SENATE SÉNAT

CANADA

DEBATES OF THE SENATE

1st SESSION • 42nd PARLIAMENT • VOLUME 150 • NUMBER 45

CRIMINAL CODE

MOTION IN AMENDMENT

Speech by:

The Honourable Diane Bellemare

Wednesday, June 8, 2016

THE SENATE

Wednesday, June 8, 2016

[*Translation*]

CRIMINAL CODE

MOTION IN AMENDMENT

Hon. Diane Bellemare (Legislative Deputy to the Government Representative in the Senate): Thank you. I would like to thank all senators who are taking part in this debate. It is an extremely important debate for all Canadians. Before I address some aspects of this amendment, which were barely touched on in the debate, I would like to read an excerpt from paragraph 14 of the *Carter* ruling, where the dissenting justices decided whether they would allow recourse to medical assistance in dying through the judicial process during the additional six-month exemption period.

The four dissenting justices, including the Chief Justice, stated the following in paragraph 14:

[*English*]

> 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 —

— being the Supreme 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.

[*Translation*]

In this ruling, the Supreme Court noted that the provinces also have responsibilities in medical assistance in dying.

In the general context of the proposed amendment, honourable senators, I have great difficulty adopting this amendment. With this amendment we are asking for the recognition of a right for individuals who are suffering, but who are not at the end of life. Medical assistance in dying is perhaps an individual right, but this right has to be considered in the context of the whole of society.

For example, we can recognize that homosexuality is not a crime, but that is not the same thing as recognizing that medical assistance in dying is no longer a crime and that it is now a right. It is not the same thing because as we recognize this right, we recognize that it applies to a group of people, and a number of groups. We must take into consideration the whole of society before recognizing this right for a specific group of people. The amendment before us allows us to avail ourselves of this right and makes it a right for all those who are suffering but whose death is not foreseeable. With that in mind, have we had a real discussion with people with serious physical disabilities?

We are giving people a right, but adding safeguard problems for an entire group of people who testified in front of the experts.

[*English*]

I quote Ms. Rhonda Wiebe from the Council of Canadian with Disabilities testified in front of the Standing Senate Committee on Legal and Constitutional Affairs, and what she asked is that we as legislators, and I quote her, that we —

> protect the vulnerable from being induced to take their own lives in time of weakness.

She also reminded us that —

> Canadians with disabilities are more likely to live in poverty, more likely to live in unsafe and inadequate housing, and that they face barriers in their physical encounters with the world and stigma on a daily basis.

[*Translation*]

Ms. Wiebe was quite concerned about broadening access to medical assistance in dying to this group of vulnerable people who are already so marginalized. She was not alone.

The second thing I wanted to say is that I cannot vote in favour of this amendment because it would lead to major legal and constitutional problems for Quebec.

When the Minister of Justice came here among us, I specifically asked her whether Quebec's law was protected within the framework of Bill C-14. She assured me that there was no legal problem. I went to the Standing Senate Committee on Legal and Constitutional Affairs to listen to the famous Professor Hogg, and I asked him what would become of Quebec's legislation if we were to adopt an amendment similar to the one before us now.

That question may have been hard to answer on the spot, but he did suggest that Quebec's legislation would likely become unconstitutional. Why? Because it is limited only to persons who are at the end of life. I would like to make a distinction that we haven't really talked about so far between the Criminal Code and health-related legislation.

Bill C-14 would amend the Criminal Code. Under what conditions and under what exceptions do we have the right to help people commit suicide? That is the question before us right now. Bill C-14 addresses that aspect of the Criminal Code, and I find that it is well written because it provides all the flexibility that the provinces need to define how they will grant this right.

I believe that, under a provincial law based on Bill C-14, Ms. Carter's and Ms. Taylor's cases would probably be eligible because Bill C-14, at paragraph 241.2(2)(*d*), speaks of reasonably foreseeable natural death taking into account the general status of the person's health, not necessarily whether a particular illness is terminal.

Third, we are adding the possibility of granting medical assistance in dying in such cases where there is no prognosis of imminent death. In such cases, provincial laws may grant medical assistance in dying to a person suffering from an illness that is not necessarily fatal but that can cause other significant secondary effects, an illness that, because of the drugs used to treat it, may affect the person's overall condition. The death of that person may be foreseeable even if it is not directly caused by the illness in question and even if it is unknown how much longer the person may live.

Bill C-14 offers a number of options. The amendment before us would change the nature of Bill C-14 and would not find support in the other place, in my opinion. We would end up without a law. Under those circumstances and under the provincial law, physicians in Quebec who are already having difficulty fulfilling their duties when it comes to medical assistance in dying will find it even more difficult to do so.

Honourable senators, as for the amendment that aims to open the floodgates to this right, we must remember the group of vulnerable people who came to tell us that we need to set guidelines around this right and think of the provinces, which will have to clarify how it will be managed.

We haven't talked about this aspect, but it's very important to talk about it now, because Bill C-14 amends the Criminal Code. It is not intended to specify how medical assistance in dying should be administered in the hospitals and clinics of all the different provinces.

Quebec has a law that people seem to be happy with. If we pass this amendment, there is a good chance that the provincial law will become unconstitutional. That is why I will be voting against the amendment.

