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CRIMINAL CODE

BILL TO AMEND—SECOND READING

Speech by:

The Honourable Diane Bellemare

Friday, June 3, 2016

THE SENATE

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[*Translation*]

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Hon. Diane Bellemare (Legislative Deputy to the Government Representative in the Senate): Honourable senators, to begin, I would like to tell you a little story. I want to share the comments that one of my dear colleagues made when she was at the end of her life. I am talking about Lise Poulin Simon, with whom I wrote books and who was a kindred spirit when it came to economics research. She passed away in 1995 after enduring a lot of suffering. Before she fell into a medically induced coma, she told me that, over the past few weeks, she had learned one thing. This is what she said: "The pain is there for a reason. It helped me to accept death." The words of this extremely intelligent woman have always stayed with me and I share them with you. At the end of her life, she was reading philosophy texts and trying to focus on that subject. Her words really touched me.

Bill C-14 on medical assistance in dying is a very emotional subject. I attended several meetings of the Standing Senate Committee on Legal and Constitutional Affairs and the atmosphere in the room was thick with emotion. I felt that it would be difficult to remain objective while addressing this subject. As the Honourable Senator Sinclair reminded us yesterday, we all have the same duty to put our preferences aside to try to fulfil our constitutional role, our role as a chamber of sober second thought, and our role as a chamber that complements, rather than opposes, the House of Commons, even if sometimes we may critique the work done there. Our role is to be open to acting in a way that complements the work of the House of Commons. In my opinion, our role is not necessarily to change the nature of a bill, unless it is something that Canadians are truly opposed to or it raises serious moral, ethical, constitutional or other problems.

I want to start by saying that I completely agree with the principle of Bill C-14, for the same reasons that I supported the principle of Bill S-225, which was introduced by the Honourable Senator Nancy Ruth and the Honourable Senator Larry Campbell. I support Bill C-14 because we cannot deny that Canadians are in favour of medical assistance in dying.

I know that we cannot always trust the polls, but they can still help us determine how socially acceptable a bill may be. There have been some comprehensive polls in recent years. One Ipsos Reid survey, conducted on behalf of Dying With Dignity, revealed that 84 per cent of Canadians believe a doctor should be able to assist someone who is terminally ill to end their life.

[*English*]

Eighty-four per cent of Canadians believe a doctor should be able to assist someone who is terminally ill and suffering unbearably to end their life.

[*Translation*]

That is important to point out. There have been others. The expert panel conducted a very thorough survey. Just 24 per cent of a cross-section of Canadians said that they agree or strongly agree with the statement that they "should be able to receive a physician's assistance to die in the case of a life-altering, but not life-threatening condition." The majority of respondents disagreed, but agreed in cases in which the condition becomes terminal.

For now at least, the majority of Canadians would not find it socially acceptable to go further. I do not think it is the Senate's job to go further than what the public would deem socially acceptable. We have a role as legislators, and we can introduce bills. However, is it really our job to go further, as a complementary chamber to the House of Commons? I'm not sure. We can perhaps debate this question, but I think it's the role of the government and the other place to move attitudes forward. Although we do have a role to play, is this our role when we are making amendments to a bill from the other place?

Second, I must say that I support Bill C-14 because its principle supports the Province of Quebec in its legislation on end-of-life care. The Quebec law is not perfect, however. It is a provincial health care act that was drafted before the *Carter* decision was handed down. Nevertheless, that legislation is interesting because it focuses on end-of-life care. When you actually read the legislation and look at how it's enforced, you could almost say that it is about the ultimate palliative care. However, that legislation has not always yielded positive results. It does have some shortcomings, as documented recently in the media. In particular, some physicians still aren't entirely in favour of administering medical assistance in dying, and as a result, even in a large city like Montreal, apparently it is harder to obtain medical assistance in dying than in a city like Quebec City, for instance.

