

The Supreme Court Extends its Declaration of Invalidity in Carter for Four Months

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On January 15, 2016, the Supreme Court issued an order in response to the federal Liberal government's request to extend the suspension of its declaration invalidating the *Criminal Code of Canada* prohibitions on physician-assisted death for six months (the Extension). The Supreme Court also ruled on Québec's request to be exempt from the Extension and the request to grant a constitutional exemption for individuals seeking physician-assisted death during the Extension.

The Supreme Court unanimously granted the Attorney General's request to approve the Extension. However, it granted only a four-month extension rather than the six months the Attorney General had requested. The Supreme Court noted that "severe harm" would be inflicted on individual members of Canadian society by the Extension and that "extraordinary circumstances must be shown" to justify such an order. Nevertheless, it found that the four-month interruption of work on a legislative response to the Supreme Court's decision in *Carter v Canada (Attorney General)* due to a federal election amounted to extraordinary circumstances that justified a four-month extension of the suspension.

In a 5-4 split decision, the Supreme Court granted Québec's request to be exempt from the Extension. Québec was concerned that the Extension would cast doubt on the validity of its own assisted-dying legislation, which came into force on December 10, 2015. Québec was also concerned that the Extension would have a chilling effect on physicians offering end-of-life assistance because of the threat of possible criminal and civil liability. For these reasons, and also because no other party opposed Québec's request, the majority ruled in favour of Québec.

The dissenting Justices refused to grant an exemption for Québec on the basis that it was unnecessary. They noted that Québec had not sought an exemption when the Québec Act came into force during the initial suspension of the declaration of invalidity. Moreover, in their view, Québec had already taken sufficient measures to guard against any chilling effects on the provision of end-of-life assistance that might arise because of the Extension.

The Court also granted the request to allow individuals to apply for access to life-ending assistance during the Extension in a 5-4 split decision. The Supreme Court noted that an exemption could mitigate the severe harm suffered by adults with a grievous, intolerable and irremediable medical condition by making a remedy available during the Extension, pending Parliament's response. The Supreme Court also felt that refusing to grant the exemption for

individuals would be unfair since Québec was exempted from the Extension. Finally, the Supreme Court found that requiring judicial authorization during the Extension will ensure compliance with the rule of law and provide an effective safeguard against potential risks to vulnerable people.

The dissenting Justices pointed to the Court's decision in *Carter* not to allow a free-standing constitutional exemption from the *Criminal Code* prohibitions on assisted dying in lieu of a declaration of invalidity. In those reasons, the Court had expressed its view that a declaration of invalidity was more appropriate because an exemption "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." The Court held that the same concerns were equally applicable to the request for an exemption during the Extension. While expressing sympathy for those adversely affected by the Extension, the Court recognized the difficulty of creating appropriate legislation around this complex issue and held that it is preferable to allow the legislative process more time to develop an appropriate regime than to permit interim exemptions.

In the result, during this interim period, hospitals and physicians in common law provinces and territories who are asked to provide medical aid in dying should ensure that an appropriate court order has been obtained before doing so, as an additional layer of protection from liability.

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