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BILL TO AMEND—SECOND READING—
DEBATE ADJOURNED

Speech by:

The Honourable Judith Seidman

Thursday, June 2, 2016

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Hon. Judith Seidman: Honourable senators, I rise to speak to Bill C-14, an Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) — MAID. What I am about to speak, I speak with all the knowledge I took from expert witness testimony and the serious soul-searching I went through as a member of the Special Joint Parliamentary Committee on Physician-Assisted Dying this past January and February 2016, in addition to the testimony of the Ministers of Justice and Health, who appeared yesterday for Committee of the Whole here in this place.

Bill C-14 provides a federally regulated approach to MAID with procedural safeguards to protect the vulnerable, as well as a national monitoring system through data collection. The bill has been criticized by some as too restrictive and by others as too permissive. I see Bill C-14 as minimalist, and can accept this with the knowledge that most countries that have created such legislation have done so through an iterative process, gradually, adding to it and/or altering it with experience over a period of years. However, the language used in the bill, around the definition of eligibility, raises serious concerns.

The Supreme Court *Carter* ruling provides for MAID where there is:

> . . . 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.

"Reasonably foreseeable death," as an eligibility criterion in Bill C-14, is not the language of the Supreme Court ruling. And "reasonably foreseeable death" leads to diverging interpretations of eligibility. Generally, it has been interpreted to mean that eligibility requires an individual to be in a terminal stage of their illness.

In their submissions to all parliamentary committees, the Canadian and the Quebec bar associations have criticized the "reasonably foreseeable" clause as being too restrictive. Most would agree with Joseph Arvay, the lawyer who argued the *Carter* case before the Supreme Court, when he states that "this bill, in so far as it has a reasonably foreseeable clause, is contrary to the *Carter* decision and is unconstitutional." He indicts Bill C-14 for being too restrictive — it would not even have permitted Kay Carter herself access to MAID.

The reasonably foreseeable clause has also been highly criticized as "meaningless to physicians." The Federation of Medical Regulatory Authorities of Canada, which represent all 13 provincial and territorial colleges, explains that "reasonably foreseeable" death is what they call "legal language that is far too vague" to enable doctors to confidently determine who is eligible for MAID. While physicians struggle to interpret aspects of the Supreme Court's ruling, the regulators say that the court's eligibility criteria are more manageable.

Yet, one has to believe that the government and the Supreme Court have both made deliberate choices in their language — language that has a profound impact on how one understands the intent of the bill and even the true legal meaning of the proposed determined action.

In fact, the Alberta Court of Queen's Bench ruling of May 17 — just a couple of weeks ago — is a perfect illustration of the complications encountered in the reasonably foreseeable clause. The ruling granted MAID to an individual who was not terminally ill and suffered from a primary psychiatric condition. In its conclusion, the court stated:

> It is not appropriate . . . to revisit these issues, which were considered at length and decided by the Supreme Court in *Carter 2015* . . . .
>
> . . . *Carter 2015* does not require that the applicant be terminally ill to qualify . . . . The decision itself is clear. No words in it suggest otherwise. If the Court had wanted it to be thus, they would have said so clearly and unequivocally. They did not.

Just Monday this week, on May 30, it was revealed that the Ontario Superior Court echoed the Alberta ruling when it said that ". . . the Supreme Court's minimum standard for the right to an assisted death is the loss of quality of life, not whether natural death is 'reasonably foreseeable,' as stated in the Liberal bill." Furthermore, Ontario Superior Court Justice Paul Perell said, "There is no requirement . . . that a medical condition be terminal or life-threatening."

Honourable senators, our special joint parliamentary committee made 21 recommendations; three were specific to the issues of advance requests, mature minors and individuals suffering from psychiatric conditions.

While Bill C-14 does not permit access where mental illness is the sole underlying condition, it does allow for eventual additions and alterations to the bill to address this. However, there are some who say that Bill C-14 is open to a court challenge on this very omission, and that such a challenge would condemn a person at their most vulnerable time to cruel and unusual punishment in revisiting the Supreme Court ruling once again.

Indeed, two other important recommendations made by the special joint parliamentary committee are not addressed in Bill C-14: access to mature minors and the use of advance requests. In the preamble of the bill, these have been designated for further study.

It is important to recognize that Bill C-14 is a legislative framework with a compulsory monitoring regime in order to compile data to analyze and evaluate how MAID is working in practice. It also ensures a full parliamentary review of its provisions in order to change and/or add to the existing framework.

Honourable senators, many have recently expressed that it is preferable to have no federal bill than to have a flawed one. Indeed, Mr. Arvay recently said that the government's proposed

legislation was "awful" and that he "would rather see this bill die" than become law.

The special joint parliamentary committee heard testimony from a constitutional expert, Professor Peter Hogg, who explained that it is a prerequisite to have federal legislation in order to ensure consistent access to MAID, especially in provinces where no such legislation exists.

It is important to note that at this eleventh hour, the regulators, provincial colleges of physicians and surgeons, have announced guidelines that define eligibility. These guidelines uniformly meet the essence of the language of the Supreme Court *Carter* ruling.

It is my belief that federal legislation is imperative to secure the very basic framework for a safe, coherent, universal, accessible system of MAID in every province and territory in Canada.

Federal legislation, and indeed Bill C-14, will reassure not only physicians but those other allied health professionals, nurse practitioners and pharmacists, that their participation will be free from prosecution. Bill C-14 also ensures their rights to conscientious objection as prescribed by the Supreme Court ruling.

Federal legislation will also fulfill two other necessary requirements that are, in my view, critical for oversight: the creation of a national information system to monitor MAID and a built-in review at the start of its fifth year, which will provide evidence-based data to update the law.

We have the opportunity, as a chamber of sober second thought, to amend Bill C-14 in order to live up to the challenge the Supreme Court tasked us with as parliamentarians.

In my judgment, recognizing from experiences in other countries that legislation on medical assistance in dying will be an iterative process over time, understanding the necessity for Canadians to have equal access with appropriate safeguards, we must amend the bill to be true to the eligibility language of the Supreme Court *Carter* ruling, no more, no less.

This would require the removal of section 241.2(2)(d): "their natural death has become reasonably foreseeable . . . ."

I look forward to our continued debate at second reading and further committee work. I know we will struggle with what is truly the most difficult piece of legislation we will likely ever deal with in our time as parliamentarians, but we must try and get it right for Canadians. Thank you.