We have also heard about many people who are dying and are forced to add to their own suffering in order to receive medical assistance in dying. There was the heartbreaking case of a man who wanted to say good-bye to his loved ones with a smile and gentle words for them. He was on his hospital bed and was forced to stop his pain medication so as to be able to consent in the end to medical assistance in dying. That was a special case, but there are also other cases involving hunger strikes, and so on.

I'd like to take a moment to compare eligibility under the Quebec legislation and eligibility under Bill C-14. The Quebec legislation is quite clear. There are six criteria that are quite similar to Bill C-14. The Quebec act states, and I quote:

> 26. Only a patient who meets **all** the following criteria may obtain medical aid in dying:
>
> (1) be an insured person within the meaning of the Health Insurance Act (chapter A-29);
>
> (2) be of full age and capable of giving consent to care;
>
> (3) be at the end of life;

— That is important because end of life is really defined as the terminal phase of a condition or illness —

> (4) suffer from a serious and incurable illness;

— This is also in Bill C-14 —

> (5) be in an advanced state of irreversible decline in capability; and

This is in Bill C-14 as well.

> (6) experience constant and unbearable physical or psychological suffering which cannot be relieved in a manner the patient deems tolerable.

The following criterion is also in Bill C-14. I quote:

> The patient must request medical aid in dying themselves, in a free and informed manner, by means of the form prescribed by the Minister. The form must be dated and signed . . . in the presence of . . . a health . . . professional . . . .

Quebec's law on medical assistance in dying is very clear about diagnosis and end-of-life prognosis, and it applies to people who are dying while under the care of health professionals.

My view is that Bill C-14, particularly at paragraph 241.2(2)(*d*), broadens the scope of medical assistance in dying because it is an option when death is reasonably foreseeable. However, reasonably foreseeable death is not necessarily directly associated with an illness. It relates to the general status of the condition that enables us to say death is foreseeable, without necessarily having a prognosis. Bill C-14 makes a definite distinction between diagnosis and prognosis. Prognosis is about life expectancy.

From Quebec's point of view, Bill C-14 provides doctors with the assurance that they can administer medical assistance in dying and not be charged with a crime. It also provides Quebecers with reassurance that Quebec's law may evolve, most likely for people who have a terminal illness diagnosis but whose end of life is not imminent.

I think that, for Quebecers, that addresses the criticisms that have been voiced in recent weeks.

Lastly, I support this bill because the Supreme Court has asked us to correct the sections of the Criminal Code that make the total prohibition on medical assistance in dying unconstitutional. The Supreme Court was very clear. It stated that it is Parliament's responsibility to correct the unconstitutionality of the legislation, specifically, the absolute prohibition of medical assistance in dying. As stated by the Supreme Court, and I quote:

> Complex regulatory regimes are better created by Parliament than by the courts.

Bill C-14 is therefore intended as a legislative response to the *Carter* decision. Without a doubt, many would agree that it's not perfect, but it deserves a chance to evolve, and that is what matters, I think. It gives us an opportunity to study issues such as those pertinent to people suffering from mental illness. It gives us an opportunity to study the situation of mature minors and to study advance consent.

I think that without Bill C-14, we would be depriving many Canadians of their constitutional rights as set out in the *Carter* decision.

However, speaking of constitutionality, I'm not an expert on the subject, but I think that we have had some very rich debates about it here, and I have a great deal of respect for the opinions of my colleagues who spoke on the matter. Nevertheless, I do have doubts about whether the *Carter* decision actually defines the right to receive medical assistance in dying as a constitutional right in the case of individuals who are not dying. For me, this isn't clear. It isn't crystal clear, in any case, that all Canadians who are suffering from an incurable but non-life-threatening condition have a constitutional right to receive medical assistance in dying. That is not clear.

In the last sentence of paragraph 127 of the *Carter* decision, which comes after the three criteria that everyone agrees give persons who are not at the end of life the right to receive medical assistance in dying when the illness is incurable, intolerable, and so forth, the Supreme Court says 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.

