

# TOP FIVE 2016

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

## **CARTER v CANADA (ATTORNEY GENERAL), 2016 SCC 4, [2016] 1 SCR 13**

Date Released: January 15, 2016

Full decision: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15696/index.do>

### Facts

Prior to the decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, providing medical assistance in dying was illegal.<sup>1</sup> Section 241(b) of the *Criminal Code* says that everyone who aids or abets a person in committing suicide commits an indictable offence. Section 14 says that no person may consent to death being inflicted on them. Together, these provisions prohibit the provision of assistance in dying in Canada. In its 2015 *Carter* decision, the Supreme Court of Canada (SCC) declared these provisions invalid 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. (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. In order to allow the government time to write

new legislation to comply with its decision, the SCC suspended the declaration of invalidity for 12 months. During the 12-month period there was a federal election and the Attorney General requested an extension of the declaration of invalidity.

### Procedural History

In 2012, the British Columbia Supreme Court (the equivalent of the Ontario Superior Court) found that the prohibition against physician-assisted dying violated s. 7 of the *Charter of Rights and Freedoms* for competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. Smith J. concluded that the infringement was not justified under s. 1 of the *Charter*.<sup>2</sup>

The Attorney General of British Columbia appealed the decision. The majority of the British Columbia Court of Appeal allowed the appeal on the ground that the trial judge was bound to follow the earlier SCC decision in *Rodriguez v. British Columbia (Attorney General)*, which upheld the validity of the provision.<sup>3</sup>

<sup>1</sup> For a case summary of *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, see OJEN's resource *Top Five 2015*, available online at: <http://ojen.ca/en/resource/top-five-2015>.

<sup>2</sup> See *Carter v. Canada (Attorney General)*, 2012 BCSC 886 and *Carter v. Canada (Attorney General)*, 2012 BCSC 1587.

<sup>3</sup> See *Carter v. Canada (Attorney General)*, 2013 BCCA 435.

In 2015, the SCC concluded that ss. 241(b) and 14 of the *Criminal Code* unjustifiably infringed s. 7 of the *Charter*.

## Issues

1. Should the Court order an extension of the suspension of the declaration of invalidity?
2. If the extension is granted, should Quebec be exempted from the four-month extension of the suspension of the declaration of invalidity?
3. If the extension is granted, should the court grant an exemption to those individuals who wish to seek assistance in ending their life on the bases articulated in the reasons in *Carter v. Canada (Attorney General)*, 2015 SCC 5.

## Decision

The extension of the suspension of the declaration of invalidity was granted. An exemption was also ordered for Quebec, and for those individuals seeking assistance from a physician in accordance with the criteria set out in the 2015 SCC *Carter* decision. Those individuals were instructed to apply to the Superior Court of their jurisdiction for relief during the extended period of suspension.

## Reasons

The SCC held that to suspend a declaration of the constitutional validity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of the members of Canadian society. Extraordinary circumstances must be shown in order for an extension to be given. The SCC ruled that the interruption of work on a legislative response to the Court's 2015 decision which was due to a federal election amounted to extraordinary circumstances. Parliament was dissolved on August 2, 2015 and officially resumed on December 3, 2015. The Court acknowledged that this four-month delay justified granting an extension of the suspension of the declaration of invalidity, but only for four months.

## DISCUSSION

1. In its 2015 *Carter v. Canada* decision, the SCC found the provisions of the Criminal Code which prohibited physician-assisted suicide to be invalid. Do you agree with that decision? Why or why not?

2. Following the 2015 decision, the SCC gave parliament 12 months to rewrite the law instead of immediately striking it down. Why do you think the Court did that? Do you agree with this approach?

3. In this case, the federal government was seeking an extension of the suspension of the declaration of invalidity. What does this mean?