Peter W. Hogg
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Presentation to Standing Senate Committee on Legal and Constitutional Affairs
Bill C-14 (medical assistance in dying)

Credentials

I am the Scholar in Residence at Blake, Cassels & Graydon LLP. I am also a Professor Emeritus of the Osgoode Hall Law School of York University, where I taught from 1970 to 2003, serving as Dean for the last five years. My specialty is constitutional law, and my principal publication is *Constitutional Law of Canada* (Carswell, 5th ed., 2007, 2 volumes annually supplemented in the loose-leaf edition).

I have no expertise on physician-assisted dying, and can only help you on issues of constitutional law.

R. v. Carter 2015 SCC 5

The order of the Supreme Court was (para. 127):

> "The appropriate remedy is therefore a declaration that s. 241(b) [aiding and abetting suicide] and s. 14 [consent of deceased does not change criminal responsibility] of the Criminal Code are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (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 her condition."

The Court suspended this declaration of invalidity for 12 months, which was later extended to 16 months (to June 6). The Court said (para. 126) that the purpose of the period of suspension was to allow "Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation *consistent with the constitutional parameters set out in these reasons*." (My emphasis.)

Bill C-14

The House of Commons has now passed Bill C-14, and one of the issues that the Senate has to resolve is whether the Bill is "consistent with the constitutional parameters set out in" the *Carter* reasons. That is the only point on which I am qualified to provide advice. In my opinion, the Bill is not consistent with the constitutional parameters set out in the *Carter* reasons.

The most important deviations from the *Carter* reasons are the provisions of the Bill that purport to define "grievous and irremediable medical condition" by adding end-of-life requirements, namely, s. 241.2(2)(b) ("they are in an advanced state of irreversible decline in capability") and 241.2(2)(d) ("their natural death has become reasonably foreseeable"). If you go back to the Court order, above, you will see that neither of those requirements (nor anything to the same effect) was in the Court order.

In two recently decided cases, courts have decided that the *Carter* right is not limited to end-of-life cases. One was decided by a unanimous Alberta Court of Appeal (*Canada v. E.F.* 2016

ABCA 155, May 17, 2016); the other by Perell J. of the Ontario Superior Court of Justice (*IJ v. Canada* 2016 ONSC 3380, May 24, 2016). In both those cases the applicant was suffering from a grievous and irremediable medical condition that was not terminal. In both cases a careful analysis of the *Carter* reasons yielded the conclusion that no end-of-life requirements were express or implied. In both cases permission was granted for a physician-assisted death.

It is clear from these two decisions, that the class of persons entitled to the Charter right of physician-assisted death includes people whose suffering is not an end-of-life condition. But, if Bill C-14 were enacted in its present form, the class of entitled persons would no longer include people whose suffering is not an end-of-life condition. It is incredible to me that the Court in *Carter*, when it called for legislation by Parliament "consistent with the constitutional parameters set out in these reasons" was envisaging legislation that would *narrow* the class of entitled persons. The Court obviously wanted Parliament to enact procedural safeguards to avoid the risk of error or abuse, which of course Bill C-14 does provide in s. 241.2(3) to (9). The Court would have no reason to object to the *widening* of the entitled class perhaps to include mature minors, who could thereby acquire a statutory, but not a constitutional, right to physician-assisted dying. But, for the legislation to narrow the class by *taking away* a right that had just been deliberately granted by the Supreme Court, seems to me to be inconsistent with the constitutional parameters set out in the Court's reasons. The Court certainly gave no indication that the constitutional parameters could be limited under s. 1.

If Bill C-14 is enacted in its present form, it can safely be predicted that a member of the newly excluded class—those who satisfy the *Carter* criteria and do not have an end-of-life condition--will bring a constitutional challenge to the new legislation. The challenge will come before a single judge and the challenger will show the judge three things: (1) the order made by the Supreme Court in *Carter*, (2) the two decisions confirming that *Carter* did not require any end-of-life conditions, and (3) sections 241.2(2)(b) and (d) of Bill C-14. What judge would not strike down the end-of-life provisions?

That concludes my submission, but let me commend to you the brief to the Senate on Bill C-14 by Jocelyn Downie, dated May 5, 2016. She is admirably qualified to comment since she is a Professor of Law and Medicine at Dalhousie University. She walks carefully through the Bill, identifies a number of other places where it departs from the *Carter* declaration of invalidity, and makes other suggestions for changes that I at least thought well worth your consideration.

All of which is respectfully submitted,

Peter W. Hogg