Hon. Claude Carignan (Leader of the Opposition): Will Senator Bellemare take a question?

Senator Bellemare: Yes, of course.

Senator Carignan: I heard your argument, which claims that if we amend the Criminal Code, the Quebec law will become unconstitutional. Is that what you said?

Senator Bellemare: Actually, I am not the one who said it. I was quoting Professor Peter Hogg, who appeared before the committee. I respect your expertise, Senator Carignan. I know you specialize in this field.

I asked him the question directly, and he replied that if Bill C-14 were amended so as to comply with the *Carter* decision, the Quebec law would then become unconstitutional.

Senator Carignan: I'll check what Peter Hogg said, but I would find that very surprising.

What is not constitutional is to look at whether an act or an individual's actions comply with the Constitution instead of with the Criminal Code.

You are saying that we should not amend the Criminal Code, that it is a very complex area and that legislators would be wading into a complex area. The Supreme Court also touched on this in paragraph 126 of the *Carter* decision, which states, and I quote:

> It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.

It seems quite clear that the Supreme Court gave legislators a choice about whether to enact legislation, saying that if legislators decided to do so, they would have to comply with certain constitutional parameters. Furthermore, the definition of individuals whose rights are being violated is similar to what Senator Joyal has proposed in his amendment.

My question is the following. Do you agree that we are not required to enact legislation and that if we do not, the parameters set out in the *Carter* decision or the definition that Senator Joyal is proposing will prevail?

Senator Bellemare: What Senator Joyal has proposed in his amendment is very vague. In his first speech, the Honourable Senator Baker pointed out that the criteria pertaining to intolerable suffering were subjective. He also mentioned a case in which a petitioner asked for medical assistance in dying to be available in two months and one week. The court found that this was not consistent with intolerable suffering and that the petitioner had to submit an earlier request. Senator Baker explained this situation in great detail.

Getting back to the main issue, when I asked Professor Hogg that question, he answered that since Quebec would exclude people who are not terminally ill, the Quebec legislation would be unconstitutional. He was clear about that.

Even though he did not have much time to reflect on the question, that is what he said, and you can verify that. I checked again earlier. I have it in my notes and I could give you the exact quote.

It is important to reflect on this point because if only the *Carter* ruling applies, it is unclear what will happen. Bill C-14 opens the door to medical assistance in dying for people who are suffering, but who are not necessarily at the end of life.

The Hon. the Speaker *pro tempore***:** Is more time granted to the honourable senator? A number of senators would like to ask her some questions.

Hon. Senators: Agreed.

Senator Bellemare: I would like to remind all senators that paragraph 127 of *Carter* describes all the various criteria to be met. The last two sentences lead us to believe that some judges wanted to introduce some flexibility. They added the following:

> The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

I know that these sentences are difficult to interpret, but they could easily be interpreted as applying to the specific cases of Ms. Carter and Ms. Taylor. Bill C-14, with a broader interpretation, would have made it possible for Ms. Carter and Ms. Taylor to receive medical assistance in dying.

Senator Joyal: Would the honourable senator accept another question?

Senator Bellemare: Yes, of course.

Senator Joyal: You mentioned the impact that the amended version of Bill C-14 would have on the provincial legislation. I would like to draw your attention to what the Quebec Minister of Health, Dr. Gaétan Barrette, had to say about the provision affected by my amendment, in other words, the provision on reasonably foreseeable natural death.

In an article published in *La Presse* on May 31, 2016, Dr. Gaétan Barrette, who is responsible for the Quebec law, stated, and I quote:

> For governmental and professional reasons, I myself am disinclined to support C-14 because of its worst feature: the reasonably foreseeable natural death provision. It makes no sense. It cannot be enforced. I would be very hesitant to get on board with C-14 as it stands.

Obviously, Dr. Barrette has very substantive reservations about how to interpret the criterion of reasonably foreseeable death, which is the subject of my amendment.

I do not understand how your position is consistent with the public position that Dr. Barrette took regarding the constitutionality of the Quebec law.

He never asked that no changes be made to *Carter*. On the contrary, he asked that Bill C-14 be amended to make it consistent with Quebec's legislation and medical practices.

Senator Bellemare: The last thing you said was "he asked that Bill C-14 be amended to make it consistent with Quebec's legislation and medical practices." That is exactly what he is asking for, because he knows that Bill C-14 affords far more rights than Quebec's legislation.

In Quebec, medical assistance in dying is administered only in the context of palliative care. We are talking about six months or less. It is a bit like the U.S. laws, although in some cases I'm not sure that all doctors in Quebec give six months. I believe it is more like three. We would have to look that up.

In Quebec, the law is very restrictive. In one of his recent public statements, Dr. Barrette asked senators to respect Quebec's legislation because Bill C-14 is much broader than Quebec's legislation. Bill C-14 authorizes the administration of medical assistance in dying to people who are suffering and terminally ill, but whose prognosis is not necessarily known. Will they die in two weeks, two months or two years? The federal minister said it is not about knowing the prognosis. The distinction between the diagnosis and the prognosis is very important.

As well we have to consider the fact that vulnerable people who face all sorts of suffering are asking us not to be too permissive. I would also like to reiterate what Senator Baker said earlier, which was that the public has serious reservations about this legislation. We must take that into account.