicide, as found at Trial Reasons;

n. the impact that the availability/unavailability of physician-assisted dying can have on the life-span of those who would seek that service but cannot legally do so, as found at Trial Reasons;

o. how the interests of individuals with physical disabilities that render them unable to end their lives by their own actions are impacted when the law prevents them from obtaining assistance to die, as found at Trial Reasons;

p. that suicide and attempted suicide are serious health problems that governments are trying to address, and that a prohibition against assisted dying may have the salutary effect of sending an anti-suicide message and a message about the value of every life, including the lives of the disabled, as found at Trial Reasons;

q. that a law denying access to assisted dying to persons who are disabled, grievously ill and suffering intractably sends a negative message about the importance of the wishes and suffering of those persons, as found at Trial Reasons;

r. that denying access to physician-assisted dying to persons deprives those persons of autonomy, self-worth and the opportunity to make a choice fundamental to their sense of dignity and personal integrity and consistent with their values, as found at Trial Reasons;

s. that denying access to physician-assisted dying to persons subjects those persons to prolonged physical pain, psychological suffering, fear and/or stress, as found at Trial Reasons;

t. that denying access to physician-assisted dying to persons subjects those person's loved ones to risk of prosecution, as found at Trial Reasons;

3. A further order that the plaintiffs may rely on the facts relating to the matters referred to above, as set out in the Trial Reasons and *Carter #1* at the paragraphs referenced above, in these proceedings without the necessity of introducing evidence of same;

4. An order that AGC is estopped and/or barred from re-litigation in the action herein, by the operation of principles of issue estoppel and/or abuse of process and/or collateral attack, from asserting that the declaration and judgment in *Carter #1* were limited in scope to persons in the narrow factual circumstances of Gloria Taylor (i.e., persons whose medical conditions made

> natural death reasonably foreseeable/had incurable conditions/were in an advanced and irreversible state of decline).

Introduction

[7] The notice of civil claim in these proceedings was filed on June 27, 2016, ten days after Bill C-14 received Royal Assent. The statement of facts in the notice devotes some 30 paragraphs to the personal plaintiffs, and 6 paragraphs to the BCCLA. It also includes 22 paragraphs referring to the *Carter* proceedings and in particular to findings of fact made by the trial judge in that case.

[8] In the notice of civil claim, the plaintiffs plead and rely on all of the findings of fact in the Supreme Court of Canada's decision in *Carter* #1 as well as certain findings made in the *Trial Reasons*. The *Carter* facts that the plaintiffs seek to rely on deal with issues such as the choices facing individuals with grievous and irremediable medical conditions, the ethics of medical assistance in dying, the situation in permissive jurisdictions, the impact of medical assistance in dying on vulnerable individuals and the effectiveness of safeguards.

[9] The AGC admits that in her *Trial Reasons* the trial judge made the factual findings relied upon by the plaintiffs, but opposes the relief sought on the basis that she is not bound by those findings in these proceedings, and in the response to civil claim admits very few of the facts alleged by the plaintiffs.

[10] I have encouraged the AGC in these proceedings to concede as many of the factual findings made by the trial judge in *Carter* as reasonably possible. I understand that in keeping with my encouragement, the parties are in the process of exchanging a notice to admit facts by the plaintiffs to which the defendant will reply.

[11] The AGC contends that the plaintiffs' argument that this Court should be bound by findings of fact made in a previous case involving different plaintiffs, a different legal regime, and a different set of issues is entirely novel and without precedent.

[12] The AGC submits that to strike her pleadings at this early stage in the litigation would be highly prejudicial because it would preclude her from mounting a full defence of the new legislative regime.

Background

[13] *Carter* began in April, 2011, and involved a constitutional challenge to the assisted suicide prohibition in s. 241(b) of the *Criminal Code*, R.S.C., 1985, c. C-46 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 "impugned provisions").

[14] The plaintiffs in *Carter* were Gloria Taylor, Lee Carter, Hollis Johnson, Dr. William Shoichet, and the BCCLA. The respondents were the AGC and the Attorney General of British Columbia ("AGBC").

[15] Ms. Taylor, the lead plaintiff in *Carter,* had a terminal neurodegenerative disease, amyotrophic lateral sclerosis ("ALS") and according to the evidence adduced, had been told by her neurologist in January 2010 that she would likely die within the year.