In other words, the Supreme Court of Canada is basing its criteria on cases of terminally ill people whose death is foreseeable. Are we to take these elements proposed by the Supreme Court as meaning that there is a constitutional right? I am not sure that if the Supreme Court that drafted the *Carter* decision were to receive Bill C-14, it would necessarily deem it unconstitutional. In that sense, I agree with Professor Benoît Pelletier, a professor of constitutional law at the University of Ottawa and a member of the external panel that studied the issue of medical assistance in dying, who, in my opinion, best summed up the situation, and I quote:

[*English*]

> Might there be litigation? Yes. Will this litigation eventually win before the Supreme Court of Canada? It might be so. On the other hand, it might be said that the current bill is reasonable and justifiable in a free and democratic society because of the balance that it finds among all the elements that are at issue.

[*Translation*]

In light of the testimony that the Standing Senate Committee on Legal and Constitutional Affairs heard during the pre-study, it is hard to say that Bill C-14 is unconstitutional and fails to comply with the Canadian Charter of Rights and Freedoms, just as it is hard to say with certainty that it is completely constitutional. But is it up to us to judge? I am not sure.

How can we therefore fulfill our constitutional duty? Amendments are certainly possible, but I don't think we should change the nature of the bill or prevent this bill from passing. I don't think it is reasonable to let the parameters of the *Carter* decision apply on their own, without any legislative guidelines. The *Carter* decision does not propose any safeguards, but Bill C-14 proposes that we add a number of important safeguards in subsection 241.2(3) of the Criminal Code.

For example, Bill C-14 would require that a request for medical assistance in dying be signed before two independent doctors, and that another doctor ensure that the request is in compliance. The bill also sets out regulations regarding the collection of information relating to requests for, and the provision of, medical assistance in dying. Bill C-14 consolidates the criminal sanctions imposed for failing to comply with the parameters surrounding medical assistance in dying.

The Hon. the Speaker: Senator Bellemare, your time is up. Would you like five more minutes?

Senator Bellemare: Yes please, Your Honour.

The Hon. the Speaker: Is leave granted, honourable senators?

Hon. Senators: Agreed.

Senator Bellemare: In short, I am not convinced that it is preferable to not pass the bill and simply allow *Carter* to apply. Without legislation in this regard, Canadians will not have improved access to medical assistance in dying. Without *Carter*, I do not believe that Quebecers and Canadians will have access to the services they are entitled to.

What is more, without a concrete legal guarantee that they will not be prosecuted, I doubt that doctors and pharmacists would take the risk of providing medical assistance in dying or the necessary materials. I think that without a bill, there would be a lack of important safeguards surrounding medical assistance in dying.

In Quebec, in particular, the law indicates that medical assistance in dying is available only to Canadians with health coverage. The Quebec law covers the private clinics that provide medical assistance in dying and those that may open one day. These clinics must sign agreements with the local network because there is an oversight mechanism in place.

Under Bill C-14, medical assistance in dying would be available to Canadians with health coverage, but if Bill C-14 is not passed, there is nothing in *Carter* to that effect. There is also nothing in *Carter* about private clinics.

If there is a real demand, these services may become available even without a provincial law to govern them. That is what we are seeing in Switzerland, where people are seeking this type of service through for-profit and non-profit organizations alike. And who knows what will happen then?

In the spirit of changing attitudes, and in a context in which the role of the Senate complements that of the House of Commons, I believe we should offer guarantees, through Bill C-14, to those seeking medical assistance in dying.

Such guarantees will enable us to adapt these services because the bill provides for studies and a review in five years.

[*English*]

Hon. James S. Cowan (Leader of the Senate Liberals): Senator Bellemare, my question arises out of your comments today and also your questions to me yesterday.

You refer repeatedly to public opinion polling. I'm astounded to think that you would believe that when we're evaluating, particularly as senators, how we protect the rights under the Charter of Rights and Freedoms, the constitutional rights of Canadians as confirmed by the unanimous decision of the Supreme Court of Canada, we should somehow be guided by public opinion polls as to there being more support for this category of rights and less support for that category.

