Submission to the Senate standing committee on legal and constitutional affairs

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Thank you for inviting me today. I am honoured by this opportunity; I regret that I cannot be there in person. A crucial question before you is: whether under s 1 of the *Charter*, Parliament is authorized to restrict the class of persons declared by the court in *Carter* to be eligible to exercise their s 7 rights to physician- assistance in dying?

Some argue that because the Bill prescribes narrower eligibility criteria than *Carter*, it must therefore be unconstitutional. But this is not necessarily true. I wish to explain why.

After the Supreme Court has declared a law to be constitutionally invalid, Parliament and provincial legislatures can (and often do) enact new legislation to meet the same objective that the old one was intended to achieve. The most prominent example is the 1999 case of *R v Mills*. Although Parliament had made a law that was strikingly similar to the one struck down, the court said that this did not automatically render the new legislation unconstitutional.

I quote: "The law develops through dialogue between courts and legislatures. Against the backdrop of [the procedures that the court laid out in *O'Connor*, striking down the original legislation] Parliament was free to craft its own solution to the problem consistent with the Charter."

Therefore, in principle the court can, and in practice it sometimes does, defer to Parliament. Crucially, the court stated in *Carter*, "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." Importantly, the court stressed that "complex regulatory regimes are better created by Parliament than by the courts." It proceeded to suspend its declaration of invalidity twice, to grant Parliament an opportunity to pass relevant legislation.

Section 1 of the *Charter* provides that its rights and freedoms are "subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The question is whether Bill C-14's restrictions on the rights affirmed in *Carter* constitute "reasonable limits"?

The court in *Carter* held that banning physician-assisted suicide altogether did not qualify as "reasonable limits"; it concluded that the absolute prohibition was not "necessary in order to substantially meet the government's objective" and therefore, it was disproportionate. The court characterized the law's objective as the "goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness." The

court rejected the government's position that the objective of the blanket prohibition on assisted suicide was to preserve life or even to prevent suicide. The court is generally reluctant to let Parliament rely on "vague and symbolic objectives" to justify infringements of *Charter* rights.

Bill C-14 lifts the blanket ban on medical aid in dying, but only for those whose death is "reasonably foreseeable". Those like Ms. E.F. (the 58 year-old woman suffering from a painful psychogenic movement disorder involved in the recent Alberta Court of Appeal case) would not be permitted medical assistance in dying under the proposed regime.

The rationale behind this restriction differs from the court's line of reasoning in *Carter*. But as I have already noted, the Supreme Court itself acknowledges that we cannot expect the courts and legislatures to always be of one mind; the very possibility of dialogue precludes it. It's important to note that the specific legal effect of the *Carter* decision was the invalidation of the blanket ban. You cannot presume that, if the court were to hear a constitutional challenge of this legislation, that it would apply its reasoning in Carter whole-cloth.

If the court were to strike down Bill C-14, it would be because it had concluded that restricting the class of persons eligible to seek medical

assistance in dying to those expected to die imminently, violates the *Charter* in a manner that cannot be demonstrably justified in a free and democratic society.

On the other hand, the court would justify its refusal to strike down the law, on the basis of its respect for Parliament's democratic legitimacy, acknowledgment of the ethically contentious nature of this issue, and recognition of Parliament's unique sovereignty and legitimacy developing a complex regulatory regime.

The Supreme Court is the final authority on how the *Charter* should be interpreted and applied. But it has not reviewed and rendered a decision on the constitutionality of this Bill.

While the parameters in *Carter* are wider than those in this Bill, they are not as wide as they could be. The court did not interpret the *Charter* in such a manner that would invalidate *any* law that prohibits a competent adult (who gives informed, voluntary consent) from obtaining assistance in ending their lives. The court drew a line, restricting eligibility to those, for instance with a medical condition. It is not evident why, according to s 7, only those with a medical condition should be eligible to receive assistance in terminating their lives.

I am not trying to trivialize the suffering of those like Ms. E.F. (who qualified under *Carter* but would not under this Bill). I am just pointing out that *Carter* itself restricts access to medical aid in dying. In principle, therefore, I think Parliament may do so, also.

Whether it is constitutional for Parliament to restrict access to medical aid in dying in the manner it proposes in this Bill, turns on an application of the Supreme Court's s 1 jurisprudence to this specific piece of legislation. No one can predict with absolute certainty what the Supreme Court will decide if this Bill is challenged in the future. Thus, you have a solemn duty—along with (among other things) the benefit of the court's ruling in *Carter* and the opportunities that debate and deliberation in the Chamber affords—to interpret the Constitution and apply it to this Bill.

I thank you for the opportunity to appear before you—and for undertaking this difficult and important work. I am happy to respond as best I can to any questions you may have.