COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-027224-179
(500-17-082567-143)

DATE : LE 18 SEPTEMBRE 2018

CORAM : LES HONORABLES FRANÇOIS DOYON, J.C.A.
PATRICK HEALY, J.C.A.
JOCELYN F. RANCOURT, J.C.A.

PAUL J. SABA
APPELANT - demandeur
c.

PROCUREURE GÉNÉRALE DU QUÉBEC
PROCUREURE GÉNÉRALE DU CANADA
INTIMÉES - défenderesses
et
DIRECTRICE DES POURSUITES CRIMINELLES ET PÉNALES
MIS EN CAUSE – mis en cause
et
ALLIANCE DES CHRÉTIENS EN DROIT
EUTHANASIA PREVENTION COALITION
MISES EN CAUSE- intervenantes

ARRÊT

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[1] L'appelant se pourvoit contre un jugement rendu le 16 novembre 2017 et rectifié le 29 novembre 2017 par l'honorable Chantale Tremblay de la Cour supérieure, district de Montréal, qui déclare irrecevables les paragraphes de ses avis aux intimées portant sur ses moyens de contestation constitutionnelle des dispositions législatives encadrant l'aide médicale à mourir fondés sur les articles 7 et 15 de la *Charte canadienne des droits et libertés* et sur le partage des compétences, lui ordonne de modifier sa

demande introductive d'instance afin d'y retirer les allégations correspondantes, rejette sa demande de provision pour frais et déclare irrecevable une conclusion injonctive de sa demande introductive d'instance[1].

[2] Pour les motifs du juge Healy, auxquels souscrivent les juges Doyon et Rancourt, **LA COUR :**

[3] **REJETTE** la demande de l'appelant pour autorisation de présenter une preuve nouvelle indispensable telle qu'amendée verbalement à l'audience;

[4] **REJETTE** l'appel;

[5] **AVEC** les frais de justice.

FRANÇOIS DOYON, J.C.A.

PATRICK HEALY, J.C.A.

JOCELYN F. RANCOURT, J.C.A.

Me Anamaria Natalia Manole
Pour l'appelant

Me Mario Normandin
MINISTÈRE DE LA JUSTICE (DGAJLAJ)
Pour Procureure générale du Québec

Me Nadine Dupuis
Me Geneviève Bourbonnais
MINISTÈRE DE LA JUSTICE CANADA
Pour Procureure générale du Canada

Date d'audience : 13 juin 2018

[1] *Saba c. Procureure générales du Québec*, 2017 QCCS 5498.

MOTIFS DU JUGE HEALY, J.C.A.

Introduction

[6] This is an appeal against a judgment of the Superior Court[2] comprising two conclusions. First, it granted in part motions by the respondents[3] to dismiss the appellant's application[4] to declare invalid provincial[5] and federal[6] legislation ("the legislation") concerning medical assistance in dying (MAID). This aspect of the judgment concerned the validity of provincial legislation that was enacted before the Supreme Court gave judgment in *Carter*[7] and the validity of federal legislation that was enacted after *Carter*. The *ratio decidendi* of this part of the decision is that three of the five questions raised in the Application were answered by the judgment of the Supreme Court in *Carter* and thus foreclosed by the authority of that decision. Second, the Superior Court refused an order for interim costs to sustain the appellant's application because the appellant did not meet the jurisprudential criteria for such an order.[8] This appeal concerns both conclusions in the judgment of the Superior Court.

[7] The appellant seeks to challenge the legislation in its entirety. He does not attack specific provisions in the legislation but seeks to attack them generally in so far as they permit MAID. On this basis he seeks a judicial declaration to invalidate MAID. He therefore seeks to have invalidated by a declaratory judgment precisely what the Supreme Court concluded was constitutionally permissible in *Carter*. This is what the Court said:

> [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

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2 2017 QCCS 5498 (Hon. Chantal Tremblay).