[16] The plaintiffs in *Carter* claimed that:

> (a) to the extent the impugned provisions prohibited competent, grievously and irremediably ill adults who were voluntarily seeking physician-assisted dying on an informed basis from receiving assistance, contrary to s. 7 of the *Charter,* and
>
> (b) to the extent the impugned provisions prohibited competent, materially physically disabled, grievously and irremediably ill adults who were voluntarily seeking physician-assisted dying on an informed basis from receiving assistance, they thereby disproportionately impacted the disabled, contrary to s. 15 of the *Charter.*

[17] The *Carter* plaintiffs sought declarations of legislative invalidity under s. 52 of the *Constitution Act, 1982, being schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11, with a six-month period of suspension for Parliament to draft legislation addressing the alleged specific infringements.

[18] The defendants in *Carter* defended the *Criminal Code* absolute prohibition on assisted suicide.

[19] The trial judge canvassed the evidence and submissions of counsel and made extensive, detailed findings of fact and set out her reasoning at length. She held that the absolute prohibition on physician-assisted suicide was unconstitutional and breached ss. 7 and 15 of the *Charter*, and that neither breach was justified under s. 1. She issued declaratory orders that the impugned provisions were of no force and effect to the extent that they prohibited physician-assisted suicide.

[20] The AGC appealed the trial decision and on October 10, 2013, a majority of the British Columbia Court of Appeal allowed the appeal on the basis that previous decision of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General*), [1993] 3 S.C.R. 519 [*Rodriguez*] was binding authority on the matter. The majority concluded that the AGC's appeal revisited the same section of the *Criminal Code* that the Supreme Court had found to be compliant with the *Charter* in *Rodriguez* and allowed the appeal on the basis of the doctrine of *stare decisis*: *Carter* v. *Canada (Attorney General),* 2013 BCCA 435.

[21] The plaintiffs in *Carter* then sought and were granted leave to appeal to the Supreme Court of Canada.

[22] On October 15, 2015, the Supreme Court of Canada in *Carter #1* unanimously held that the impugned provisions constituted an unjustified breach of s. 7 of the *Charter*, and rejected the AGC's position that the impugned provisions 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 Court agreed with the trial judge that individual assessments for decisional capability in life

and death contexts were not only feasible, but were already being carried out in respect of other end-of-life decisions.

[23] The Court 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.

[24] The Court found it unnecessary to decide whether the impugned provisions also violated s. 15 of the *Charter*.

[25] At para. 127 of *Carter #1*, the Court specified that the scope of its declaration was "intended to respond to the factual circumstances in this case" and that it was making "no pronouncement on other situations where physician-assisted dying may be sought." The Court suspended its declaration for 12 months.

[26] On January 15, 2016, in response to an application from the AGC, the Supreme Court of Canada in *Carter #2* granted a four-month extension of the suspension of the declaration of invalidity. A majority of the Court also granted a constitutional exemption to the absolute prohibition on physician-assisted suicide during the extended suspension for individuals who met the criteria set by the Court in *Carter #1* "pending Parliament's response" to that decision (*Carter #2,* at para. 6).

[27] During the hearing of the suspension extension application, Mr. Justice Moldaver commented that the Court had suspended its declaration of invalidity so as to give Parliament the opportunity to determine the precise nature of the conditions under which access to medical assistance in dying would be granted, stating: "Or maybe when Parliament authorizes someone to kill somebody they might want judicial approval first. They might want other conditions beyond what we talked

about just the circumstances; they might want to put in measures that ensure so far as possible that we are not killing people who really ought not to be killed."

[28] 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 the approval of their Superior Courts for access to physician-assisted dying on the basis of the criteria set out by the Supreme Court of Canada. These approvals included the decisions of the Alberta Court of Appeal in *Canada (Attorney General) v. E.F.*, 2016 ABCA 155 [*E.F.*], and the Ontario Superior Court of Justice in *I.J. v. Canada (Attorney General)*, 2016 ONSC 3380 [*I.J.*].

[29] Following *Carter #1*, the Government of Canada carried out a consultation process with experts, stakeholders, and other Canadians to explore legislative responses to the Supreme Court of Canada's declaration of invalidity. On April 14, 2016, the Government introduced Bill C-14. The Bill proposed, in part, to add s. 241.2 to the *Criminal Code* so as to permit medical assistance in dying where, among other things, an individual's natural death has become reasonably foreseeable.

[30] On June 17, 2016, after 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.

