COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lamb v. Canada (Attorney General),*
2018 BCCA 266

Date: 20180628
Docket: CA44889

Between:

Julia Lamb and British Columbia Civil Liberties Association

Appellants
(Plaintiffs)

And

Attorney General of Canada

Respondent
(Defendant)

And

Canadian Association for Community Living
and Council of Canadians with Disabilities

Intervenors

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated October 11, 2017 (*Lamb v. Canada (Attorney General)*, 2017 BCSC 1802, Vancouver Registry S165851).

Counsel for the Appellants:	S. Tucker, Q.C. & A. Latimer
Counsel for the Respondent:	J. Brongers & B.J. Wray
Counsel for the Intervenors:	R. Anand
Place and Date of Hearing:	Vancouver, British Columbia May 29, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2018

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Mr. Justice Fitch

Concurring Reasons by:
The Honourable Mr. Justice Hunter (Page 33, para. 102)

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Summary:

This is an appeal from the dismissal of the appellants' application to strike portions of the respondent's amended response to civil claim. The application was founded primarily on the grounds that the defence puts in issue factual questions the appellants say were finally determined in prior litigation, Carter v. Canada (Attorney General), 2015 SCC 5, and Carter v. Canada (Attorney General), 2016 SCC 4, and, to that extent, is an abuse of the process of the Court. The appellants say when the chambers judge dismissed the application on the basis that the case at bar could not be said to be re-litigation of an issue that was or should have been raised in Carter, and when he held that it was not an abuse of process for Canada to fully defend the newly enacted legislation at issue in the case, he did not address the abuse they alleged. They argue the chambers judge should have considered whether the same question of fact arose in both proceedings. Issue estoppel can apply to a "fact distinctly put in issue and directly determined". They argue the chambers judge erred in requiring the legal issue or cause of action to be the same in both proceedings. Held: appeal dismissed. The appellants have not shown that the judge wrongly exercised his discretion, erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to an injustice. The assessment of the constitutionality of the impugned legislation should proceed on evidence that is specific to the objectives and effects of the legislation and that is properly tested through the normal process. It cannot be said that the chambers judge failed to grant an order that would clearly be more conducive to the efficient determination of the case on the merits. The chambers judge is better able than this Court to determine what record will be necessary to make the adjudication called for in this case and to determine what steps are most likely to lead to the speedy, just, and efficient determination of the issues on the merits.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from the dismissal of the appellants' application for an order striking portions of the response to civil claim and an order precluding the Attorney General of Canada ("Canada") from challenging certain factual assertions made in the pleadings. Reasons for judgment below are indexed as 2017 BCSC 1802.

[2] In the underlying litigation, the appellants challenge the constitutional validity of the definition of a "grievous and irremediable medical condition", one of the prerequisites to the legal provision of medical assistance in dying, set out in s. 241.2(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended by *An Act to*

amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), S.C. 2016, c. 3 [*Bill C-14*]:

> (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.

[3] That amendment, of course, followed the decision of the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter #1*], which struck down the *Criminal Code's* absolute prohibition on physician-assisted dying as a violation of s. 7 of the *Charter.* After *Carter #1*, Parliament engaged in an extensive consideration of the decision, helpfully summarized by Perell J. at paras. 38-51 of the judgment in *A.B. v. Canada (Attorney General)*, 2017 ONSC 3759. *Bill C-14* and s. 241.2 were the result of this process.

The Initiating Application

[4] In their notice of civil claim, filed June 27, 2016, and amended on June 21, 2017, the appellants, at paras. 71-77, describe the procedural history of *Carter #1*. At paras. 78-93, the appellants describe the facts as found by the judge in the trial decision that was upheld in *Carter #1*, indexed as 2012 BCSC 886. The appellants expressly rely upon those findings in support of the claim advanced in the case at bar. They characterize this litigation as a continuation of the same "constitutional dialogue" started by the decision in *Carter #1*.

[5] In Part 1, Division 2 of the amended response to civil claim at paras. 8-13, Canada says the findings in *Carter #1* are specific to the context in which they were made: a challenge to the absolute prohibition on physician-assisted dying. Canada

does not admit the findings remain true today or that they are applicable in this litigation. It says the decision in *Carter #1* was expressly stated to be restricted to the factual circumstances of that case.

[6] By notice of application filed May 23, 2017, the appellants sought an order striking paras. 8-13 of the response and precluding the re-litigation in this action of matters said to have been determined in the *Carter* decisions, including factual and legal conclusions with respect to such questions as:

a) the availability and the efficacy of palliative care;

b) the legality and ethical propriety of presently available end-of-life practices;

c) the level of success achieved by permissive jurisdictions and the safeguards to protect vulnerable persons in those jurisdictions;

d) the impact legalization of physician-assisted dying will have on palliative care and the physician/patient relationship;

e) the potential impact of physician-assisted dying on the lifespan of those who would seek that service;

f) the ability of physicians to reliably assess patients for competence, informed consent, and ambivalence in medical decision-making;

g) the symbolic impact of laws prohibiting physician-assisted dying, including on issues surrounding anti-suicide messaging and the autonomy of persons with disabilities; and

h) the impact of the prohibition of physician-assisted dying on the autonomy, dignity, and personal integrity of patients.

[7] The appellants, in Part 2 of their notice of application, at paras. 21-27, argued that *Carter #1* had authoritatively resolved certain questions:

> The trial judge canvassed the evidence and made extensive, detailed findings of fact and set out her legal reasoning at length, including (a) as to negative messaging resulting from permitting assisted dying …; and (b) as to the feasibility of assessing the eligibility of disabled persons – including

> [Canada's] assertion that disabled people should not be permitted access to assisted dying because of their particular vulnerability …
>
> …
>
> The [Supreme Court of Canada] unanimously upheld the trial judge's finding that the [impugned provisions of the *Criminal Code*] constituted an unjustified breach of s. 7 of the *Charter* to the extent they prohibited assistance for persons meeting the *Carter* criteria. …
>
> …
>
> The [Supreme Court of Canada] noted the trial judge's factual findings at length, and dismissed all of [Canada's] challenges to those findings, including of societal and legislative fact …

[8] In support of their submission that Canada is bound by certain of the findings in *Carter #1*, the appellants relied upon the doctrine of issue estoppel. They also argued that re-litigation of these issues would amount to an abuse of process and constitute a collateral attack on prior court judgments.

