

Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor (respondents/appellants on cross-appeal/plaintiffs) v. Attorney General of Canada (appellant/respondent on cross-appeal/defendant) and Attorney General of British Columbia (respondent/defendant)  
(CA040079; 2012 BCCA 336)

**Indexed As: Carter et al. v. Canada (Attorney General) et al.**

British Columbia Court of Appeal  
Prowse, J.A.  
August 10, 2012.

**Summary:**

A June 15, 2012 order of Smith, J., reported at [2012] B.C.T.C. Uned. 886, declared that the provisions of the Criminal Code prohibiting assisted suicide unjustifiably infringed ss. 7 and 15 of the Charter and were of no force and effect to the extent that they prohibited physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance was provided to a fully-informed, non-ambivalent competent adult patient in certain circumstances. The effect of the declarations was suspended for one year. During the period of suspension of the declaration of constitutional invalidity, Taylor (who had amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease) was granted a constitutional exemption permitting her to obtain physician-assisted death under certain conditions. The Attorney General of Canada (AG Canada) appealed from the decision. The AG Canada applied for an order staying both the declarations of invalidity and the exemption until the appeal had been heard and decided. The respondents consented to an order staying the declarations of invalidity and the running of the suspension of those declarations until the appeal was decided. Therefore, the only issue was whether a stay should be granted of the exemption order which permitted Taylor to seek a physician-assisted death pending the outcome of the appeal.

The British Columbia Court of Appeal, per Prowse, J.A, dismissed the application for a stay of the portions of the order granting the constitutional exemption.

**Constitutional Law - Topic 2999**

Determination of validity of statutes or acts - Practice - Appeals - Stay pending - A June 15, 2012 order of Smith, J., declared that the Criminal Code provisions prohibiting assisted suicide unjustifiably infringed ss. 7 and 15 of the Charter and were of no force and effect to the extent that they prohibited physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance was provided to a fully-informed, non-ambivalent competent adult patient in certain circumstances - The effect of the declarations was suspended for one year - During the period of suspension of the declaration, Taylor (who had amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease) was granted a constitutional exemption permitting her to obtain physician-assisted death under certain conditions - The Attorney General of Canada (AG Canada) appealed from the decision - The AG Canada applied for a stay of the exemption order permitting Taylor to seek a physician-assisted death pending the outcome of the appeal (the respondents had consented to a stay of the

declarations of invalidity and the running of the suspension of those declarations) - The British Columbia Court of Appeal, per Prowse, J.A, dismissed the application for a stay of the constitutional exemption - The AG Canada had established a case which exceeded the threshold of a serious question to be tried - The exercise by Taylor of her rights under the exemption would give rise to some harm to the public interest, which was concerned with the value of all life, but the level of harm did not reach the level of irreparable harm alleged by the AG Canada - The court placed some weight on the distinction between the stay of the declarations of invalidity, the refusal of which was more likely to result in irreparable harm, and the stay of the exemption - Assuming, that refusing a stay would result in irreparable harm to the AG Canada as representative of the public interest, and finding that granting a stay would result in irreparable harm to Taylor, the balance of convenience favoured refusing a stay - The harm to the public did not outweigh the harm to Taylor if she was left without a remedy pending the resolution of the appeal, and possibly at all.

**Practice - Topic 8954**

Appeals - Stay of proceedings pending appeal - What constitutes "irreparable harm" - [See **Constitutional Law - Topic 2999**].

**Practice - Topic 8955.1**

Appeals - Stay of proceedings pending appeal - Test for "merit to the appeal", "arguable issues", etc. - A June 15, 2012 order of Smith, J., declared that the Criminal Code provisions prohibiting assisted suicide unjustifiably infringed ss. 7 and 15 of the Charter and were of no force and effect to the extent that they prohibited physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance was provided to a fully-informed, non-ambivalent competent adult patient in certain circumstances - The effect of the declarations was suspended for one year - During the period of suspension of the declaration, Taylor (who had amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease) was granted a constitutional exemption permitting her to obtain physician-assisted death under certain conditions - The Attorney General of Canada (AG Canada) appealed from the decision - The AG Canada applied for an order staying the exemption pending the outcome of the appeal - The AG Canada submitted that "a higher level of scrutiny" of the merits might be appropriate because granting a stay of the exemption might result in a final determination of the issue, i.e., if the stay was granted, Taylor might never receive the benefit of the exemption - The British Columbia Court of Appeal, per Prowse, J.A, stated that "Upon considering the limited nature of the stay application relating to the exemption, and given the main focus of the appeal, I conclude that this is not one of those rare cases which require an extensive examination of the merits" - The AG Canada had established a case which exceeded the relatively low threshold of a serious question to be tried - See paragraphs 18 to 23.

**Practice - Topic 8958**

Appeals - Stay of proceedings pending appeal - Balance of convenience and justice - [See **Constitutional Law - Topic 2999**].