[31] The amendments in Bill C-14 resulted in s. 241.2 of the *Criminal Code* which permits medical assistance in dying for individuals who have a "grievous and irremediable medical condition" providing in s. 241.2(2) that:

> (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, talking 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.

[32] The plaintiffs challenge the constitutional validity of the newly enacted s. 241.2, taking issue with some of 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.

Discussion

[33] The AGC contends that the plaintiffs' proposition that this Court ought to be bound by the *Carter* facts is inconsistent with the jurisprudence on the binding scope of precedents and, that if granted, would lead to an untenable situation in which a party could circumvent the requirement to prove their case through relevant evidence.

[34] The Alberta Court of Appeal considered a similar argument in *Allen* v. *Alberta,* 2015 ABCA 277 [*Allen*]. The plaintiff in that case, 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. Dr. Allen argued that his security of the person was violated, but rather than tendering evidence to support this argument, he relied on the Supreme Court of Canada's findings of fact in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*], and *Canada (A.G.) v PHS Community Services Society*, 2011 SCC 44*.*

[35] In reasons for judgement indexed at 2014 ABQB 184, the chambers judge rejected Dr. Allen's claim and concluded that the evidentiary record was insufficient to rule on the constitutional issue because Dr. Allen failed to tender evidence on the specific issues before the Court. The judge emphasized that the Supreme Court of

Canada's conclusions in *Chaoulli* with respect to the impacts of a prohibition on private insurance were based on the specific evidence adduced at trial.

[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.

Basis for the Plaintiffs' Application

[37] On the application before me, the plaintiffs rely on Rule 9 - 5(1)(b) and (d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], the law of issue estoppel, and the Court's inherent jurisdiction which subsumes the issues of abuse of process and collateral attack.

a) Rule 9 - 5(1)(b) and (d)

[38] The plaintiffs' application seeks to strike several paragraphs from the AGC's response to civil claim that address the role of the findings of fact made in *Carter*.

[39] This Court has consistently held that there is a high threshold for striking pleadings pursuant to Rule 9-5(1). It must be "plain and obvious" that the claim falls within the parameters of that subrule.

[40] The AGC contends that the plaintiffs have failed to demonstrate that it is "plain and obvious" that the doctrine of *res judicata* applies or that the AGC's pleadings with respect to the *Carter* facts constitute a "plain and obvious" abuse of process.

[41] The parts of this Rule relied upon by the plaintiffs provides:

> (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
>
> …
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> … or
>
> (d) it is otherwise an abuse of the process of the court.

[42] A pleading is frivolous if it is unsustainable by virtue of the doctrine of estoppel or is otherwise an abuse of process: *Moulton Contracting Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia,* 2010 BCSC 506 at para. 41 [*Moulton*], partly rev'd on other grounds, 2011 BCCA 312.

[43] I will address issue estoppel and abuse of process of the court in turn.

b) Issue Estoppel

[44] Issue estoppel is a branch of *res judicata* that prevents a party from re-litigating an issue that was decided in a prior judicial proceeding between the same parties or their privies.

[45] In *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 [*Danyluk*], the Supreme Court of Canada reviewed the law with respect to issue estoppel. At paras. 24 and 25, Mr. Justice Binnie, for the Court, stated that:

> [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 added.]

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, 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, supra*, 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.

[25] The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[46] At para. 54, Binnie J. elaborated:

[54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. In this case, for example, the existence of an employment contract is a material fact common to both the ESA proceeding and to the appellant's wrongful dismissal claim in court. Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. <u>The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.</u>

[Emphasis added.]

[47] In *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 [*Malik*], Binnie J., again writing for the Court, commented at para. 7:

> [7] In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).

[48] However, at para. 35 in *Malik*, Binnie J. found that issue estoppel did not arise in that case. Notwithstanding that finding, he commented at para. 37 that:

> [37] The admissibility of prior civil or criminal judgments in subsequent civil proceedings, and the effect to be given to them, must be seen in the broader context of the need to promote efficiency in litigation and reduce its overall costs to the parties. The doctrines of *res judicata*, issue estoppel and abuse of process are all part of this larger judicial policy but they do not exhaust its potential.

[49] I conclude that so long as the preconditions stated in *Danyluk* are met, issue estoppel can apply to findings of fact in prior litigation.

[50] The AGC contends that leaving aside the question of whether issue estoppel has any application in the challenge to the constitutionality of legislation, the plaintiffs have not met any of the three *Danyluk* preconditions.