[9] In response, Canada argued that *Carter #1* was a challenge to the absolute prohibition on physician-assisted suicide and the judgment in that case was intended to respond to particular factual circumstances. It asserted: there is a high threshold for striking pleadings; the impugned legislation is a result of extensive parliamentary debate and review; the appellants' argument is inconsistent with jurisprudence on the binding scope of precedents; issue estoppel does not apply; there is no abuse of process or collateral attack; and this litigation is a challenge to new legislation which has not previously been challenged.

The Judgment Below

[10] Chief Justice Hinkson required the appellants to meet a high threshold for striking pleadings pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*: the well-established test that it is "plain and obvious" the claim is unsustainable, either by virtue of the doctrines of estoppel or abuse of process.

[11] He held that issue estoppel might arise from findings of fact in prior litigation, but the appellants were required to meet the preconditions described by Dickson J. (as he then was) in *Angle v. M.N.R.* (1974), [1975] 2 S.C.R. 248 at 254, and adopted

by Binnie J., writing for the Court, in *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44 at para. 25, by showing:

> (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.

[12] Although he would have found that the second and third prerequisites had been met, the first had not:

> [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.

[13] He accepted the argument advanced by Canada that *Carter #1* had addressed a specific question:

> [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 [Canada]. 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.

[14] Further, while he acknowledged that some of the findings in the *Carter* decisions may in fact meet the test for issue estoppel, he held:

> [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.

[15] While the prospect of shortening the proceedings was said to have some "allure", the chambers judge was of the view that he should not prevent the defendant from creating the full factual matrix that is important in constitutional challenges (referring to *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361, and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 28). He noted, at para. 75: "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".

[16] While the pleadings raised factual questions that had been considered in *Carter #1,* some (but not all) of those factual questions could be said to be collateral to the prior decisions and some might be said to be out of date. Binding Canada to these factual findings would prejudice its ability to fully defend the constitutionality of the new legislation.

[17] In relation to the submission that the defence amounted to an abuse of process, he held:

> [98] In my view, the plaintiffs have failed to demonstrate that it is an abuse of process for [Canada] 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.

[18] Similarly, he dismissed the submission that the defence amounted to a collateral attack upon decisions that followed, and considered the scope of, *Carter #1*:

> [106] In my opinion, the [Attorney General] 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.

Issues on Appeal

[19] On appeal, the appellants contend that the chambers judge erred in the following ways:

a) in his application of the doctrine of abuse of process with regard to the *Carter* decisions themselves;

b) in his application of the doctrine of issue estoppel, including exercising his residual discretion not to apply it;

c) by failing to consider relevant considerations;

d) by improperly relying on the principles of *stare decisis*; and

e) in his application of the abuse of process doctrine with regard to subsequent judgments which considered the scope of *Carter #1*, which the appellants liken to a collateral attack.

The Appellants' Position

Abuse of process

[20] The appellants say the chambers judge erred by misconceiving their argument that the position taken by Canada amounts to an abuse of process. They say they have not asserted that the case at bar amounts to re-litigation of *Carter #1*. They do not seek to preclude the Attorney General from arguing in support of *Bill C-14*. They assert only that Canada should, in these proceedings, "be bound by specific factual findings fully litigated and determined in *Carter*".

[21] For that reason, they say that when the chambers judge dismissed the application on the basis that the case at bar could not be said to be re-litigation of an issue that was or should have been raised in *Carter #1*, and when he held that it was

not an abuse of process for Canada to fully defend the newly enacted legislation, he did not address the abuse they alleged.

Issue estoppel

[22] Similarly, insofar as issue estoppel is concerned, the appellants say the chambers judge erred in the application of the doctrine by misconceiving their argument. In considering the first prerequisite described in *Danyluk,* the chambers judge should have considered whether the same question of *fact* arose in both proceedings. Issue estoppel can apply to a "fact distinctly put in issue and directly determined". They argue the chambers judge erred in requiring the legal issue or cause of action to be the same in both proceedings. They argue (at para. 65 of their factum):

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

[23] Further, the appellants say the chambers judge erred in the exercise of his residual discretion. They argue that the existence of *distinct legal issues* in this appeal is not a determining factor or a proper basis for declining to apply the estoppel doctrine where, as here, the applicants seek to prevent re-litigation of *factual* issues. These factual questions were not collateral but fundamental to the *Carter #1* decision.

[24] They consider the chambers judge's concern with respect to prejudice to be unfounded. If the Attorney General is of the view that findings in *Carter #1* can be undermined with new evidence, an application may be made to admit fresh evidence in the case at bar. They argue (at para. 73 of their factum):

> If evidence meeting the threshold for admission of fresh evidence has come to Canada's attention since [the final conclusion of the *Carter* proceedings], then Canada can apply to admit fresh evidence regarding specific [findings].

Failure to consider relevant factors

[25] The appellants say the chambers judge failed to consider or gave inappropriate weight to the fact that the case at bar is a challenge to replacement legislation, that the legislation fails to accord with the minimum terms of a judicial declaration, and that the position taken by Canada in this case forces repeated public-interest *Charter* litigation and undermines access to justice.

Improper reliance on *stare decisis*

[26] The appellants say the judge erred in treating the discussion of *stare decisis* by Slatter J.A. in *Allen v. Alberta,* 2015 ABCA 277, in some sense as authoritative. In *Allen*, the appellant brought a constitutional challenge to Alberta's restrictions on private health care insurance. He did not adduce any evidence of the law's infringement of his rights but sought to rely on the factual findings from *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, and *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, to prove his claim. In upholding the dismissal of the appellant's action, the Alberta Court of Appeal maintained that *stare decisis* dictated that the prior Supreme Court of Canada decisions were only binding on points of law, not factual issues.