You've said today, and you said yesterday, that there was obviously a higher degree of public support for medical assistance in dying for those who were close to death and less support for those who were not terminally ill.

Surely we can't discriminate amongst Canadians who have been granted their constitutional rights. We can't be guided by public opinion in determining which rights we support and for which Canadians. We clearly have a responsibility to support the constitutional rights of all Canadians, and particularly for us in this chamber, the rights of the minority.

If it is the majority, and if we're going to be guided by opinion polls and opinion polls are going to say only those who have the majority support will have their constitutional rights protected, surely that's not a position for us.

Senator Bellemare: Thank you for the question. I agree with you. We don't have to be guided exclusively by the criteria of social acceptability, but for this matter of life and death, for the matter of those who want to die and for those who have to provide the services, I think we have to consider social acceptability in this particular matter of importance.

I don't think I'm alone in saying that the Supreme Court of Canada gave a clear constitutional right to all Canadians who suffer to have the right to be assisted to die if there is no reasonable death that is announced.

I'm not certain about that, even though I heard you and Honourable Senator Joyal yesterday. It was very compelling, but is it our right, as senators, to recognize that right? Why not leave it to the tribunals and let the law evolve? As a start, I think Bill C-14 at least answers the flaw of the Quebec law. This is my point of view.

The Hon. the Speaker: Your extended time has expired as well. If Senator Cowan wishes to ask another question, it's up to the chamber to agree.

Is it agreed, honourable senators?

Hon. Senators: Agreed.

Senator Cowan: I won't repeat what was said yesterday, but we've had judgments, most recently, most clearly, from the Court of Appeal in Alberta. We had the exchange that took place that Senator Joyal and I referred to between the justices of the Supreme Court and lawyers for Canada on the application for the extension, and they very clearly said that terminality is not the test.

I don't see how we can say "notwithstanding the judicial interpretations" from the tribunals that you speak about. That's what the tribunals have said. They've already spoken. They said the Supreme Court of Canada is clear.

If the Supreme Court of Canada had wanted to use language that restricted access to those who were terminally ill, they would have done so. They didn't, and courts have repeatedly referred to it.

I suggest to you, senator, that there's absolutely no doubt about that. Surely you would agree with me that we can't disregard those very clear judicial statements and say, "Well, based upon some public opinion polling, there's more support for this and less support for that, and because there's not the same level of support for non-terminally ill patients, we should deny the constitutional rights of those persons to seek medical aid in dying." Surely you're not suggesting that.

Senator Bellemare: No, but I'm suggesting that the Supreme Court of Canada, in these last two sentences of paragraph 127, opens doubt about a recognition that is clear that the Charter of Rights recognizes the right to die as a universal right for those who suffer and those who have an incurable situation. The court said:

[*Translation*]

> We make no pronouncement on other situations where physician-assisted dying may be sought.

[*English*]

In my interpretation, the criterion of age was irrelevant in that decision. They were not looking at a specific illness but at a broad situation that opens the door so that you can have euthanasia for individuals who are not terminally ill, who do not have a prognosis of terminally ill, while in Quebec this is the definition of a terminal situation. The terminal situation is very difficult to apply. That's why in Quebec there's some flaw.

It probably will be enlarged through time, but after six years of deliberation, the National Assembly of Quebec arrived at that kind of law.

I agree with you. It was in the context where *Carter* was not there; yet people accept that, and we'll see for the future. Because subjectivity is there when a patient is suffering but is not terminally ill and he suffers and there's no cure for the moment, that there's an absolute right to that.

That's why I think our role as senators is not to confirm but maybe to affirm that there is doubt, that there's no clarity. Maybe that has been the intent of the Supreme Court and the legislators, so that we have flexibility to get laws processed to evolve through time. That's my opinion.