[51] Despite the AGC's contention that the second precondition of the *Danyluk* test, i.e. finality of the judicial decision, is not met, I have no difficulty accepting that it is met by the decision of the Supreme Court of Canada in *Carter #1*, insofar as the issues that were decided in the case are concerned.

[52] Turning then to the third precondition of the *Danyluk* test, i.e. that the parties or their privies are the same, the AGC and the BCCLA were both parties to the *Carter* proceedings. The plaintiffs contend that Julia Lamb could properly be regarded as a privy to the *Carter* plaintiffs. In *Carter*, the BCCLA was granted public

interest standing to represent people meeting and potentially meeting the *Carter* claimant group criteria.

[53] While some of the parties in *Carter* are not parties to these proceedings, and some of the parties in these proceedings were not parties in *Carter,* the burden of that litigation was, and presumably the burden of these proceedings will be carried by the institutional plaintiff, the BCCLA.

[54] As I will discuss below, the doctrine of abuse of process will accommodate a failure to meet one of the preconditions for issue estoppel including privity, where otherwise the integrity of the administration of justice or other important principles would be violated. While I have some reservations as to whether or not the second of the *Danyluk* preconditions has been met, I would be loathe to dismiss the present application on that basis.

[55] I am not, however, persuaded that the plaintiffs have met the first precondition discussed in *Danyluk*, i.e. that the same question has been decided.

[56] The principle of issue estoppel is not always intended to allow the parties to litigation to rely on findings of fact made in truly different litigation. The AGC relies upon the decision of the British Columbia Court of Appeal in *Hamilton v. Laurentian Pacific Insurance Co.*, [1989] B.C.J. No. 869, wherein Mr. Justice Lambert wrote that:

> [16] … the issue of whether there was a forcible ejection of Mr. Hamilton from the beer parlor was not an issue that had to be decided in the assault proceedings, and for that reason cannot, in any event, be considered to have been conclusively decided, for the purposes of the proceedings against the insurer, on the basis of either the principle of *res judicata* or the principle of issue estoppel.

[57] In that case, the Court of Appeal addressed whether a finding of fact from the first trial, a civil action for assault, was binding in a second trial on the applicability of an exclusion clause in the defendants' insurance policy. The Court of Appeal rejected the application of issue estoppel, holding that the finding in the first trial, that

the plaintiff was forcibly ejected from a bar, was not in issue in the first trial, was arrived at by the trial judge in the first trial through only an inference, without direct evidence, but was the central issue in the second trial. As a result, the Court of Appeal held that issue estoppel did not apply.

[58] Similarly, in *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.,* [1980] B.C.J. No. 2 [*Lehndorff*], the British Columbia Court of Appeal declined to apply issue estoppel. There, findings from a first trial, a foreclosure action based on a mortgage security interest, were argued to bind the parties in a second trial, an action to determine the debtor's possessory rights in the same property, stemming from an entirely separate leasehold. The Court of Appeal rejected issue estoppel, holding that the issue of whether the lease gave the debtor possessory rights was not actually raised in the first trial, concluding at para. 18 that:

> [18] . . . Lehndorff, in its foreclosure action, did not plead the penthouse lease and did not specifically seek to foreclose the penthouse lease nor specifically to obtain possession of the penthouses.

[59] As a result, the Court of Appeal held that there was a triable issue to be heard in the second trial, and therefore issue estoppel did not apply.

[60] With respect to the factual issues in dispute in *Carter*, extensive evidence was adduced before the trial judge.

[61] The AGC argues that the present case and *Carter* involve different questions about different legislative schemes and argues that the fact that a previous case dealt with a similar subject matter between some of the same parties is insufficient to meet the first precondition for issue estoppel.

[62] The AGC contends that the expert evidence in *Carter* was tendered prior to the start of the modified summary trial in November 2011, and that, in the result, the experts' considerations, for example, of the regulatory regimes for physician-assisted suicide in foreign jurisdictions, were limited to studies and reports available

at that time. The AGC contends that evidence ought to be adduced that is properly responsive to the particular *Charter* issues raised in the present proceedings.

[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.

[64] The Government of Canada has chosen new wording in response to the decisions of the Supreme Court of Canada in *Carter*, and it is that wording that is challenged by the plaintiffs in these proceedings.