[27] The appellants in this case argue that *Allen* dealt with the doctrine of *stare decisis* as between complete strangers in different jurisdictions. This case, on the other hand, involves not only the same parties or their privies and the same jurisdiction, but also replacement legislation consequent to the earlier proceedings. For these reasons, they allege that the chambers judge was wrong to rely on the principles that were determinative in *Allen*.

Collateral attack

[28] Finally, the appellants say that the chambers judge erred in misconceiving the nature of the collateral attack they allege. Their argument begins with the declaration of invalidity at paras. 126-127 of *Carter #1,* which reads as follows:

> [126] We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241(*b*) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in

> accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter*. ... To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982*. ... It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.
>
> [127] The appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. ... "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. ... 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.

[29] The Supreme Court suspended this declaration, initially for 12 months, though the suspension was later extended in *Carter v. Canada (Attorney General)*, 2016 SCC 4 [*Carter #2*]. In granting the extension in the latter judgment, the Court provided exemptions from the suspension in para. 6:

> We would ... grant the request for an exemption so that those who wish to seek assistance from a physician in accordance with the criteria set out in para. 127 of our reasons in [*Carter #1*], may apply to the superior court of their jurisdiction for relief during the extended period of suspension. Requiring judicial authorization during that interim period ensures compliance with the rule of law and provides an effective safeguard against potential risks to vulnerable people.

[30] In subsequent cases, superior courts have been required to determine which individuals fall within the scope of the exemption. One such case is *Canada (Attorney General) v. E.F.*, 2016 ABCA 155, in which the first two issues before the court were:

> [11] … (1) does the constitutional exemption granted in [*Carter #2*] apply only to applicants whose medical conditions are terminal?; and (2) are those persons suffering psychiatric conditions and who otherwise comply with the criteria in [*Carter #1*] similarly excluded from the ambit of the constitutional exemption?

[31] Canada's submission in *E.F.* was that, despite the absence of any reference to terminal illness in para. 127 of *Carter #1*, the declaration of invalidity applied only

to those persons who were, in the words the Supreme Court used in para. 126 "people like Ms. Taylor", in Canada's submission, persons at, or very near, the end of life. The Alberta Court of Appeal rejected this interpretation:

> [33] As Canada fairly conceded, the language of the declaration itself is broad and rights based. Nowhere in the descriptive language is the right to physician assisted death expressly limited only to those who are terminally ill or near the end of life. Canada accepts that a dictionary definition of "grievous and irremediable" medical condition could include conditions that are not life-threatening or terminal.
>
> [34] We do not accept the argument that the subsequent sentences in paragraph 127 reflect an intention to further limit the right, or to establish narrower or different criteria that conform to the specific facts of Ms. Taylor's case. Rather, we read those sentences as clarifying that the criteria established in the declaration respond to the circumstances before the court. The court is noting that there may be other circumstances, not before the Court in [*Carter #1*], where a person who does not satisfy the [*Carter #1*] criteria, for example a mature minor, may seek a declaration of invalidity. The court is careful to state that it is not opining on the merits of applications that may be made in the future.

[32] The Court added:

> [40] Any attempt to read in or infer additional limitations to those expressly set out in paragraph 127 must respect the balance of competing values struck by the court – balancing the sanctity of life, broadly speaking, and society's interest in protecting the vulnerable, against the *Charter* rights of an individual to personal autonomy without state intervention, including autonomy over personal decisions regarding one's life and bodily integrity. Given the importance of the interests at stake, it is not permissible to conclude that certain people, whose circumstances meet the criteria set out in the [*Carter #1*] declaration and who are not expressly excluded from it, nevertheless can be inferentially excluded. It is not appropriate, in our view, to revisit these issues, which were considered at length and decided by the Supreme Court in [*Carter #1*], at authorization hearings conducted under it.

[33] That judgment was not appealed.

[34] Similarly, in *I.J. v. Canada (Attorney General)*, 2016 ONSC 3380, an exemption application by an almost 90-year-old man suffering from medical conditions that were described as horrific but not imminently terminal or life-threatening, Perell J. held:

> [19] There is no requirement in *Carter v. Canada (Attorney General)*, 2015 SCC 5, or *Carter v. Canada (Attorney General),* 2016 SCC 4, that a medical condition be terminal or life-threatening.

[35] The appellants say Canada's argument that *Carter #1* had limited scope and only applied to persons in the exact factual circumstances of specific individuals (namely the parties, Taylor and Carter) was squarely rejected in these cases. The appellants say that having chosen not to appeal those decisions, it is not open to Canada to argue in this litigation, that the scope of the declaration made in *Carter #1* is narrower and does not apply to individuals whose deaths are not reasonably foreseeable.

[36] They argue that the impugned paragraphs in Canada's response, that attempt to re-litigate the scope of the *Carter #1* declaration, are an abuse of process "*akin* to a collateral attack" on *E.F.* and *I.J.* (the "exemption decisions").

The Respondent's Position

[37] The respondent says deference to the chambers judge is warranted in this case because the appellants' motion was brought under Rule 9-5(1)(b) and (d). It was primarily concerned with the abuse of process doctrine.

[38] Canada submits the chambers judge correctly found that the jurisprudence on the binding scope of precedent is inconsistent with the proposition that he should be bound by the findings of fact in the *Carter* decisions. It argues *Allen* is correct that *stare decisis* means that precedents are only binding on legal issues, regardless of the parties or the nature of the litigation.

[39] With respect to issue estoppel, Canada says the Court in *Carter #1* was dealing with different legislation and different questions than those that arise in the case at bar; the factual findings in that case were made in a different context. In *Carter #1,* Canada was under no obligation to defend a particular model of medical assistance in dying; the question before the court was the constitutionality of the absolute prohibition. Canada says (at para. 46 of its factum):

> The chambers judge recognized the inherent connection between the 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".

