

**SUPREME COURT OF CANADA**

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| **Citation:** Carter *v.* Canada (Attorney General), 2016 SCC 4, [2016] 1 S.C.R. 13 | **Motion heard:** January 11, 2016  **Order:** January 15, 2016  **Docket:** 35591 |

Between:

Lee Carter, Hollis Johnson, William Shoichet,

British Columbia Civil Liberties Association and Gloria Taylor

Appellants

and

Attorney General of Canada

Respondent

**And Between:**

Lee Carter, Hollis Johnson, William Shoichet,

British Columbia Civil Liberties Association and Gloria Taylor

Appellants

and

Attorney General of Canada and Attorney General of British Columbia

Respondents

- and –

Attorney General of Ontario, Attorney General of Quebec,

Council of Canadians with Disabilities, Canadian Association for Community Living, Christian Legal Fellowship, Canadian HIV/AIDS Legal Network,

HIV & AIDS Legal Clinic Ontario, Association for Reformed Political Action Canada, Physicians’ Alliance against Euthanasia, Evangelical Fellowship of Canada,

Christian Medical and Dental Society of Canada, Canadian Federation of Catholic Physicians’ Societies, Dying With Dignity, Canadian Medical Association,

Catholic Health Alliance of Canada, Criminal Lawyers’ Association (Ontario),

Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Canadian Civil Liberties Association, Catholic Civil Rights League,

Faith and Freedom Alliance, Protection of Conscience Project, Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society,

Canadian Unitarian Council, Euthanasia Prevention Coalition and

Euthanasia Prevention Coalition — British Columbia

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

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| **Joint Reasons for Order** (motion seeking an order extending the suspension of the declaration of constitutional invalidity issued in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331)**:**  (paras. 1 to 7)  **Joint Reasons Dissenting in Part:**  (paras. 8 to 15) | Abella, Karakatsanis, Wagner, Gascon and Côté JJ.  McLachlin C.J. and Cromwell, Moldaver and Brown JJ. |

Carter *v.* Canada (Attorney General), 2016 SCC 4, [2016] 1 S.C.R. 13

Lee Carter, Hollis Johnson, William Shoichet,

British Columbia Civil Liberties Association and Gloria Taylor Appellants

v.

Attorney General of Canada Respondent

- and -

Lee Carter, Hollis Johnson, William Shoichet,

British Columbia Civil Liberties Association and Gloria Taylor Appellants

v.

Attorney General of Canada and

Attorney General of British Columbia Respondents

and

Attorney General of Ontario,

Attorney General of Quebec,

Council of Canadians with Disabilities,

Canadian Association for Community Living,

Christian Legal Fellowship,

Canadian HIV/AIDS Legal Network,

HIV & AIDS Legal Clinic Ontario,

Association for Reformed Political Action Canada,

Physicians’ Alliance against Euthanasia,

Evangelical Fellowship of Canada,

Christian Medical and Dental Society of Canada,

Canadian Federation of Catholic Physicians’ Societies,

Dying With Dignity,

Canadian Medical Association,

Catholic Health Alliance of Canada,

Criminal Lawyers’ Association (Ontario),

Farewell Foundation for the Right to Die,

Association québécoise pour le droit de mourir dans la dignité,

Canadian Civil Liberties Association,

Catholic Civil Rights League,

Faith and Freedom Alliance,

Protection of Conscience Project,

Alliance of People With Disabilities Who are Supportive of

Legal Assisted Dying Society,

Canadian Unitarian Council,

Euthanasia Prevention Coalition and

Euthanasia Prevention Coalition — British Columbia Interveners

**Indexed as:** Carter ***v.* Canada (**Attorney General)

2016 SCC 4

File No.: 35591.

2016: January 11; 2016: January 15.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

motion for an extension of the suspension of a declaration of constitutional invalidity

*Constitutional law — Charter of Rights — Remedy — Judgments and orders — Court declaring, in Carter v. Canada (Attorney General), that Criminal Code prohibition on physician-assisted death is of no force or effect to specified extent, and suspending its declaration for 12 months — Attorney General of Canada applying for six-month extension of suspension of declaration of invalidity — Four-month extension justified by delay due to federal election — Exemption from extension granted to Quebec in respect of ss. 4 and 26 to 32 of Act respecting end-of-life care, CQLR, c. S-32.0001 — Exemption granted for those who wish, during extension period, to seek assistance in ending their life in accordance with criteria set out in Carter.*

**Statutes and Regulations Cited**

*Act respecting end-of-life care*, CQLR, c. S-32.0001, ss. 4, 26 to 32.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 14, 241(*b*).

MOTION seeking an order extending the suspension of the declaration of constitutional invalidity issued in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331. Motion granted in part, McLachlin C.J. and Cromwell, Moldaver and Brown JJ. dissenting in part.

Robert J. Frater, Q.C., and Donnaree Nygard, for the applicant the Attorney General of Canada.

