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STARE DECISIS OR A LICENSE TO DISTURB SETTLED MATTERS? THE IMPACT OF THE DECISION IN *CARTER V CANADA* ON COMMERCIAL LITIGATION

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When can judges decide that established rules from previous decisions no longer apply? This was one of the central issues in *Carter v Canada*,[1] where the Supreme Court of Canada addressed the limits of the doctrine of *stare decisis* in the context of changing norms of society.

In common law jurisdictions, judges must follow the principle of *stare decisis*. The principle, whose literal translation means "to stand by decided matters", requires that judges follow previous rulings (i.e. precedents) of the Supreme Court and of the appellate courts in their jurisdiction, if those precedents address the same issue and contain similar facts.[2]

Yet, in *Carter*, the Supreme Court found that a trial judge was justified in her deviation from the previous Supreme Court ruling on the same issue. The Supreme Court in *Carter* did so on the basis that there are two general exceptions to *stare decisis*: (i) when a new legal issue is raised, and (ii) when a change in the circumstances or evidence "fundamentally shifts the parameters of the debate."[3]

Litigants have always been entitled to argue that the facts of the case before them are distinguishable in an attempt to justify that a precedent does not apply in the circumstances.

With *Carter*, the Supreme Court appears to have created a new tool for litigants to argue that lower courts may depart from precedent.

THE DECISION IN *CARTER V CANADA*

The key issue before the Supreme Court in *Carter* was whether subsection 241(b) and section 14 of the *Criminal Code*, which prohibit physician-assisted death, violated sections 7 and/or 15 of the *Canadian Charter of Rights and Freedoms*[4] in a manner inconsistent with principles of fundamental justice. In 2011, Lee Carter and Gloria Taylor brought a challenge to subsection 241(b) of the *Criminal Code*.

This issue (i.e., whether subsection 241(b) violated sections 7/15 of the *Charter*) had already been decided by the Supreme Court in 1993 in *Rodriguez v British Columbia*,[5] where the Supreme Court upheld the ban on physician-assisted suicide by finding that the legislation did not violate section 7 of the *Charter*, and that any infringement on section 15 would be justified by section 1.

At first instance in *Carter*, Smith J. of the British Columbia Supreme Court overruled the precedent established in *Rodriguez*. She justified her departure from precedent in *Rodriguez* for three reasons: (1) the majority in *Rodriguez* failed to specifically address the right to life under section 7 while simply assuming a violation of section 15;[6] (2) significant changes in the law with respect to the *Charter* had occurred, including a substantive change to the section 1 analysis as well as the introduction of the principles of gross disproportionately and overbreadth;[7] and, (3) there had been significant changes in legislative and social facts since *Rodriguez*. She found that the combination of the aforementioned circumstances and the changes in *Charter* jurisprudence warranted a reconsideration of the constitutionality of physician-assisted death.[8]

The British Court of Appeal overturned the trial decision. The majority opinion by Newbury J.A. found that, although *Charter* jurisprudence had evolved since *Rodriguez*, there had been no change sufficient to undermine the binding authority of *Rodriguez*.[9] According to the majority, Smith J.'s determination that section 1 had been dealt with "only very summarily" in *Rodriguez* was not the proper inquiry: "the focus for purposes of stare decisis should be on what was decided, not how it was decided or how the result was described."[10]

On appeal, the Supreme Court restored Smith J.'s ruling by declaring the *Criminal Code* provisions invalid for adult persons who: (1) clearly consent to the termination of life; and, (2) have a grievous and irremediable medical condition that causes intolerable suffering.[11] The Supreme Court found that the criminal prohibition violated section 7 of the *Charter* since it forced some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point of intolerable suffering.[12] The Supreme Court found that the prohibition was not saved by section 1 because it did not minimally impair one's right to life, liberty and security of the person since a less restrictive regime could achieve the same objective.[13]

While the Supreme Court's decision in *Carter* will undoubtedly have an impact on future Charter cases – the focus here is on the impact of *Carter* as it relates to the principles of *stare decisis.*

[1] 2015 SCC 5 ["*Carter*"].
[2] *Carter v Canada (Attorney General)*, 2013 BCCA 435 at para 54 ["*Carter CA*"].
[3] *Carter*, *supra* note 1 at para 44, citing *Bedford v Canada (Attorney General)*, 2013 SCC 72 at para 42.
[4] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 ["*Charter*"].
[5] [1993] 3 SCR 519 [*Rodriguez*].
[6] *Carter v Canada (Attorney General)*, 2012 BCSC 886 at paras 913 and 921 [*Carter* BCSC].
[7] *Ibid* at paras 974-76 and 994.
[8] *Carter*, *supra* note 1 at para 28: summarizing the decision of the trial judge.
[9] *Carter CA*, *supra* note 2 at para 246.
[10] *Carter CA* at para 321.
[11] *Carter*, *supra* note 1 at para 4.
[12] *Ibid* at para 57. The Court did not consider section 15 of the *Charter* since it decided that the prohibition on physician-assisted suicide violated section 7.
[13] *Ibid* at para 29.