[40] Insofar as the exercise of discretion is concerned, Canada says it was entitled to create a full factual matrix in defence of the new legislation. It submits (at para. 50 of its factum):

> 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. In effect, they ask this court to re-weigh the competing considerations set out by the chambers judge and come to a different conclusion.

[41] Canada says restraint is to be exercised when applying the doctrine of abuse of process to strike pleadings. The appellants' argument that Canada can be bound by *Carter* findings of fact, yet still argue in support of the new legislation and adduce evidence that meets the "fresh evidence" threshold, glosses over the crucial importance of evidence in *Charter* litigation; the new legislation should be examined on as full a factual matrix as reasonably possible.

[42] Canada asserts the chambers judge correctly concluded that its defence does not amount to a collateral attack either on the judgment in *Carter #1* or the exemption decisions. The chambers judge rejected the appellants' characterization of the exemption decisions. He properly concluded the exemption cases "concerned whether or not certain individuals met the exemption criteria for medical assistance in dying during the period of time the declarations of invalidity in *Carter* were suspended, prior to the introduction of the new regime" (at para. 104).

[43] Canada contends the chambers judge properly concluded that it does not seek to overturn previous judicial orders and the doctrine of collateral attack cannot be used to prevent the Attorney General from mounting a full defence to the constitutionality of newly enacted federal legislation.

[44] Last, Canada says the appellants' contention that the chambers judge failed to give consideration to several of their arguments is unfounded.

Analysis

Introduction

[45] The appellants' application was founded upon two related but distinct concepts: first, that the impugned pleadings constitute an abuse of process; second, that Canada is barred by the doctrine of issue estoppel from re-litigating certain questions. Both doctrines (abuse of process and issue estoppel) are founded upon the court's inherent power to prevent misuse of the judicial process. The former is a broad, unencumbered power; the latter is more restricted and requires close consideration of the nature and extent of the prior judicial determination in light of enumerated criteria. The abuse of process alleged by the appellants is re-litigation of an issue. The potential scope of the doctrine of abuse of process is broader than the relatively narrow issue estoppel doctrine.

[46] At the outset, it should be clear that the appellants are required to discharge the burden of establishing that the chambers judge erred in the exercise of a discretion. The standard of review was clearly set out in *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19, which concerned a judge's residual discretion not to apply issue estoppel to strike pleadings:

> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. ... Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.

[47] In *Gonzalez v. Gonzalez,* 2016 BCCA 376, Bennett J.A., for this Court, said:

> [16] The parties agree that an order made under Rule 9-5(1)(d) is a discretionary order and accorded deference. In order to overturn the decision, Mr. Gonzalez must show that the judge wrongly exercised his discretion, erred in principle, ignored or misapplied a relevant factor or was clearly wrong so as to amount to an injustice. *Dhillon v. Pannu*, 2008 BCCA 514 at para. 28 (standard of review for discretionary orders generally); *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at para. 15 (orders concerning whether pleadings involve a claim which is *res judicata* or an abuse of process are discretionary orders).

Abuse of process

[48] The doctrine of abuse of process was comprehensively reviewed, in the administrative law context, in *Toronto (City) v. C.U.P.E., Local 79,* 2003 SCC 63, where the Court noted, at para. 35, that the discretionary power to strike pleadings as abusive stems from the court's inherent jurisdiction to control its process; it should be exercised to avoid proceedings that are "oppressive or vexatious" and that violate fundamental principles of justice. The doctrine is not restricted by the stringent parameters of issue estoppel and is focused on the integrity of the administration of justice, not the interests of any particular parties. In some cases, re-litigation undermines the adjudicative process, and is therefore abusive.

[49] Justice Arbour noted that re-litigation is expensive and gives rise to a risk of inconsistent outcomes. She observed:

> [52] … It is … apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

[50] The doctrine was revisited in *Behn v. Moulton Contracting Ltd*., 2013 SCC 26, where the Supreme Court of Canada dismissed an appeal from an order striking pleadings as an abuse of process. The appellants' claim in that case hinged upon a challenge to the validity of timber harvesting licenses, which they had not challenged when the licenses were issued. As in the case at bar, only certain portions of the pleadings were said to be offensive. Justice LeBel, for the Court, described the scope of the abuse of process doctrine:

> [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [C.A.], at p. 358 …
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith*, *supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process.
>
> [Emphasis added by LeBel J.]

[51] The principles set out in *Toronto (City)* and *Behn* were recently addressed in *Gonzalez*, where this Court dismissed an appeal from a finding that the claim amounted to an abuse of process, as an attempt to re-litigate issues previously determined. The circumstances were described as follows:

> [29] The parties are the same, the factual matrix is the same and the issue of whether [the appellant] had a reasonable expectation of privacy in the computer and its contents are the same. The factual matrix and question of reasonable expectation of privacy have already been determined by [the first trial judge], and not in [the appellant's] favour.

[52] There were no grounds in *Gonzalez* to exercise the discretion to permit the disputed claim to proceed; it was not suggested that re-litigation would yield a more accurate result and there was a risk that inconsistent outcomes would undermine the credibility of the entire judicial process and its aim of finality. The appellant had not shown that re-litigation would "enhance, rather than impeach, the integrity of the judicial system". The Court found that applying the abuse of process doctrine would not cause any injustice and there was, therefore, no basis on which the trial judge should have declined to apply it. In this regard, the Court considered the following factors (at paras. 33-34):

a) Whether the stakes of the two proceedings differed substantially, such that the original proceedings were "too minor to generate a full and robust response", while the stakes of the case at bar were "considerable";

b) Whether there was an "inadequate incentive to defend";

c) Whether the "discovery of new evidence" calls for further consideration; or

d) Whether the prior decision was "tainted" in some way.