3 Attorney General of Quebec (AGQ) and the Attorney General of Canada (AGC).

4 *Demande introductive d'instance ré-ré-amendée en jugement déclaratoire, en demande de nullité et en injonction interlocutoire et permanente du demandeur Paul J. Saba*, (herein « the Application ») 12 September 2017.

5 *Act respecting end-of-life care*, L.R.Q. c. S-32.0001 (L.Q. 2014, c. 2).

6 *An Act to amend the* Criminal Code *and to make related amendments to other Acts (medical assistance in dying)*, S.C. 2016, c. 3.

7 *Carter* v. *Canada (Attorney General)*, 2015 SCC 5.

8 *Demande d'ordonnance de sauvegarde amendée du demandeur Paul J. Saba visant l'obtention d'une provision pour frais*, 7 September 2017.

> respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.[9]

[8] The appellant does not claim that the legislation fails to respond adequately to the conclusions in *Carter*. He argues in effect that *Carter* was wrong in its conclusion that any legislation permitting MAID could be constitutionally consistent with the principles stated by the Court.

[9] The Application does not state succinctly the conclusions sought. At first instance the motion judge distilled the conclusions sought by the appellant into five grounds, of which three are at issue in this appeal:

> Ground 2: Whether the legislation infringes section 7 of the Charter.
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> Ground 4: Whether the legislation infringes section 15 of the Charter.
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> Ground 5: Whether medical assistance in dying is not within the legislative competence of a provincial legislature over health because it is not a health-care service ("*soin de santé*") or treatment.[10]

With reference to these three grounds, the motion judge framed the conclusions of her judgment by dismissing the corresponding paragraphs in the Notices of Constitutional Questions served by the appellant on the respondents pursuant to Article 76 of the *Code of Civil Procedure* (C.C.P.). The paragraphs thus struck were:

> Ground 2: Notice to AGQ and AGC, paragraphs 36-63; Notice to AGQ, paragraphs 76-99;
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> Ground 4: Notice to AGQ and AGC, paragraphs 73-84; Notice to AGQ, paragraphs 100-111;
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> Ground 5: Notice to AGQ, paragraphs 5-18.

These three grounds were dismissed on the ground that they were resolved by the authority of *Carter* and will be examined in turn as a single ground of appeal under the heading "The Authority of *Carter*."

[10] In a corrective judgment delivered on 29 November 2017 the motion judge added to her formal conclusions a statement that the application for interim costs was dismissed. This conclusion repeats an observation to the same effect in paragraph 116 of her reasons for judgment. This ground of appeal will be examined second.

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9 *Supra*, note 6.

10 The other two grounds are these :

> Ground 1: The two statutory schemes are confusing and vague;
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> Ground 3: The two statutes infringe the freedom of conscience of physicians.

As these points are not in issue in this appeal, nothing more will be said of them in these reasons.

[11] The eight questions raised in this appeal are thus reduced to two: the authority of *Carter* and interim costs.

[12] The appellant has also presented a motion to produce fresh evidence, which he describes as "indispensable." The proposed evidence is a letter from the President of the College of Physicians in Quebec to the provincial Minister of Health and Social Services. In it the President claims that as a consequence of inadequate health services in the province, and in particular adequate palliative care, larger numbers of patients in the regions are opting for MAID. Thus the appellant claims that inadequate provision of health services violates patients' rights to life and security of the person, the right to equality and the right of physicians to freedom of conscience.

A preliminary point

[13] Before turning to the authority of *Carter*, I must address a preliminary issue raised by the appellant. He claims that the decision of the Superior Court to dismiss three grounds in the Application was erroneous because the motion judge was precluded by *res judicata* even to consider the respondents' motions to dismiss. The basis for this submission is that previous decisions of the Superior Court and the Court of Appeal *in this case* recognised that the appellant was entitled to contest the legislation that he challenges. The appellant claims in effect that such recognition does not allow the motion judge to consider a motion to dismiss. There is no merit in this claim.