**Cases Noticed:**

Kiewit (Peter) & Sons Co. v. Perry et al. (2006), 226 B.C.A.C. 280; 373 W.A.C. 280; 2006 BCCA 259, reld to. [para. 8].  
RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur général), [1994] 1 S.C.R. 311; 164 N.R. 1; 60 Q.A.C. 241, reld to. [para. 9].  
Miron and Valliere v. Trudel et al., [1995] 2 S.C.R. 418; 181 N.R. 253; 81 O.A.C. 253, dist. [para. 24].  
Rodriguez v. British Columbia (Attorney General) et al., [1993] 3 S.C.R. 519; 158 N.R. 1; 34 B.C.A.C. 1; 56 W.A.C. 1, reld to. [para. 25].  
Canada v. Craig - see Minister of National Revenue v. Craig.  
Minister of National Revenue v. Craig (2012), 433 N.R. 111; 2012 SCC 43, reld to. [para. 25].

**Counsel:**

D. Nygard and M. Nicolls, for the appellant, Attorney General of Canada;  
S.M. Tucker and A.M. Latimer, for the respondents;  
No one appeared for the Attorney General of British Columbia.

This application was heard in chambers on August 3, 2012, at Vancouver, B.C., before Prowse, J.A., of the British Columbia Court of Appeal, who delivered the following judgment on August 10, 2012.

Application dismissed.

Editor: Angela E. McKay

**Practice - Topic 8954**

Appeals - Stay of proceedings pending appeal - What constitutes "irreparable harm" - A June 15, 2012 order of Smith, J., declared that the Criminal Code provisions prohibiting assisted suicide unjustifiably infringed ss. 7 and 15 of the Charter and were of no force and effect to the extent that they prohibited physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance was provided to a fully-informed, non-ambivalent competent adult patient in certain circumstances - The effect of the declarations was suspended for one year - During the period of suspension of the declaration, Taylor (who had amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease) was granted a constitutional exemption permitting her to obtain physician-assisted death under certain conditions - The Attorney General of Canada (AG Canada) appealed from the decision - The AG Canada applied for a stay of the exemption order permitting Taylor to seek a physician-assisted death pending the outcome of the appeal (the respondents had consented to a stay of the declarations of invalidity and the running of the suspension of those declarations) - The British Columbia Court of Appeal, per Prowse, J.A, dismissed the application for a stay of the constitutional exemption - The AG Canada had established a case which exceeded the threshold of a serious question to be tried - The exercise by Taylor of her rights under the exemption would give rise to some harm to the public interest, which was concerned

with the value of all life, but the level of harm did not reach the level of irreparable harm alleged by the AG Canada - The court placed some weight on the distinction between the stay of the declarations of invalidity, the refusal of which was more likely to result in irreparable harm, and the stay of the exemption - Assuming, that refusing a stay would result in irreparable harm to the AG Canada as representative of the public interest, and finding that granting a stay would result in irreparable harm to Taylor, the balance of convenience favoured refusing a stay - The harm to the public did not outweigh the harm to Taylor if she was left without a remedy pending the resolution of the appeal, and possibly at all.

### **Practice - Topic 8958**

Appeals - Stay of proceedings pending appeal - Balance of convenience and justice - A June 15, 2012 order of Smith, J., declared that the Criminal Code provisions prohibiting assisted suicide unjustifiably infringed ss. 7 and 15 of the Charter and were of no force and effect to the extent that they prohibited physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance was provided to a fully-informed, non-ambivalent competent adult patient in certain circumstances - The effect of the declarations was suspended for one year - During the period of suspension of the declaration, Taylor (who had amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease) was granted a constitutional exemption permitting her to obtain physician-assisted death under certain conditions - The Attorney General of Canada (AG Canada) appealed from the decision - The AG Canada applied for a stay of the exemption order permitting Taylor to seek a physician-assisted death pending the outcome of the appeal (the respondents had consented to a stay of the declarations of invalidity and the running of the suspension of those declarations) - The British Columbia Court of Appeal, per Prowse, J.A, dismissed the application for a stay of the constitutional exemption - The AG Canada had established a case which exceeded the threshold of a serious question to be tried - The exercise by Taylor of her rights under the exemption would give rise to some harm to the public interest, which was concerned with the value of all life, but the level of harm did not reach the level of irreparable harm alleged by the AG Canada - The court placed some weight on the distinction between the stay of the declarations of invalidity, the refusal of which was more likely to result in irreparable harm, and the stay of the exemption - Assuming, that refusing a stay would result in irreparable harm to the AG Canada as representative of the public interest, and finding that granting a stay would result in irreparable harm to Taylor, the balance of convenience favoured refusing a stay - The harm to the public did not outweigh the harm to Taylor if she was left without a remedy pending the resolution of the appeal, and possibly at all.