Issue estoppel

[53] In the present appeal, I do not find it necessary to address the appellants' argument that the chambers judge erred in his consideration of whether the impugned pleadings met the strict prerequisites for issue estoppel. It is clear that he accepted, at least for some of the factual findings from the *Carter* decisions, that the three-part *Danyluk* test *may* have been met. However, the chambers judge held, at para. 71, that he would exercise his discretion to decline to apply issue estoppel, regardless of whether or not the appellants could satisfy its requirements. In my view, this determination is crucial. If the appellants cannot establish that the chambers judge erred in the exercise of this discretion, their appeal must fail.

[54] Some of what is said about the residual discretion in the leading cases, *Penner*, *Toronto (City)*, and *Danyluk*, has particular application in administrative law cases, where there may be more significant questions with respect to the fairness of the prior administrative tribunal proceeding and whether the statutory scheme was intended to bind parties outside the context of those proceedings. Those issues are not engaged here. However, much of what is said about the exercise of the Court's discretion to apply the doctrine of issue estoppel to strike claims is applicable.

[55] The Court retains a residual discretion to refuse to give effect to an estoppel, even where all of the prerequisite elements described in *Danyluk* are present: *Danyluk* at paras. 33, 62; *Penner* at para. 29. The doctrine "should not be applied mechanically to work an injustice": *Penner* at para. 30, citing *Danyluk* at para. 1; *Toronto (City)* at paras. 52-53. However, "the discretion must not be exercised so as to, in effect, sanction collateral attack": *Penner* at para. 31. The approach that should be taken to the exercise of the residual discretion was addressed by Cromwell and Karakatsanis JJ. at paras. 36-48 of *Penner*. They noted that the list of factors that might be considered, as set out in *Danyluk* at paras. 68-80, is not exhaustive and was not intended to describe a mechanical analysis. Further, they held:

> [39] Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. ... First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. ... Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.
>
> [Emphasis added.]

[56] There is no suggestion of any inadequacy of the procedures or analysis in *Carter #1*; the sole concern in this case, in relation to the discretion, is whether it would be unfair to use the results of that process to preclude the subsequent claim. In *Penner*, Cromwell and Karakatsanis JJ. elaborated on that question as follows:

> [42] The second way in which the operation of issue estoppel may be unfair is not so much concerned with the fairness of the prior proceedings but with the fairness of *using their results* to preclude the subsequent proceedings. ... Fairness, in this second sense, is a much more nuanced enquiry. ... On the one hand, a party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favourable judicial determination. ... Finality is important both to the parties and to the judicial system. ... However, even if the prior proceeding was conducted fairly and properly having regard to its purpose, injustice may arise from using the results to preclude the subsequent proceedings. ... This may occur, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings.
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> [Underlining emphasis added.]

[57] In considering the exercises of the chambers judge's discretion, both in concluding that the response was not an abuse of process and in declining to give effect to issue estoppel, many of the same factors come into play. Justice Arbour made this observation in *Toronto (City)*:

> 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).

[58] Since many of the same considerations rightly informed the judge's analysis of his discretion under both doctrines, I propose to deal with the two conclusions together here. Ultimately, the chambers judge dismissed the appellants' application because he was of the view that invoking either the doctrine of issue estoppel or the doctrine of abuse of process to strike the impugned pleadings would work an injustice.

[59] The appellants assert that the chambers judge wrongly considered the application to be an attempt to bar Canada from fully defending the new legislation, rather than simply an attempt to preclude re-litigation of specific factual findings in *Carter #1*. They say that misconception affected the exercise of his discretion.

[60] It cannot be said the chambers judge was not acutely aware of the fact the appellants sought to preclude Canada from contesting specific facts. That is why he expressly found, at para. 49 of his reasons, that issue estoppel can apply to findings of fact in prior litigation.

[61] However, he did not accept the appellants' description of the limited issues likely to arise in the underlying litigation. He held:

> [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.

[62] The chambers judge clearly placed some weight on the fact that, if the new legislative regime violates s. 7 of the *Charter*, he would be required to engage in the balancing that occurs under s. 1. In my opinion, he was justifiably reticent to simply transpose the facts from the *Carter* decisions, made in a different context, into that analysis.

[63] Nor can it fairly be said that the chambers judge dismissed the application because the findings of fact in the *Carter* decisions, upon which the appellants seek to rely, were collateral. He expressly accepted, at para. 63, that "the findings cited in paras. 49-64 of the notice of civil claim in these proceedings were fundamental to the *Carter* decision".

[64] It is true that the judge placed considerable weight upon the fact the case at bar ultimately challenges the "new regime". However, when he refused to apply the doctrines of issue estoppel or abuse of process to strike Canada's pleadings it was not because a party cannot, in principle, be bound by findings of fact in prior litigation with a different object. Rather, he dismissed the application because the findings of fact were made in a different context. Here, as noted in the passage from *Penner*, cited at para. 55 above, it is important that there is a significant difference between the purposes or stakes involved in the two proceedings. In the chambers judge's view:

> [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.

[65] It was evidently for that reason he concluded:

> [76] I am persuaded by [Canada] 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 [Canada's] response to civil claim at this early stage in the proceedings would be highly prejudicial because it would preclude [Canada] from mounting a full defense of the new regime.
>
> [Emphasis added.]

[66] The chambers judge did not err in considering the differences between the statutory provisions, language, and objectives at issue in the case before him and *Carter #1*. Nor did he err in considering the fact that the present case involves a constitutional challenge to legislation, a situation where the courts have repeatedly stressed the importance of robust factual records. These factors properly inform

whether it is unfair to require Canada, in defending the constitutionality of a newly enacted statute, to be bound by factual determinations made in a previous judgment.

[67] Finally, I would not accede to the argument that because *Carter #2* is a relatively recent decision; that few new facts will have emerged since its pronouncement, and Canada can apply for leave to adduce fresh or new evidence, if any exists; the chambers judge therefore erred in finding that Canada would be prejudiced by an order striking their response and binding Canada to the material factual findings.

