

## Editorial

### Dialogue Between the Court and Parliament: A Recent Charter Trilogy

Any skeptics about dialogue between the Court and Parliament should be convinced of its reality given three recent and high-profile acts of legislative responses to Charter decisions. Parliament has replied aggressively to arguably three of the most important Charter victories over the last decade: namely, (1) the Court's ruling that the Insite safe injection site should be granted a Ministerial exemption from drug laws in *PHS Community Services Society v. Canada (Attorney General)* (2011), 272 C.C.C. (3d) 428, (*sub nom.* Canada (Attorney General) v. PHS Community Services Society) [2011] 3 S.C.R. 134, 86 C.R. (6th) 223 (S.C.C.) (2) its invalidation of three prostitution related laws in *Bedford v. Canada (Attorney General)* (2013), 303 C.C.C. (3d) 146, (*sub nom.* Canada (Attorney General) v. Bedford) [2013] 3 S.C.R. 1101, 2013 SCC 72 (S.C.C.) and (3) its suspended and tailored declaration that the offence of assisted suicide is invalid in *Carter v. Canada (Attorney General)*, 2015 SCC 5, 2015 CarswellBC 228, 2015 CarswellBC 227 (S.C.C.).

The replies to all three cases are so strong that they arguably have turned Charter victories into legislative defeats. The lesson for those who engage in Charter litigation is clear: you must be prepared to play the long game. It may be as important to convince Parliamentarians of the justness of your cause as five Justices of the Supreme Court.

At the same time, it is highly unlikely that the dialogue will stop with the three controversial pieces of reply legislation. In all three cases, follow on Charter litigation is likely. At a minimum the courts will play a role in interpreting and perhaps reading down the new laws. Dialogue or institutional interaction is an ongoing process especially with contentious and difficult issues. Even clear Charter victories do not bring finality.

Even though the Court has stayed cleared of invoking the contentious dialogue metaphor in its recent decisions, it seems increasingly conscious of Parliament's role. In all three cases, the Court crafted its decision quite

narrowly. In *PHS Community Services Society*, it left open the ability of the Minister to deny exemptions to other safe injection sites. In *Bedford*, the Court noted that its reasoning did not speak to whether Parliament could criminalize prostitution and in *Carter* the Court carefully articulated criteria that reflected the facts of the case and did not extend to other issues such as mature minors and advance directives.

The Court also took some innovative measures in *Carter* that now seem quite wise. Although the Court suspended its declaration of invalidity first for 12 months, and then for an additional four months, it tailored the declaration to avoid striking all of the offence in s. 241 of the Code down. As a result, the assisted suicide offence is only unconstitutional when applied to physician assisted deaths of competent adults who clearly consent and are suffering an irremediable medical condition causing intolerable and enduring suffering. *Carter*, at para 127.

This tailored and limited declaration of invalidity reflects a form of reading in (though comments from the bench suggests that some Justices appear not to think so). It certainly represents something different from the standard declaration that an entire offence is unconstitutional in cases like *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449, (*sub nom.* *R. v. Morgentaler* (No. 2)) [1988] 1 S.C.R. 30, 62 C.R. (3d) 1 (S.C.C.) dealing with the abortion offence.

There is much controversy about how Bill C-14 departs from the criteria articulated by the Court in *Carter*. The new s. 241.2(2) of the *Criminal Code* as enacted by S.C. 2016, c. 3, introduces requirements of foreseeable death, incurable conditions and advanced states of irreversible decline. The Department of Justice's own legal analysis (which was released in a positive sign of more transparency in the government's end of the dialogue) recognizes that the bill can be subject to Charter challenge of a variety of basis including discrimination based on age and disability.

The ongoing episode demonstrates that it is possible to both engage Parliament (and its committees, an expert task force, a provincial-federal task force, the medical profession and the nation) and to enforce Charter rights. This is especially so after *Carter v. Canada (Attorney General)* (2016), 331 C.C.C. (3d) 289, 2016 SCC 4, 394 D.L.R. (4th) 1 (S.C.C.), where the Court, albeit in 5:4 split, allowed individuals qualified under its original decision or under Quebec's new law to obtain exemption from the assisted suicide offence.

It is surprising that the Court was so evenly divided on the exemptions during the suspension issue. If the courageous lead plaintiffs in the case, the late Gloria Taylor and Lee Carter, had been alive when the Court originally rendered judgment, surely the Court would have, as the trial judge was prepared to do, provided them exemptions rather than prolong their suffering? It is one thing to object to case-by-case exemptions as a permanent

remedy, but part of the judicial contribution to dialogue should be its concern with providing effective remedies in adjudicated cases.

The Court in *Bedford* clearly indicated that its decision did not speak to whether it was consistent with the Charter to criminalize sex work. The Harper government responded with legislation criminalizing the purchase but not the sale of sex. Although there are some exemptions from the new offences for sex workers, many of these do not apply if there is a commercial enterprise.

The government heard but rejected testimony that criminalizing purchasers would require sex workers to take the same type of evasive actions that the Court held in *Bedford* threatened the lives of sex workers. This reply legislation seems destined for a future Charter challenge if it is not amended by the new government.

The Supreme Court has made it clear in so called second look cases that “the mere fact that the legislation represents Parliament’s response to a decision of this Court does not militate for or against deference”. *J.T.I. MacDonald Corp. v. Canada (Procureure générale)*, [2007] 2 S.C.R. 610, 2007 SCC 30, 281 D.L.R. (4th) 589 (S.C.C.), at para 11. This dicta may be relevant if and when the three recent replies come back to court.

It will also be interesting how the government and the court define the objective of the new prostitution laws. Moral disapproval of sex work may in itself not be an important enough objective to limit a Charter right. Other objectives such as combating the sex trade may encounter problems of overbreadth, gross disproportionality or even arbitrariness depending on the facts of the case.

The legislative reply to *PHS Community Services Society* is perhaps not as well known as the others, but is particularly aggressive. The 2015 legislation seems designed to discourage any additional applications (the check list in s. 55 of the *Controlled Drugs and Substance Act* of what is required in an application goes from subsection a to subsection (z.1) and to ensure that exemptions are rarely, if ever, granted. Under s. 56.1(5) the Minister of Health will now be required to consider a range of public safety factors and the harm that drugs cause, but none related to public health factors such as the spread of HIV or the prevention of overdoses. This is mean spirited legislation that demonstrates no compassion for the health of addicts. Alas, it is transparently mean and will be vulnerable to Charter challenge as well as public criticism.

It may be tempting for those who are disappointed with these three legislative replies to give up on Charter litigation or condemn suspended declarations of invalidity or the idea of dialogue altogether. I would not go that far. There is a clear need for regulation in all three areas and legislation is more transparent than reliance on executive discretion. All three matters impact areas of provincial jurisdiction notably health. The criminal law is a

blunt instrument but it may also be the only one that can provide needed national standards.

Dialogue means that court victories can lead to legislative battles. Alas it often means that no one, including Parliament, has the final word. These episodes make clear that the hard work of criminal justice reform requires continued effort.

K.R.