[14] The previous decisions cited by the appellant concerned a refusal by the Superior Court to grant a provisional interlocutory injunction[11] and a subsequent appeal from that decision.[12] No previous decision in this matter concerned a question properly presented before the designated trial judge on the merits of the appellant's application. The appellant was indeed entitled to proceed to trial on the merits of his Application before the Superior Court. This point was explicitly affirmed by this Court :

> It should also be noted that the respondents may continue to challenge on their merits before the Superior Court the constitutional validity of the provisions of the *Act respecting End-of-Life Care* that concern medical aid in dying with respect to the other grounds raised in their amended motion to institute proceedings.[13]

But the respondents were equally justified as parties to the proceedings to present a preliminary motion to dismiss that application under Article 168 C.C.P. on the basis that even if any facts alleged by the appellant were true the Application is unfounded in law. A preliminary exception of this nature is an ordinary step in defining the terms of an application presented for trial.

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11 2015 QCCS 5556.
12 2015 QCCA 2138.
13 2015 QCCA 2138, para. 45.

[15] The authority of *res judicata* applies only when the object of a previous judgment is sought in a subsequent demand that is based on the same cause between the same parties, acting in the same qualities, and the conclusion sought is the same.[14] It is well established that interlocutory decisions do not have the force of *res judicata*. In any event, the previous decisions invoked by the appellant in this appeal concerned an application for an injunction against the Government of Quebec and thus in no way concerned grounds to dismiss the appellant's Application. The conditions of *res judicata* do not exist in these circumstances.

Vertical authority

[16] The principle of vertical authority concerns that aspect of *stare decisis* in which the authoritative decisions of a higher court compel compliance of a lower court to the extent that those decisions answer questions of law presented to the lower court.[15] Unlike the stricter conditions of *res judicata*, vertical authority signifies that the application of principles established by previous authorities will not permit inconsistent principles to prevail in a subsequent case if the question in the subsequent case is substantively the same or similar. If it is, the principle of vertical authority may be advanced in a preliminary motion to dismiss any application or defence, in whole or in part, on the basis that it has no legal foundation and thus no chance of success.[16]

[17] The degree of similarity required for the application of vertical authority was considered in *Canada (Attorney General)* v. *Confédération des syndicats nationaux*, in which the Supreme Court said that "it will be necessary to identify the nature of the [previous] action that was the subject of the Court's judgment […] and determine how it relates to the allegations and the conclusions sought" in the [present] action.[17] To do so, the judge must identify the substance of the previous decision and the present action, not merely formal similarities, to establish the essential nature of the proceedings and thus to dismiss a subsequent action that rehearses a question previously determined.

[18] The rationale for the principle of vertical authority may be identified variously as certainty, predictability, and economy but any expression of the point returns to a central theme of consistency. The Supreme Court reiterated this in *Comeau*:

> [26] Common law courts are bound by authoritative precedent. This principle — *stare decisis* — is fundamental for guaranteeing certainty in the law. Subject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it. This is called vertical *stare decisis*. Without this foundation,

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14 Article 2848 C.C.Q.

15 *R.* v. *Comeau* 2018 SCC 15, paragraph 26. By contrast, horizontal authority concerns the binding effects of previous decisions by a court in the resolution of questions subsequently presented to the same court.

16 Article 168 C.C.P.

17 2014 SCC 49, paragraph 28.

> the law would be ever in flux — subject to shifting judicial whims or the introduction of new esoteric evidence by litigants dissatisfied by the status quo.[18]

The same points were addressed in *Canada (Attorney General)* v. *Confédération des syndicats nationaux*, with specific reference to proceedings in Quebec on a motion to dismiss under article 165(4) of the former *Code of Civil Procedure*, now article 168(2) C.C.P. :