[68] In my view, the chambers judge was correct to point out that it is prejudicial to Canada to limit, at the outset, what relevant evidence it may adduce to defend the constitutionality of legislation. For example, Canada may well seek to adduce evidence that, although it existed prior to the *Carter* decisions, is of particular relevance to the constitutionality of the specific enumerated criteria or objectives of the new legislation, and less pertinent to an absolute prohibition on physician-assisted dying. Under the appellants' proposal, if the general point was touched on in the *Carter* decisions, Canada would be precluded from doing so. This result is clearly prejudicial to Canada's ability to establish a full factual matrix in defence of the statute's constitutional validity. It also fails to accord to Parliament the latitude it requires to defend its own legislation. The separate roles and responsibilities of the courts and Parliament in our constitutional system demands that Canada be fully entitled to defend the constitutional validity of the legislation that it has duly enacted, how it sees fit to do so.

[69] It is also prejudicial to Canada's position to force it to surpass additional procedural hurdles – in overcoming a threshold test for the introduction of "fresh" or "new" evidence – to ensure that the record upon which the court will make its determination is as up-to-date as possible.

[70] I would add briefly here that it is unclear precisely what standard the appellants want the trial judge to apply to Canada's applications to admit "fresh" or "new" evidence. They may be referring to the test from *Palmer v. The Queen* (1979),

[1980] 1 S.C.R. 759, that this Court applies to the introduction of fresh evidence on appeal. However, the appellants have not cited any case in which this test has been employed by a court of first instance.

[71] In this respect, I subscribe to the argument made by the intervenor to the effect that an order that the 20 findings of fact described in the appellants' motion are binding on the trial judge, unless leave is granted to adduce new or fresh evidence, may invite a slew of fresh evidence applications and will usurp the trial judge's role in assessing the relevance of all evidence in the context in which it is adduced. Such an order may be practically unworkable and may actually prolong the trial and increase expenses.

[72] The chambers judge weighed the purported efficiencies of the appellants' application against the unfairness that would result and concluded that striking the response would impair, rather than enhance, the integrity of the adjudicative process. He was entitled to reach that result in the exercise of his discretion.

[73] I would make one final point. Nothing I have just said should be taken to preclude the trial judge from eventually determining that Canada's arguments are in fact an abuse of process, or properly barred by issue estoppel, after he has heard the evidence and arguments of the parties. I would simply hold that the chambers judge did not err in declining to strike paragraphs of Canada's pleadings at this early stage of the proceedings. It is still open to the trial judge to determine, at a later stage of the trial, that he cannot give effect to some of Canada's submissions because of the doctrines of abuse of process or issue estoppel: *Lehndorff Management Limited v. L.R.S. Development Enterprises Ltd.* (1980), 109 D.L.R. (3d) 729 at 736.

[74] As the trial of this matter unfolds, the judge hearing the matter will be better able to define the factual issues in respect of which issue estoppel or abuse of process may apply. I would defer to the judge assigned to case manage these proceedings to determine the best and most efficient manner to resolve the pressing and important issues raised by this case.

Failure to consider relevant factors

[75] The appellants further argue that this Court can interfere with the chambers judge's exercises of discretion because he failed to give weight to relevant considerations.

[76] The appellants say the chambers judge gave inadequate weight to the fact the case at bar is part of a constitutional dialogue, as was the litigation arising out of replacement legislation in *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121 [*BCTF*]; *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184; *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49; and *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30; *JTI-MacDonald Corporation v. Canada (Attorney General)*, 2005 QCCA 726; *J.T.I. Macdonald Corporation v. Canada (Attorney General)* (2002), [2003] R.J.Q. 180 (S.C.).

[77] As the chambers judge pointed out, however, while those cases emphasize the importance of not "re-inventing the wheel" in serial *Charter* litigation, in neither case were the parties constrained from adducing new evidence. The chambers judge noted, at para. 91, that in *J.T.I. Macdonald*, Mr. Justice Denis for the Quebec Superior Court had held he was bound by the conclusions of law and some of the conclusions of fact drawn by the Supreme Court in prior litigation "unless different evidence is introduced". Indeed, he did hear from many witnesses, considered extensive documentary evidence consisting of hundreds of thousands of pages, and made many express factual findings based on that record.

[78] And, at para. 97, Hinkson C.J.S.C. noted that in *BCTF*, the trial judge expressed her reluctance to limit the evidence she could receive in the following terms:

> [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 by Hinkson C.J.S.C.]

[79] Further, in that case, the parties had themselves agreed to be bound by factual findings regarding the background context of the prior unconstitutional legislation: see *BCTF* at para. 111.

[80] The appellants also say the chambers judge failed to place weight upon the importance of making Parliament accountable to the courts. They refer us to the Federal Court of Appeal's consideration of the interplay between government response and judicial declarations in *Assiniboine v. Meeches*, 2013 FCA 114 (Chambers), where the Court held:

> 14. … [The] proposition that public bodies and their officials must obey the law is a fundamental aspect of the principle of the rule of law, which is enshrined in the Constitution of Canada by the preamble to the *Canadian Charter of Rights and Freedoms*. ... Thus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it. If the public body or official has doubts concerning a judicial declaration, the rule of law requires that body or official to pursue the matter through the legal system. ... The rule of law can mean no less.

[81] The appellants contend that the chambers judge should have considered the fact that, in holding additional consultations and passing *Bill C-14* with additional restrictions on who can obtain medical assistance in dying, Parliament sought to undermine the findings from *Carter #1* with which it disagreed. They allege that Parliament was not entitled to revisit the merits of the *Carter* decisions and conclude that the courts were wrong. The appellants claim that this is a violation of Parliament's duty under the rule of law and should have been persuasive to the chambers judge.

[82] Last, they say that in weighing the factors relevant to the exercise of his discretion, the chambers judge failed to consider the extent to which the case at bar is public interest litigation: litigation that should be dealt with efficiently, so as to promote access to justice. No authority is cited in support of this proposition. It is common sense, but so, too, is it common sense to say constitutional cases must be decided on a complete and satisfactory evidentiary record.