[65] The AGC argues that the expert evidence in the present case will not address whether or not medical assistance in dying should be permitted at all but will, instead, address particular features of the new legislation. The AGC contends that because the *Carter* trial began in November 2011, the evidence filed in that case, especially with respect to medical assistance in dying in other jurisdictions, is no longer current. The AGC argues that the laws in other jurisdictions have continued to evolve since 2011 and that it will be important for the Court to hear from experts on how the criteria chosen by Canada compares to the criteria in other jurisdictions, and that in order to assess the efficacy of certain safeguards, it is important for this Court to have expert evidence on the impact of eligibility criteria on individuals seeking assistance in dying and on society in general.

[66] The AGC contends that the issues in *Carter* and the present case are not the same, arguing that in *Carter*, Ms. Taylor sought to strike down the absolute prohibition on physician-assisted dying, while Ms. Lamb and Ms. Moro arguably seek to expand the eligibility criteria for medical assistance in dying.

[67] The plaintiffs point to the written submissions filed by the AGC in *Carter* dated November 14, 2011, and contend that the AGC recognized that the case was not

restricted to the terminally ill and argued that allowing physician assisted dying was inconsistent with the governmental objective of reducing suicide, and the need to protect especially vulnerable populations “such as aboriginal communities and the elderly” from the risk of suicide with respect to s. 7, and subsequently s. 1 of the *Charter*.

[68] The plaintiffs assert that the AGC has not identified any significant new evidence she will proffer on any issues that will differ from the record before the trial judge in *Carter*, but as the proceedings are at a relatively early stage, and Rule 3 - 1(2) of the *Rules* does not require a party to set out the evidentiary foundation for its pleadings, I do not consider that this assertion is a dispositive aspect of the applications before me.

[69] In *Carter*, the trial judge decided that an absolute prohibition on medical assistance in dying was unconstitutional, and her decision was approved of by the Supreme Court of Canada. But both the trial judge and the Supreme Court of Canada noted in their respective decisions that it was up to Parliament to craft an appropriate legislative response to the declarations of unconstitutionality. Parliament did so and the constitutional challenge in the present proceedings is with respect to the terms of the new legislation.

[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.

[71] In any case, even if all three of the *Danyluk* preconditions are met, the Court retains discretion not to apply issue estoppel if, when taking into account the entirety

of the circumstances, its application would promote the orderly administration of justice at the cost of injustice: see *Danyluk*, at paras. 62-67.

[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: see *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361, and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 28.

[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 on to another (para. 683); and

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.

[75] I find that the principles discussed by the Alberta Court of Appeal in *Allen* apply with equal force to these proceedings, and I conclude that although the plaintiffs in this case are undoubtedly seeking to preserve resources and time, the prior decisions are at best binding on points of law, not questions of fact. Constitutional judgments are highly dependent on contextually-specific factual findings and therefore the factual findings of the *Carter* litigation cannot simply be transposed on to this contextually-distinct case.

[76] I am persuaded by the AGC that in light of the different set of questions to be answered in these proceedings, the plaintiffs' argument that this 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. I conclude that to strike the impugned paragraphs of the AGC's response to civil claim at this early stage in the proceedings would be highly prejudicial because it would preclude the AGC from mounting a full defense of the new regime.

[77] That 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.

[78] I therefore reject the submission that the principle of issue estoppel warrants the relief sought by the plaintiffs on this application.

c) Abuse of Process

[79] 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. The doctrine is intended to preserve the integrity of the court's process and is concerned with fairness and the proper administration of justice.

[80] The concerns of abuse of process are "the integrity and the coherence of the administration of justice" and "of judicial decision making": *Toronto (City) v. C.U.P.E., Local 7*9, 2003 SCC 63 at paras. 29, 43 [*Toronto*].

[81] This doctrine is flexible. It precludes re-litigation where one or more of the requirements of issue estoppel typically, privity, are not met, but where allowing the litigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Henry v. H.M.T.Q.,* 2015 BCSC 1798 at para. 18, and *Toronto,* at paras. 139–42.

[82] The plaintiffs argue that the decision of the Supreme Court of Canada in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, made it clear at para. 154 that social and legislative findings are no more open to question than any other findings of fact. But as the AGC points out, the Court's comments in *Bedford* on the level of deference to be given social and legislative facts were made within the context of an appellate court's consideration of a trial judge's finding, and not in the context of a trial judge's first instance consideration of a case.