THE IMPACT OF *CARTER* ON THE PRINCIPLE OF *STARE DECISIS*

Based on a strict interpretation of the principle of *stare decisis*, the *Rodriguez* decision should have bound any future decision of a lower court regarding the constitutionality of physician-assisted dying.

Indeed, the Attorney Generals of Canada and Ontario took the position in *Carter* that the trial judge was not at liberty to deviate from *Rodriguez*, and was therefore bound to uphold the *Criminal Code* prohibition. This strict interpretation of *stare decisis* is grounded in the need for predictability, stability and consistency in law.

The Supreme Court in *Carter* approached the question of *stare decisis* differently. The Supreme Court justified its approach by stating the following:

> 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.[14]

In order to provide guidance to lower courts in applying this more flexible approach, the Supreme Court listed two situations in which lower courts may reconsider settled rulings:

> (i) where a new legal issue is raised; and,
> (ii) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.[15]

The Supreme Court found that both of the above conditions were met in *Carter*; therefore, Smith J. was entitled to consider the different "matrix of legislative and social facts" that was not present in the evidence before the Supreme Court in *Rodriguez*.[16]

A MORE FLEXIBLE APPROACH TO *STARE DECISIS* IN OTHER RECENT SUPREME COURT CASES

Prior to *Carter SCC*, the Supreme Court articulated the test for overturning its own precedent in *Bedford v Canada (Attorney General)*.[17] The issue in *Bedford* was the constitutionality of sections 197, 210 and 213 of the *Criminal Code*, which prohibited bawdy-houses, living off the avails of sex work, and soliciting for the purpose of sex work. The Supreme Court had previously upheld the constitutionality of the aforementioned provisions in the *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*.[18]

In a departure from its own precedent established in the *Prostitution Reference*, the Supreme Court found that a trial judge can decide arguments that were not raised previously and may revisit matters when:

> 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.[19]

The Supreme Court in *Carter* relied on this language from *Bedford*, notwithstanding that, in *Bedford*, the issue of *stare decisis* arose in the context of an advisory opinion, not a binding decision.

Aside from *Carter*, recent jurisprudence from the Supreme Court also reveals a more flexible approach to *stare decisis*.

In *Saskatchewan Federation of Labour v Saskatchewan*,[20] which was released one week prior to *Carter* SCC, the Supreme Court again used the "significant developments in the law" criterion set out in *Bedford* to find that the trial judge was entitled to depart from precedent.[21] As a result, the Supreme Court effectively ruled that subsection 2(d) of the *Charter* included a positive right to strike, expanding its scope.

The exceptions to *stare decisis* developed in *Bedford*, *Saskatchewan* and *Carter SCC* recognize the reality of our common law system as one that is continually evolving as lower courts apply existing law to new facts and evidence.

SUBSEQUENT APPLICATION OF *CARTER*

Some of the initial reactions to *Carter*, *Bedford* and to a lesser extent, *Saskatchewan*, include criticism from commentators on the "shockingly standardless approach to precedent,"[22] which may lead to increased judicial activism from the Court.[23]

However, an examination of the case law citing recent Supreme Court cases reveals that, in applying these decisions, the approach taken by the lower courts has been to follow precedent. Many of the recent cases that cite *Carter* or *Bedford* have declined to overturn precedent.

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[14] *Ibid* at para 44.
[15] *Ibid*.
[16] *Ibid* at para 47.
[17] 2013 SCC 72 [*Bedford*].
[18] [1990] 1 SCR 1123 [*Prostitution Reference*].
[19] *Bedford* SCC, *supra* note 17 at para 42.
[20] 2015 SCC 4 [*Saskatchewan*]
[21] *Ibid* at para 32.
[22] Dwight Newman, "Judicial Method and Three Gaps in the Supreme Court of Canada's Assisted Suicide Judgment in *Carter*" (2015) 78 Sask L Rev 217 at 219.
[23] See for example Andrew Coyne, "Supreme Court euthanasia ruling marks the death of judicial restraint," *National Post* (February 13, 2015) online: <http://news.nationalpost.com/full-comment/andrew-coyne-supreme-court-euthanasia-ruling-marks-the-death-of-judicial-restraint>

For example, in *Canada v. Caswell*,[24] the Alberta Court of Appeal considered whether to grant leave to appeal to, among other things, have one of its prior decisions reconsidered: *Canada v. Mitchell* (*Mitchell*).[25] In *Mitchell*, the Court had found that an individual's section 10(b) *Charter* right to counsel was suspended during an investigative detention for impaired driving.