Joseph J. Arvay, Q.C., Alison M. Latimer and Sheila M. Tucker, for the respondents on the motion Lee Carter et al.

Written submissions only by *Jean M. Walters*, for the respondent on the motion the Attorney General of British Columbia.

Malliha Wilson and S. Zachary Green, for the respondent on the motion the Attorney General of Ontario.

Jean-Yves Bernard, Mario Normandin and Manon Des Ormeaux, for the respondent on the motion the Attorney General of Quebec.

David Baker, for the respondents on the motion the Council of Canadians with Disabilities and the Canadian Association for Community Living.

Jonathan Sikkema, for the respondent on the motion the Christian Legal Fellowship.

Written submissions only by Michael Fenrick, for the respondents on the motion the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario.

Written submissions only by Pierre Bienvenu, for the respondent on the motion the Physicians’ Alliance against Euthanasia.

Written submissions only by Kelly Doctor, for the respondent on the motion Dying With Dignity.

Jean Nelson, for the respondent on the motion the Canadian Medical Association.

Written submissions only by Jason Gratl, for the respondent on the motion Association québécoise pour le droit de mourir dans la dignité.

Written submissions only by Angus M. Gunn, Q.C., for the respondent on the motion the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society.

Written submissions only by Tim Dickson, for the respondent on the motion the Canadian Unitarian Council.

Written submissions only by Hugh R. Scher and Geoffrey Cowper, Q.C., for the respondents on the motion the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition — British Columbia.