> [24] Of course, the doctrine of *stare decisis* is no longer completely inflexible. As the Court noted in *Bedford*, the precedential value of a judgment may be questioned "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para. 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (*Bedford*, at para. 46).
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> [25] Although relatively uncommon in Quebec civil procedure, the mechanism for dismissing actions at a preliminary stage on the basis of *stare decisis* is similar to the *res judicata* exception (art. 165(1) C.C.P.). Under both of them, the legal issues raised by the applicant must already have been clearly resolved by the courts. However, unlike *res judicata*, *stare decisis* does not necessarily require that the dispute be between the same parties. What must be established is that the issue is the same and that the questions it raises have already been answered by a higher court whose judgment has the authority of *res judicata*.
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> […]
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> [27] This being said, before granting a motion to dismiss an action because it has no basis in law, the judge must also be satisfied in light of the record and the alleged facts that the precedent relied on by the applicant actually concerns *the entire dispute* that it should normally resolve, and that it provides a *complete, certain and final* solution to the dispute. In case of doubt, the judge may not grant the motion to dismiss, but must instead give the parties an opportunity to argue the issues on the merits.[19]

[19] The principle of vertical authority is a restraint that seeks to promote consistency and it also imposes a measure of judicial discipline to the extent that it prevents the contradiction of binding authority. But it is not, as noted in the passages previously quoted, an imperative that operates without exception so as to exclude the evolution of the law under changing circumstances. The doctrine of *stare decisis* allows binding authority to be modified or even reversed under compelling conditions.

[20] The margin of flexibility was affirmed in *Comeau*:

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[18] *Supra*, note 14.
[19] *Supra*, note 16, paragraphs 24-27.

> [29] In *Bedford*, this Court held that a legal precedent "may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate": para. 42. The trial judge, relying on the evidence-based exception identified in that excerpt from *Bedford*, held that the historical and opinion evidence he accepted "fundamentally shifts the parameters of the debate" over the correct interpretation of s. 121, referring to this Court's treatment of the question in *Gold Seal*.
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> [30] The new evidence exception to vertical *stare decisis* is narrow: *Bedford*, at para. 44; *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331, at para. 44. We noted in *Bedford*, at para. 44, that
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> > a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach… This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.
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> [31] Not only is the exception narrow — the evidence must "fundamentally shif[t] the parameters of the debate" — it is not a general invitation to reconsider binding authority on the basis of *any* type of evidence. As alluded to in *Bedford* and *Carter*, evidence of a significant evolution in the foundational legislative and social facts — "facts about society at large" — is one type of evidence that can fundamentally shift the parameters of the relevant legal debate: *Bedford*, at paras. 48-49; *Carter*, at para. 47. That is, the exception has been found to be engaged where the underlying social context that framed the original legal debate is profoundly altered.[20]

[21] The same point was made in *Carter*:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, at para. 42).[21]

[22] The application of vertical authority requires substantial similarity between the previous decision and the present action. When this issue arises in Quebec on a motion to dismiss, it is affected by the requirement that the judge must assume that the facts alleged in the present action are true. The scope of *stare decisis* is thus determined in part by what counts, or does not count, as a fact. Vertical authority is concerned with the binding effect of legal principles in dealing successively with substantively similar questions of principle. It is not concerned with degrees of similarity

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[20] *Supra*, note 15.
[21] *Supra*, note 6.

between discrete events or circumstances. In this case no adjudicative facts are alleged. The appellant alleges only that the legislation that he seeks to challenge permits MAID in a manner that it is unconstitutional and that its validity has not been subject to judicial scrutiny. This is not a fact but a legal conclusion or argument.

The Authority of *Carter*

[23] For the purposes of this appeal the issue concerning the authority of *Carter* may be stated simply: if *Carter* resolves in substance Grounds 2, 4 and 5 in the appellant's Application, the motion judge correctly dismissed those grounds. Put differently, the motion judge correctly dismissed those grounds if his Application could not succeed without reversing the authority of *Carter*. The appellant advances two arguments at once: that *Carter* is not binding authority with respect to the three grounds dismissed by the motion judge but, if it is, the exception to the principle of vertical authority applies.

Does the legislation violate section 7 of the Charter?