In refusing leave to have *Mitchell* reconsidered, the Court in *Caswell* found there were no significant developments in the law or changes of circumstances or evidence that fundamentally shifted the parameters of the debate.[26] Further, the Court emphasized the public interest aspect of *stare decisis* by stating: "[t]he public interest is not served by upsetting the balance whenever it is asserted 'it's different now'."[27]

However, a recent case in the Federal Court relied on *Carter* to overturn existing case law on judicial review of permanent residency applications based on spousal sponsorship. In *Huang v Canada (Minister of Citizenship and Immigration)*,[28] Boswell J relied on *Carter* to overturn the precedent established in *Dasent v Canada (Minister of Citizenship and Immigration)*[29] on the duty of fairness owed by the immigration officer in spousal sponsorship application interviews. In doing so, Boswell J adopted the *Carter* test by stating: "I am satisfied that significant developments in the law of procedural fairness have implicitly overruled *Dasent*."[30]

In so finding, the Court emphasized the dissonance in the case law that addressed the duty of procedural fairness generally, and the case law that addressed the duty of fairness owed in spousal sponsorship interviews specifically. In other words, the Court characterized the effect of its departure from precedent as one of stabilization that is normally associated with *stare decisis*.

The Courts have also noted that evidence plays an important role in persuading a court to overturn precedent.[31] In *Canada v. Wagner*,[32] the Ontario Court of Justice denied a *Charter* challenge to section 223 of the *Criminal Code* on abortions, stating that the evidence presented fell "far, far short of 'fundamentally [shifting] the parameters of the debate'."[33] Similarly, in *Council of*

Canadians v Canada (Attorney General),[34] the Ontario Superior Court of Justice declined to depart from the precedent of refusing interlocutory injunction to suspend a duly enacted legislation (in this case, subsection 46(3) of the *Fair Elections Act*). The Court ruled that the applicants did not meet the evidentiary burden of the *Carter* test:

> [I]t is difficult to say that the evidence has fundamentally shifted the parameters of any debate when the evidentiary foundation [the Federal Election of 2015] for the applicants' challenge is not developed.[35]

THE POTENTIAL IMPACT OF THE SUPREME COURT DECISIONS IN THE COMMERCIAL CONTEXT

As of August 2016, the *Carter* decision appears to have only been cited in one commercial case in which the Court ultimately found that the threshold in *Carter* to not follow the decision of a higher court had not been met.[36]

Commercial litigants could take advantage of the Court's statement that "*stare decisis* is not a straitjacket" to advance arguments that are inconsistent with existing precedent. The evidentiary burden required to show a fundamental change in circumstances should serve to moderate the prospect of a drastic change in the law, absent expert evidence that convinces the court of the fundamental nature of such change. This may in turn introduce further opportunity for expert input in commercial cases (i.e., economics, finance, technology, intellectual property, etc.).

CONCLUSION

The *Carter* decision acknowledges the balancing act between the need for predictability in the law and the recognition that precedent will change if enough contextual change has occurred.

Given how recent the *Carter* decision is, the boundaries of the exceptions to *stare decisis* remain to be clarified by the lower courts. Recent case law such as *Huang* have demonstrated the broader applicability of the *Carter* exceptions outside the context of challenging legislation. Future decisions will need to answer some of the pressing questions, such as the necessary evidentiary threshold for establishing a change that is sufficient to truly shift the parameters of a debate.

It remains unclear how lower courts will apply the exceptions to *stare decisis* in a commercial context.

[24] 2015 ABCA 97 [*Caswell*].
[25] 1994 ABCA 369.
[26] *Caswell*, *supra* note 24 at para 34; citing *Bedford*, *supra* note 17 SCC at para 42.
[27] *Caswell*, *supra* note 24 at para 38.
[28] 2015 FC 2015 [*Huang*]
[29] [1995] FC 720; aff'd [1996] FCJ No 79 (FCA).
[30] *Huang*, *supra* note 34 at para 11.
[31] Michael Adams, "Escaping the 'Straitjacket': *Canada (Attorney General) v Bedford* and the Doctrine of *Stare Decisis*" (2015) 78 Sask. L. Rev. 325 at 341.
[32] 2015 ONCJ 66 [*Wagner*].
[33] *Ibid* at para 76.
[34] 2015 ONSC 4940.
[35] *Ibid* at para 11.
[36] ***Ballantrae Holdings Inc v "Phoenix Sun" (The)***, 2016 FC570.