[83] The plaintiffs further contend that these proceedings are not a challenge to a "new regime", and purport that they are limited to challenging the present provisions on the basis that they do not comply with the constitutional minimums articulated in *Carter.* While I accept that the present challenge is, in fact, limited to challenging the narrower prohibition in the present provisions, the potential application of s. 7 and s. 1 of the *Charter* to the new legislative scheme and objectives may not be so limited.

[84] In *Lehndorff*, the British Columbia Court of Appeal declined to strike pleadings even though the parties and some of the general issues in the cases were the same because the new proceedings "raise[d] triable issues not adjudicated upon by the [previous] judge". Mr. Justice Carrothers explained at paras. 14–16 that:

> [14] If the maxim *res judicata* applies in the circumstances of this case, that is, the judicial decision and order in the foreclosure proceedings deal with the very causes and issues in the present action and, except on appeal, cannot be contradicted, the order ought to go striking out the endorsement on the writ of summons and the statement of claim and dismissing the present action either on the ground that the present action "is unnecessary, scandalous, frivolous or vexatious" (Supreme Court Rule 19 (24(b)) or on the ground that the present action "is otherwise an abuse of process of the Court" (Supreme Court Rule 19 (24) (d)), or on both grounds. The rule is designed for the preliminary elimination of claims unsupportable in law: *British*

Columbia Power Corporation Limited v. Attorney-General of British Columbia et al. (1962) 38 W.W.R. 657 at 675. However, a review of the authorities is necessary to ascertain the applicability in this case of the principle or defence of res judicata.

[15] This problem is not new. In 1843, Vice-Chancellor Wigram had this to say about it, as settled law at that distant time, in *Henderson v. Henderson* (1843) 3 Hare 100 at 114-5; 67 E.R. 313:

> I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (*except under special circumstances*) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, *except in special cases*, not only to points upon which the court was actually required by the Parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. (The italics are mine.)

[16] This passage has been much quoted with approval and followed in the Courts of England and Canada. These subsequent decisions appear to explain the "special circumstances" or "special cases" which render the principle of *res judicata* inoperative as those where the question of law or fact, which is the subject of the later litigation, is not identical with, or inextricably involved with, the question of law or fact previously decided. The maxim res judicata does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd*. (1959) 15 D.L.R. (2d) 638), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972) 27 D.L.R. (3d) 249 B.C.C.A.). It also applies not only to points on which the Court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar* (1929) 2 W.W.R. 518 B.C.C.A.). The principle of *res judicata* would also apply if the issue in the present action was one of the several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it (*Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* (1965) 2 All E.R. 4).

[85] Carrothers J.A. noted that while the principle of *res judicata* should not be used at the early stage in the action to strike the pleadings, the trial judge retained the discretion to apply the principle after the trial of the issues in his final analysis.

[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.

[87] The plaintiffs contend that the enactment of replacement legislation does not "reinvent the wheel" of litigation, relying upon *J.T.I. Macdonald Corp. v*. *Canada (Attorney General)* (2002), 102 C.R.R. (2d) 189 at paras. 83, 102–107 [*J.T.I. Macdonald*], and *British Columbia Teachers' Federation v. British Columbia,* 2014 BCSC 121 [*British Columbia Teachers' Federation*] to support their argument that this proceeding deals with what they describe as "replacement legislation".

[88] I am not persuaded that these authorities assist the plaintiffs on the issue before me.

[89] In *J.T.I. Macdonald*, Mr. Justice Denis of the Superior Court of Justice of Quebec was considering the constitutional validity of successor legislation to the *Tobacco Products Control Act,* S.C. 1988, c. 20 that had been declared unconstitutional by the Supreme Court of Canada.

[90] At para. 83, Denis J.C.S. observed in part that:

> [83] The Court should draw its conclusions in fact and in law from the *RJR-MacDonald Inc*. case. Allowing for any necessary adjustments, those conclusions are as applicable now as they were in 1989, when the *Tobacco Products Control A*ct was enacted. To do otherwise would be merely to reinvent the wheel.

[91] At paras. 102–105, Denis J.C.S. continued:

> [102] Although many references were made to the first case, which ended in the *Tobacco Products Control Act* being declared invalid, we must bear in mind that the *T.P.C.A*. was enacted in 1989 and that the case was heard before this court in 1991.
>
> [103] The Act in question in the case at hand was given Royal Assent in 1997, and its Regulations were passed in 2000 and 2001.
>
> [104] Much has changed since the first case.
>
> [105] The Court is bound by the conclusions of law and some of the conclusions of fact drawn by the Supreme Court in the first case unless different evidence is introduced.
>
> [106] This being said, this is a completely new trial, and the Court must draw its conclusions from the evidence presented to it, weighing the relevance of that evidence and the credibility of the witnesses heard.
>
> [Emphasis added.]