[24] In *Carter* the Supreme Court concluded that sections 14 and 241(*b*) of the *Criminal Code*[22] were validly enacted under Parliament's legislative jurisdiction over criminal law. The Court also concluded that they were inconsistent with section 7 of the Charter because those provisions are overbroad to the extent that a categorical prohibition of medical assistance in dying would deny this choice to competent adults who suffer from a grievous and irremediable medical condition that causes enduring and intolerable suffering. This conclusion was pronounced in the following declaration:

> Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that 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.[23]

Accordingly, the Court decided that the Charter does not preclude the enactment of a legislative and regulatory scheme that would permit medical assistance in dying, subject to informed consent, as an exemption from any other prohibition of such assistance. The Court emphasises that medical practitioners are capable of assessing consent to MAID just as they are capable of assessing consent to other forms of treatment or decisions to refuse treatment.

[25] The National Assembly enacted such legislation in 2014, before *Carter*, and Parliament enacted such legislation after *Carter*. Neither the federal nor the provincial legislative scheme has yet been examined by the Supreme Court of Canada. The appellant argues that both legislative schemes violate section 7 of the Charter due to

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[22] R.S.C. 1985, c. C-46.

[23] *Supra*, note 6, paragraph 147. See also paragraph 127.

inadequate health-care services in Quebec. He argues that the inadequacy of these services leads ineluctably to increased numbers of persons in need of end-of-life care and correspondingly that the inadequacy of health services infringes the right of such persons to life, liberty and security of the person. Moreover, he argues, the increased numbers of persons in need of end-of-life care will lead to increased numbers of demands for MAID with the result that the system of health services cannot ensure an informed consent to MAID for persons in need of end-of-life care. The appellant argues that a person suffering from terminal illness who does not and cannot receive appropriate treatment cannot voluntarily give an informed consent to MAID because such consent is vitiated by the inadequacy of the health-care system in Quebec.[24] I must repeat that the appellant attacks in its entirety the concept that a patient can validly consent to MAID, but does not challenge the specific scheme for assessing consent in the impugned legislation.

[26] This argument might serve as advocacy for improvement in health services but deficiencies in such services cannot support an argument that the legislation at issue in this appeal permits MAID without sufficient protection of the right to life and the security of the person. The appellant argues, in effect, that MAID as permitted by the legislation violates section 7 of the Charter[25] whereas the Supreme Court concluded in *Carter* that the prohibition of MAID infringes section 7. The appellant thus defies the authority of *Carter* and on this basis the motion judge was justified in dismissing the appellant's challenge to the legislation under section 7 of the Charter.

[27] The appellant advances an alternative argument that the authority of *Carter* should be set aside in accordance with the exception to the principle of vertical authority that applies when there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate and justifies a reconsideration of settled authority. The appellant submits that there is such evidence and that it would demonstrate that informed consent cannot be given or ascertained under the legislation that he seeks to challenge, thus imperiling rights to life and security of the person guaranteed by section 7.

[28] He cites the Annual Report of the Commission on End-of-life Care (Quebec, September 2016), which affirms that between 10 December 2015 and 31 August 2016 there were 21 cases in which the statutory protocols were not followed as required. He also seeks to rely on seven expert reports concerning various topics. The motion judge concluded that none of this information could be said to change fundamentally the parameters of debate concerning MAID that were resolved in *Carter*. With respect to the Commission's report, this conclusion is justified because the report sheds no light on the legal validity of legislation concerning informed consent to MAID but only a little light on the practical administration of that legislation. With respect to the expert reports, the motion judge concluded that this information does not present a new

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[24] *Demande*, supra, note 3, paragraph 72.2.c.

[25] See *Demande*, *supra*, note 3, paragraphs 58, 59, 73.

empirical basis for the examination of issues that were thoroughly examined in *Carter*. The judge rightly concluded that nothing presented or proposed by the appellant radically alters the parameters of the debate in *Carter* and therefore there is no basis to conclude that there is an applicable exception to the principle of vertical authority.

[29] Accordingly, this ground of appeal must fail.