[83] I would not accede to the argument that the chambers judge failed to appreciate that the case at bar is part of an ongoing "constitutional dialogue" or that

he failed to give appropriate weight to constitutional accountability. To the contrary, in my view, he was acutely aware that the case is a challenge to a "new regime" founded upon the proposition that it does not comply with the constitutional minimums articulated in *Carter #1.* He expressly considered the appellants' desire to preserve resources and time, but rather than concluding that the constitutional dialogue would be facilitated by striking the impugned pleadings, he held that the dialogue in constitutional cases should be founded on a sufficient factual footing:

> [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 [Canada's] pleadings or to permit the use of the factual findings in *Carter* as they propose. To do so would, in my view, … 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.
>
> [Emphasis added.]

[84] The appellants' argument in this regard essentially asks this Court to reweigh the factors considered by the chambers judge in the exercise of his discretion, and give greater weight to particular considerations. That is not something that this Court is entitled to do.

Improper reliance on *stare decisis* principles

[85] The appellants say that the chambers judge erred in regarding the Alberta Court of Appeal's application of the rule of *stare decisis* in *Allen* as "authoritative". They say the decision in *Allen* ought not to have been of assistance to the chambers judge because it "dealt with the doctrine of *stare decisis* as between complete strangers in different jurisdictions".

[86] I see no issue in this case as to the appropriate scope of the rule of *stare decisis*. I am of the view that it is not necessary to describe the scope of the doctrine here.

[87] I would not accede to the argument that the chambers judge felt himself to be bound by the decision of the Alberta Court of Appeal in *Allen*. He did not refer to the case as a binding statement of law but, rather, one that enunciated principles that he

accepted. He referred to *Allen* twice in the reasons for judgment, first at paras. 34-36, where he outlined the general principles from the case, and later, at para. 75, when addressing the issue estoppel argument, where he concluded:

> [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.
>
> [Emphasis added.]

[88] The decision of Slatter J.A. in *Allen* does, at para. 21, in fact enunciate principles the chambers judge applied, among them, that proper procedure in constitutional cases must be:

> (a) fair to the citizens challenging the statute, in the sense that they are given a reasonable opportunity to make the case for unconstitutionality: *Canada (A.G.) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras. 31-2, [2012] 2 SCR 524.
>
> (b) fair to the legislature, in the sense that the government has a reasonable opportunity to defend the statute;
>
> (c) fair to the court, in the sense that the court has a reasonable record on which to exercise this important component of its jurisdiction; and
>
> (d) fair to other governments and interested groups who are affected by, and may want to intervene in, the process.

[89] Justice Slatter also stated:

> [22] The courts have always been reluctant to decide constitutional questions in a factual vacuum: *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 51, [2004] 3 SCR 698; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para. 46, [2002] 2 SCR 146. *Chaoulli* [*v. Quebec (Attorney General)*, 2005 SCC 35], for example, was only decided after a full trial, at which numerous expert witnesses testified. That is as it must be.
>
> [23] The presumption is that constitutional cases will be decided on a full evidentiary record, including, where appropriate, the evidence of expert witnesses: *Canada (A.G.) v Bedford*, 2013 SCC 72 at paras. 53-4, [2013] 3 SCR 1101. The expectation is that the parties will prove the facts on which the constitutional challenge lies, and that resort to judicial notice will be kept on a "short leash", the more so the closer one comes to the ultimate issue: *R. v Spence*, 2005 SCC 71 at paras. 58, 64, [2005] 3 SCR 458. As a general

> rule, evidence from unrelated cases cannot be transported into the record: *R. v Daley*, 2007 SCC 53 at para. 86, [2007] 3 SCR 523.

[90] It was not an error for the chambers judge to subscribe to these principles. The appellants are correct to point out that, in *Allen*, the plaintiff was attempting to rely on a judgment in a constitutional challenge to a different law, in a different jurisdiction, involving completely separate parties. However, it cannot be said that the chambers judge was unaware of these facts. Despite these distinguishing characteristics, the chambers judge viewed the principles from *Allen* as applicable to the issue estoppel question before him. He did not err in doing so.

Collateral attack

[91] In *Garland v. Consumers' Gas Co*., 2004 SCC 25, Iacobucci J., for the Court, described what might constitute a collateral attack on an *order* (as opposed to a *judgment*):

> 71 … The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79* …; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). ... Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). ... In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:
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> > It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. ... It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. ... Consequently, the collateral attack doctrine does not apply.

[92] The appellants' argument that the impugned pleadings set up a collateral attack on the judgments in the exemption decisions is, in effect, a re-casting of the

abuse of process by re-litigation argument in another guise. In my view, the jurisprudence specific to collateral attacks relates to litigation that calls upon the court to pass judgment on the validity of an order that should properly be challenged in another forum. Extending the description of a collateral attack to any action that calls upon the court to revisit an issue litigated elsewhere is inapt and unnecessary as the doctrines of abuse of process and issue estoppel provide a more appropriate remedy. That, in effect, was what Arbour J., writing for the majority, said in *Toronto (City).* After citing the passage from *Wilson*, referred to by Iacobucci J. in *Garland*, and reproduced above, she summarized the jurisprudence as follows:

> 33 … [In] *Wilson*, *supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. ... Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. ... In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". ... Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. ... Binnie J. described the rule against collateral attack in *Danyluk*, *supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" [emphasis added by Arbour J.].
>
> 34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. ... However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. ... It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. ... Prohibited "collateral attacks" are abuses of the court's process. ... However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

[93] The appellants say the impugned paragraphs of Canada's pleadings are "in effect" a collateral attack on the judgments defining the scope of the *Carter #1* order,

relying on the judgment of this Court in *Krist v. British Columbia*, 2017 BCCA 78. In that case, Savage J.A., for the Court, held:

> [47] To determine whether a claim constitutes a collateral attack, the court should inquire into whether the claim, or any part of the claim, is "in effect" an appeal of an order (*Leroux* [*v. Canada Revenue Agency*, 2012 BCCA 63] at para. 19). As I see it, Mr. Krist in both the pleadings and in argument seeks to effectively appeal findings made in the Forfeiture Proceedings.