[92] In *British Columbia Teachers' Federation*, unlike the present situation, the government re-enacted virtually identical legislation in response to declarations of unconstitutionality.

[93] The dispute in *British Columbia Teachers' Federation* is captured by the headnote which explains:

> Action and application by the British Columbia Teachers' Federation for constitutional remedies against the Province of British Columbia based on continuing violations of s. 2(d) *Charter* rights. A prior proceeding challenged the constitutionality of provincial legislation, the *Education Improvement Act*, which deleted collective agreement terms and prohibited collective bargaining on issues related to class size, class composition, and supports for special needs students. The court issued a declaration that the legislation interfered with teachers' collective bargaining rights and breached s. 2(d) of the *Charter*. An order striking down the legislation was suspended for 12 months to grant the Province time to address the decision. The decision was not appealed. Upon expiration of the suspension period, the Province enacted virtually identical legislation. The Province submitted that the new legislation followed consultations with the Federation undertaken in good faith, and contained a material difference from the prior legislation by limiting the prohibition on collective bargaining about working conditions. The Federation challenged the new legislation and additional measures taken by the Province, including its net zero mandate for collective agreements, the appointment of a mediator with narrow terms of reference for bargaining, and the enactment of various regulations. The Federation sought orders striking down the impugned legislation and regulations, and damages pursuant to s. 24(1) of the *Charter*.

[94] Madam Justice Griffin dealt with replacement legislation and at para. 14 commented that “to the extent Bill 22 simply duplicates the unconstitutional legislation, it too substantially interferes with s. 2(d) rights unless there are new circumstances”.

[95] Griffin J. pointed out at para. 111 of her reasons that the parties before her were the same parties that had appeared before her in earlier litigation. They agreed that they were bound by the findings in the earlier litigation.

[96] At para. 401, Griffin J. commented that:

> [401] The only change to the re-enacted legislation which the government relies on as "saving" the previously found invalid provisions from being unconstitutional (combined with its pre-legislation "consultation" process), is the government's change to the length of time for which the legislative ban on collective bargaining would be in force.

[97] At para. 644, Griffin J. cautioned:

> [644] The government urged the Court to limit the scope of the evidence that may be called in the Bill 28 Remedies Application. I did not consider this appropriate, given the wide ambit of the arguments being advanced by both sides. A premature ruling limiting the scope of evidence and arguments could dictate the substantive result.
>
> [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.

d) The Inherent Jurisdiction of the Court

[99] It is clear that courts have an inherent jurisdiction and residual discretion to prevent misuse of the court's procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute: *Behn v. Moulton Contracting Ltd.,* 2013 SCC 26 at para. 39*,* and *Toronto,* at para. 35.

[100] As noted in *Toronto,* at para. 53, the exercise of discretion is guided by the same factors for both issue estoppel and abuse of process:

> [53] 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).

[101] As I have explained above, the plaintiffs have not satisfied me that the principles of either issue estoppel or abuse of process have been made out, and I am not prepared to grant the relief they seek by exercising my inherent jurisdiction to strike the AGC's pleadings or to permit the use of the factual findings in *Carter* as they propose. To do so would, in my view, would improperly limit the role of the trial judge and would be contrary to the important role of the trial judge in making findings on legislative and social facts on this constitutional challenge.

e) Collateral Attack

[102] In *Wilson* v. *The Queen,* [1983] 2 S.C.R. 594 at 599–600 [*Wilson*], Mr. Justice McIntyre described a collateral attack as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. He commented that:

> … Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[103] In its recent decision in *Krist v. British Columbia*, 2017 BCCA 78, the Court of Appeal held at para. 47 that "[t]o 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." The court stated that it 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.

[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."

[106] In my opinion, the AGC 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.

Conclusion

[107] I agree with the submission of the AGC 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. It also seeks to ignore the fact that Parliament's decision to enact the new law was informed by an extensive Parliamentary record. The constitutionality of the new legislation must be assessed 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.

[108] I therefore dismiss the plaintiffs' application.

"The Honourable Chief Justice C.E. Hinkson"