Does the legislation violate section 15 of the Charter?

[30] The Supreme Court concluded in *Carter* that in view of its conclusions concerning MAID and section 7 of the Charter there was no need to consider whether the prohibition of MAID also violated the right to equality guaranteed by section 15. The appellant now argues that the legislation that permits MAID violates that right.

[31] The premise of this argument is that persons in need of end-of-life care are more likely to suffer depression and they may thus be identified as a disadvantaged group that is incapable of giving an informed consent to MAID. The argument is another challenge to the proposition that legislation could provide for obtaining valid and informed consent to MAID. In particular, it is an argument that the legislation does not provide a carefully designed and monitored system of safeguards to limit the risks of MAID in relation to vulnerable persons.

[32] The Supreme Court did not expressly address the compatibility of the legislation with section 15 of the Charter but it did address the issue that the appellant seeks to raise. The position advanced by the appellant closely resembles submissions advanced by the Attorney General of Canada in *Carter* that were expressly rejected. The Supreme Court concluded in *Carter* that risks that might be associated with MAID can be minimised by rigorous safeguards that ensure the quality of informed consent. The concerns are the focus of the following extracts of the judgment, which must be quoted at length:

> [103] The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective. It was the task of the trial judge to determine whether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.
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> [104] This question lies at the heart of this case and was the focus of much of the evidence at trial. In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated. In the trial judge's view, an absolute prohibition would have been necessary if the evidence showed that physicians were unable to reliably assess

competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life (paras. 1365-66).

[105] The trial judge, however, expressly rejected these possibilities. After reviewing the evidence, she concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them:

My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. [para. 883]

[106] The trial judge found that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process (paras. 795-98, 815, 837, and 843). In reaching this conclusion, she particularly relied on the evidence on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making (para. 1368). She concluded that it would be possible for physicians to apply the informed consent standard to patients who seek assistance in dying, adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity (para. 831).

[107] As to the risk to vulnerable populations (such as the elderly and disabled), the trial judge found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying (paras. 852 and 1242). She thus rejected the contention that unconscious bias by physicians would undermine the assessment process (para. 1129). The trial judge found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that in some cases palliative care actually improved post-legalization (para. 731). She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized (para. 1271). Finally, she found no compelling evidence that a permissive regime in Canada would result in a “practical slippery slope” (para. 1241).

[…]

[114] At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible

sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

[115] The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

[116] As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.

[117] The trial judge, on the basis of her consideration of various regimes and how they operate, found that it is possible to establish a regime that addresses the risks associated with physician-assisted death. We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards.

[118] Canada also argues that the permissive regulatory regime accepted by the trial judge "accepts too much risk", and that its effectiveness is "speculative" (R.F., at para. 154). In effect, Canada argues that a blanket prohibition should be upheld unless the appellants can demonstrate that an alternative approach eliminates all risk. This effectively reverses the onus under s. 1, requiring the

> claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government.
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> [119] The trial judge found that Canada had not discharged this burden. The evidence, she concluded, did not support the contention that a blanket prohibition was necessary in order to substantially meet the government's objectives. We agree. A theoretical or speculative fear cannot justify an absolute prohibition. As Deschamps J. stated in *Chaoulli*, at para. 68, the claimant "d[oes] not have the burden of disproving every fear or every threat", nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1is a process of demonstration, not intuition or automatic deference to the government's assertion of risk (*RJR-MacDonald*, at para. 128).
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> [120] Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.
>
> [121] We find no error in the trial judge's analysis of minimal impairment. We therefore conclude that the absolute prohibition is not minimally impairing.[26]

[33] This passage is clear. The Court concludes in *Carter* that the risks identified by the appellant in his argument concerning section 15 were already a preoccupation addressed in Canadian law. That legislation in no way detracts from the quality of protection in existing Canadian law and, if anything, it only enhances that protection. The authority of *Carter* thus forecloses the appellant from setting *Carter* aside on this point unless there has been a change in circumstances that radically alters the parameters of the debate to support an assertion that the legislation imperils the right to equality of patients in need of end-of-life care. There is no change to this effect.