[94] In my view, neither *Krist* nor *Leroux* extended the collateral attack doctrine beyond its relatively limited scope. The focus remains on whether the impugned pleadings intend to invalidate, or otherwise challenge the legal force of, an existing *order*.

[95] It is clear to me that Canada does not seek to challenge the validity of orders made elsewhere. Its defence is clearly not a collateral attack on the judgments in *E.F.* or *I.J.* It does not seek to invalidate the orders in those cases, which granted exemptions from the suspended declaration of invalidity to the applicants.

[96] Further, any argument that Canada's pleadings are somehow abusive because they seek to challenge the correctness of legal conclusions reached in the exemption decisions must also fail. Whether or not the reasoning from the exemption decisions is found to be relevant and persuasive to the issues in the case at bar will be a decision for the trial judge, after hearing all the evidence and submissions. It is not an abuse of process for Canada to make arguments regarding the appropriate scope of the declaration from *Carter #1* in this case.

[97] Finally, I question whether, in considering the scope of the declaration in para. 127 of *Carter #1*, the exemption decisions directly considered many of the questions that will arise in this case concerning the constitutionality of s. 241.2(2)(a)-(d) of the *Criminal Code*. Certainly, it cannot be an abuse of process for Canada to argue that the judgments in the exemption decisions do not control the result in this case. Ultimately, the appropriate effect of the exemption decisions on the constitutional analysis in this case, and whether they are indeed inconsistent with Canada's response, will be something for the trial judge to decide at the conclusion of the trial.

Conclusion

[98] In my view, the appellants have not shown that the judge wrongly exercised his discretion, erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to an injustice. The chambers judge, in this case the case management judge, encouraged Canada to concede as many of the factual findings made by the trial judge in *Carter* as reasonably possible. He noted that, in keeping with that encouragement, the parties were in the process of exchanging a notice to admit facts by the plaintiffs to which the defendant would reply.

[99] The chambers judge is better able than this Court to determine what record will be necessary to make the difficult adjudication called for in this case. He is in a better position to determine what steps are most likely to lead to the speedy, just, and efficient determination of the issues on the merits. That may include restricting the introduction of evidence that is not relevant to the issues before him in this case. We should defer to the exercise of his discretion in that regard.

[100] As the judge observed, at para. 107, the assessment of the constitutionality of the new legislation should proceed "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". This is the outcome that will result from the dismissal of the appellants' application. It cannot be said that the chambers judge failed to grant an order that would clearly be more conducive to the efficient determination of the case on the merits.

[101] For that reason, I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Fitch"

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[102] I agree with my colleague Justice Willcock that this appeal must be dismissed, and agree with his conclusion that the appellants have not shown that the case management judge wrongly exercised his discretion in dismissing the appellants' application. I write separately to emphasize the limited scope of these proceedings in relation to the underlying litigation.

[103] The trial of this action has not yet begun. The appellants sought an order prescribing in some detail the evidence that they considered had to be admitted at the trial and evidence that they considered could not be contested at the trial. They advanced theories of issue estoppel and abuse of process. Both of these legal principles engage the discretion of the court.

[104] The case management judge declined to exercise his discretion to predetermine the evidence to be called at trial. I view his judgment as proceeding from an appropriate deference to the role of the trial judge in determining evidentiary matters. For example, in explaining why he would not exercise his inherent jurisdiction, the Chief Justice said this:

> [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.
>
> [Emphasis added.]

[105] The Chief Justice returned to this theme in his 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.

[106] In my opinion, this passage is important to understanding the limited scope of this proceeding. The manner in which the appellants brought their application would

have required the case management judge to predetermine evidentiary points that are appropriately left to the trial judge. He quite properly declined to do so. Once the trial begins, evidence will be tendered, objections will be taken, the trial judge will issue rulings and eventually give a judgment. The concerns the appellants have about re-litigation may or may not arise. As my colleague has pointed out, this judgment should not be taken as precluding the trial judge from giving effect to the appellants' arguments after hearing the evidence and arguments of the parties.

[107] Just as evidentiary rulings cannot be appealed to this Court abstracted from an order following a trial (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287), it was appropriate for the Chief Justice to defer these matters to the trial judge, and appropriate for this Court to respect that decision.

[108] Some assistance can be gained from another Court that is grappling with these issues. We were advised by Mr. Anand that the scope of s. 241.2(2) of the *Criminal Code* is also being challenged in a case in the Superior Court of Québec, *Truchon v. Attorney-General of Canada*. In *Truchon*, the challenge is limited to the requirement in s. 241.2(2) that "natural death has become reasonably foreseeable", which is one of the three elements of the new scheme that is at issue in the case at bar.

[109] In a recent judgment in *Truchon*, the question was not whether certain facts should be regarded as predetermined, but rather whether the number of affidavits on a certain point should be limited. Mr. Anand helpfully provided us with an English translation of a judgment indexed at 2018 QCCS 317 in which Justice Christine Baudouin made these comments about the evidence to be admitted at trial:

> [31] … evidence of the legislative and social facts, which is essential and which the Attorneys General wish to submit, will be limited and will have to deal not with all the general objectives of the legislation or the new legislative scheme, but solely with the criterion of death having become reasonably foreseeable, as adopted by Parliament. [trans.]

[110] Justice Baudouin also made this comment concerning the judgment under appeal in this Court:

> [48] … Some might understand the ruling in *Lamb* as an invitation to debate the constitutionality of the federal and Québec legislation in the perspective of an entirely new and "complex legal scheme", ignoring the ruling in *Carter*. The Court is of the view that such an interpretation would be erroneous. [trans.]

[111] I agree that such an interpretation of the judgment under appeal would be erroneous. In my view, the judgment we are affirming simply dismisses what Justice Baudouin described as "the evidentiary shortcuts and limits sought by the plaintiffs in *Lamb*", leaving questions of admissibility of evidence to be addressed by the trial judge.

[112] For these reasons, as well as those of my colleague Justice Willcock, I would dismiss the appeal.

"The Honourable Mr. Justice Hunter"