ORDER

1. Abella, Karakatsanis, Wagner, Gascon and Côté JJ. — The Attorney General of Canada applies for a six-month extension of the suspension of this Court’s declaration that ss. 241(*b*) and 14 of the *Criminal Code*, R.S.C. 1985, c. C-46, “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”. The declaration of invalidity of ss. 241(*b*) and 14 was suspended for 12 months, until February 6, 2016.The appellants oppose the Attorney General’s application. Should an extension of the suspension be granted, the Attorney General of Quebec asks that legislation regulating end‑of‑life assistance adopted in Quebec be exempted from the suspension, to avoid uncertainty as to whether the Quebec regime conflicts with the federal prohibition preserved by any extension of the suspension. Finally, the appellants and certain interveners ask this Court to grant a constitutional exemption for individuals who wish to seek assistance in ending their life during the period of any extension.
2. The first question is whether this Court should order an extension of the suspension of the declaration of invalidity. To suspend a declaration of the constitutional invalidity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society. To extend such a suspension is even more problematic. The appellants point to the severe harm caused to individuals by the extension. Extraordinary circumstances must be shown. The burden on the Attorney General who seeks an extension of a suspension of a declaration of constitutional invalidity is heavy. In this case, the length of the interruption of work on a legislative response to the Court’s decision due to a federal election constitutes such a circumstance. Parliament was dissolved on August 2, 2015 and officially resumed on December 3 of that year. This four-month delay justifies granting an extension of the suspension of the declaration of invalidity, but only for four months.
3. The next question is whether Quebec should be exempted from the four-month extension of the suspension of the declaration of invalidity. The Attorney General of Canada and the provincial Attorneys General who participated in the hearing do not oppose Quebec’s request for an exemption. Quebec submits that an exemption is necessary to clarify the legal position in Quebec given its law governing end-of-life assistance, the *Act respecting end-of-life care*, CQLR, c. S-32.0001 (“*ARELC*”), which came into force on December 10, 2015. Quebec also submits an exemption would avoid the chilling effect of the threat of possible violations of the criminal prohibition or potential civil liability during the four-month extension of the suspension of the declaration of invalidity.
4. In view of this, and having regard to the fact that the Attorneys General do not oppose the Attorney General of Quebec’s request for Quebec to be exempted from the extension of the suspension of the declaration of invalidity, we would grant the exemption. In doing so, we should not be taken as expressing any view as to the validity of the *ARELC*.
5. The third question is whether, during the four-month extension, the Court should grant an exemption for those who wish to seek assistance in ending their life on the bases articulated in our reasons in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331. The appellants argue that fairness and equality require this, particularly if Quebec is exempted from the extension.
6. This is the first time the Court has been asked to consider whether to grant individual exemptions during an *extension* of a suspension of a declaration of invalidity. Parliament was given one year to determine what, if any, legislative response was appropriate. In agreeing that more time is needed, we do not at the same time see any need to unfairly prolong the suffering of those who meet the clear criteria we set out in *Carter*. An exemption can mitigate the severe harm that may be occasioned to those adults who have a grievous, intolerable and irremediable medical condition by making a remedy available now pending Parliament’s response. The prejudice to the rights flowing from the four‑month extension outweighs countervailing considerations. Moreover, the grant of an exemption from the extension to Quebec raises concerns of fairness and equality across the country. We would, as a result, 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*, 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.
7. The motion is granted in part. The suspension of the declaration of invalidity is extended by four months from the date it is set to expire. In respect of ss. 4 and 26 to 32 of the *ARELC*, Quebec is exempted from the four-month extension. Finally, during the four-month extension period, we grant an exemption to those who wish to exercise their rights so that they may apply to the superior court of their jurisdiction for relief in accordance with the criteria set out in para. 127 of our reasons in *Carter*. We would award the appellants special costs of this motion on a full indemnity basis, as on the original appeal.
8. The Chief Justice and Cromwell, Moldaver and Brown JJ. (dissenting in part) — While we agree that a four‑month extension is justified, we would not exempt Quebec from that extension or provide for individual exemptions.
9. The Attorney General of Quebec submits that an exemption is necessary to clarify the legal position in Quebec under its law governing end-of-life assistance, the *Act respecting end-of-life care*,CQLR,c. S-32.0001 (“*ARELC*”). Canada does not oppose Quebec’s request for an exemption, noting that the Quebec legislation “is the sort of complex regulatory response” contemplated by our judgment in *Carter v. Canada (Attorney General)*,2015 SCC 5,[2015] 1 S.C.R. 331: reply factum, at para. 15. The other intervening Attorneys General similarly do not oppose the exemption. The Attorney General of Canada says, however, that the exemption is unnecessary.
10. We agree with the Attorney General of Canada. The *ARELC* came into force on December 10, 2015, while the initial suspension of our declaration of invalidity was in force. No exemption from the suspension of our declaration was sought at that time. We have been advised that the Minister of Justice of Quebec has issued a directive to the Director of Criminal and Penal Prosecutions not to prosecute any physician who follows the *ARELC* if the exemption to the extension of the suspension is not granted. In our view, the exemption now requested neither adds to nor takes away from whatever clarity existed in the province of Quebec when the *ARELC* came into force. We therefore would refuse Quebec’s request for an exemption.
11. The remaining question is whether, during the four-month extension, the Court should grant a constitutional exemption permitting assistance in ending life on the basis articulated in the reasons in *Carter.* The appellants request this exemption, arguing that it will alleviate suffering and, if Quebec is exempted from the extension of the suspension of the declaration of invalidity, would also serve the values of fairness and equality.
12. We are not persuaded that the appellants have established a case for a constitutional exemption. In the unanimous judgment on the merits, the Court held that this was not an appropriate case to create a mechanism for exemptions during the period of suspended invalidity. The Court wrote that doing so “would create uncertainty, undermine the rule of law, and usurp Parliament’s role. Complex regulatory regimes are better created by Parliament than by the courts”: para. 125. These considerations, in our view, continue to be compelling.
13. We would grant a four-month extension of the suspension of the declaration of invalidity, but would dismiss Quebec’s request for exemption from it and also dismiss the appellants’ request for individual exemptions during the period of suspension.
14. We add this. We do not underestimate the agony of those who continue to be denied access to the help that they need to end their suffering. That should be clear from the Court’s reasons for judgment on the merits. However, neither do we underestimate the complexity of the issues that surround the fundamental question of when it should be lawful to commit acts that would otherwise constitute criminal conduct. The complexity results not only from the profound moral and ethical dimensions of the question, but also from the overlapping federal and provincial legislative competence in relation to it. The Court unanimously held in its judgment on the merits that these are matters most appropriately addressed by the legislative process. We remain of that view. That the legislative process needs more time is regrettable, but it does not undermine the point that it is the best way to address this issue.
15. We agree with our colleagues that the Attorney General of Canada should pay the appellants’ special costs of this application on a full indemnity basis.

*Motion granted in part with costs,* McLachlin C.J. *and* Cromwell*,* Moldaver *and* Brown JJ. *dissenting in part.*

Solicitor for the applicant the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the respondents on the motion Lee Carter et al.: Farris, Vaughan, Wills & Murphy, Vancouver; DLA Piper (Canada), Vancouver.

Solicitor for the respondent on the motion the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the respondent on the motion the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the respondent on the motion the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the respondents on the motion the Council of Canadians with Disabilities and the Canadian Association for Community Living: Bakerlaw, Toronto.

Solicitors for the respondent on the motion the Christian Legal Fellowship: Miller Thomson, Calgary.

Solicitors for the respondents on the motion the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent on the motion the Physicians’ Alliance against Euthanasia: Norton Rose Fulbright Canada, Montréal.

Solicitors for the respondent on the motion Dying With Dignity: Goldblatt Partners, Toronto.

Solicitor for the respondent on the motion the Canadian Medical Association: Canadian Medical Association, Ottawa.

Solicitors for the respondent on the motion Association québécoise pour le droit de mourir dans la dignité: Gratl & Company, Vancouver.

Solicitors for the respondent on the motion the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society: Borden Ladner Gervais, Vancouver.

Solicitors for the respondent on the motion the Canadian Unitarian Council: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the respondents on the motion the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition — British Columbia: Scher Law Professional Corporation, Toronto; Fasken Martineau DuMoulin, Vancouver.