Is the provincial legislation *ultra vires* because MAID is not treatment or health care?

[34] This question is foreclosed to the appellant on the authority of *Carter*. The Supreme Court concluded that the criminal prohibition of MAID was inconsistent with section 7 of the Charter. It also concluded that this declaration of invalidity allowed

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[26] See also, *supra*, note 6, paragraphs 104-107, 115-116.

Parliament and the provincial legislatures, acting in an area of concurrent jurisdiction over matters of health, to enact measures that would authorise and regulate MAID.

> [53] We are not persuaded by the submissions that *PHS* is distinguishable, given the vague terms in which the proposed definitions of the "core" of the provincial health power are couched. In our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 32; *Schneider v. The Queen*, 1982 CanLII 26 (SCC), [1982] 2 S.C.R. 112, at p. 142. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. We are not satisfied on the record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying. It follows that the interjurisdictional immunity claim cannot succeed.[27]

[35] Having concluded that the criminal prohibition of MAID is unconstitutional, the Court in this passage leaves no doubt that a provincial legislature may validly enact measures to permit and regulate MAID in the exercise of its legislative jurisdiction over health. Moreover, the Court asserts that in doing so a provincial legislature acts within its "protected core" of jurisdiction over health. The authority of *Carter* therefore leaves no scope for the appellant to argue that the provincial legislation that he seeks to attack is *ultra vires*. The motion judge was justified to dismiss the appellant's Application on this ground.

Interim costs

[36] The appellant submits that the motion judge erred in refusing to order interim costs in respect of all five grounds advanced in his Application.

[37] An order for interim costs in a matter of public law is an exceptional measure that lies within the discretion of the court. This point was reiterated in *Carter*, which again must be quoted at length:

> [137] Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 (CanLII), [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that

[27] *Supra*, note 6, paragraph 53.

description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.

[138] Some reference to this Court's jurisprudence on advance costs may be helpful in refining the criteria for special costs on a full indemnity basis. This Court set the test for an award of advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 72 (CanLII), [2003] 3 S.C.R. 371. LeBel J. identified three criteria necessary to justify that departure from the usual rule of costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. [para. 40]

[139] The Court elaborated on this test in *Little Sisters*, emphasizing that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs" (para. 35). The standard is a high one: only "rare and exceptional" cases will warrant such treatment (para. 38).

[140] In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[141] Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.[28]

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[28] *Supra*, note 6, paragraphs 137-141.

[38] The motion judge was not satisfied that the appellant met the stringent criteria for interim costs. In particular she concluded that the appellant had failed to demonstrate impecuniosity and that his Application presented an urgent question of public importance. Accordingly, she exercised her discretion not to award interim costs in respect of any of the five grounds advanced on the merits in the appellant's Application. There is no demonstrable error in this decision.

[39] The appellant's objective is not only to invalidate the legislation that is challenged in his Application but to reverse the authority of the decision of the Supreme Court in *Carter*. In practical terms he cannot attack the validity of the legislation without a reversal of the declaration by the Supreme Court at the conclusion of *Carter*[29]. The motion judge dismissed the appellant's challenge to the authority of *Carter* and refused his demand for public assistance to sustain his application on this or any other ground.

Motion for the presentation of indispensable fresh evidence

[40] The motion to produce fresh evidence is dismissed. It is not indispensable within the meaning of Article 380 *C.C.P.* The letter might well support a political plea for improved health services in Quebec but it has no direct bearing on the content or the constitutional validity of the legislation at issue in this appeal. It does not fundamentally shift the parameters of the debate (*change radicalement la donne*)[30] and thus it fails to meet the test applied in *Carter* to set aside the authority of that decision.

Conclusion

[41] I propose that the appeal be dismissed with legal costs.

PATRICK HEALY, J.C.A.

[29] See paragraph 147.
[30] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72, paragraph 42.