

Physician-Assisted Dying: The Senate's Role in the Legislative Process

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Physician-assisted dying is now legal in Canada. In the case of *Carter v Canada (Attorney General)* 2015, the Supreme Court of Canada struck down the provisions of the *Criminal Code* prohibiting it.^[1] The House of Commons was responsible for amending the law in response to the Court decision,^[2] and did so by passing Bill C-14.^[3]

For a Bill to become law, the Constitution requires it be passed by both the House of Commons and the Senate.^[4] The Senate was considered a “wildcard”^[5] in the passing of Bill C-14 because of the unusually active role it played in the process.

The Fathers of Confederation intended the Senate to provide “sober second-thought”^[6] in the legislative process. However, with the passage of time, the Senate has often appeared to serve as a ‘rubber stamp’, rather than as the provider of sober second thought. Senators in this case appeared to seize the opportunity to exercise their intended role when the House of Commons passed Bill C-14.^[7]

Constitutionality of Bill C-14 called into question

When the House of Commons passed Bill C-14, some lawyers and pundits were left unsatisfied. They were concerned that this new legislation was not consistent with some of the requirements for physician-assisted dying laid out by the Supreme Court in *Carter*. In particular, they believed that it too heavily restricted access to the service.

In the *Carter* decision, the Court ruled that physician-assisted dying should be allowed for people who:

1. clearly consent to dying, and^[8]
2. have a grievous and irremediable medical condition causing intolerable suffering.^[9]

The government response to the decision restricted the definition of a “grievous and irremediable medical condition to mean that a person must be in an “advanced state of irreversible decline.”^[10] More controversially, the Bill also required that the person’s natural death be reasonably foreseeable.^[11]

Critics of Bill C-14 believe it is an unconstitutional attempt to limit who can access physician-assisted dying services. They argue that the Supreme Court has already stipulated

what conditions are required for constitutionally permissible physician-assisted dying.[12] The federal government admitted in a case brought before the the Alberta Court of Appeal, that the *Carter* decision does not require an applicant for physician-assisted dying to be at or near the end of life.[13] Critics say this admission illustrates the questionable constitutionality of the Bill. The Globe and Mail Editorial Board went so far as to claim this illustrated a “fatal flaw” in the approach the Government had taken to Bill C-14.[14] It implored the Prime Minister “to at least consider the possibility that his government made a mistake.”[15]

The Senate amends Bill C-14

The questionable constitutionality of Bill C-14 motivated the Senate to act.[16] Rather than rubber stamping the Bill, Senators proposed many amendments,[17] the most significant of which removed the reasonable foreseeability of death requirement from the legislation.[18] This was a fundamental change, at odds with what the Liberal Government was advocating.

The controversial and time-sensitive nature of the physician-assisted dying debate contributed to the press coverage the Senate amendments received. This was compounded by the Senate exercising its authority against the wishes of the elected House of Commons, which is somewhat controversial in its own right. In the recent past, instances of this happening are uncommon.[19]

Recent changes to the Senate could have played a role in these events. In 2014, Justin Trudeau removed all Senators from the Liberal Party caucus, resulting in formerly-Liberal Senators sitting as independents.[20] With the election of a Liberal government in 2015, these Senators could not influence government policy. The new arrangement also meant they were not controlled by Liberal Party officials, and may not have felt compelled to toe the party line. This reform may have been the root cause of the Senate’s approach to Bill C-14 and may not be an isolated event: the House of Commons may have to contend with a more active Senate in the future.

The outcome

The Senate’s amendment to Bill C-14 meant that the Bill had to be returned to the House of Commons for reconsideration. The House of Commons stood firm and rejected the amendment to remove the reasonable foreseeability of death requirement from Bill C-14.

The final version of Bill C-14, including the reasonable foreseeability of death requirement, was sent back to the Senate to be considered a second time. Would the Senate derail the legislative process after its crucial amendment had been spurned? As it turned out, no they would not. The Senate’s opposition to the legislation dissolved. The second Senate vote, 44 in favour and 28 against, wasn’t even close.[21] Thus, after all the criticism Senators levied at the Bill the first time around on constitutional grounds, they let the House of Commons off the hook. One Senator stated they “accept the message passed by the House of Commons.”[22]

It is possible to criticize the Senate for making this very public retreat from thinking soberly. What remains to be seen however, is whether the Senate's concerns about the unconstitutionality of the newly-enacted legislation will be proven correct. One group, the British Columbia Civil Liberties Association, is already challenging the new legislation.^[23]

[1] 2015 SCC 5 at para 126 .

[2] *Carter v Canada (Attorney General)*, 2016 SCC 4 at para 14 (“The Court unanimously held in its judgment on the merits that these are matters most appropriately addressed by the legislative process.”).

[3] Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 14 April 2016) [Bill C-14].

[4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 55, reprinted in RSC 1985, Appendix II, No 5.

[5] Rachel Aiello, “Lobbying on physician-assisted dying continues as new law nears passage”, *The Hill Times* (16 May 2016), online: <www.hilltimes.com/2016/05/16/lobbying-on-physician-assisted-dying-continues-as-new-law-nears-passage/63755>.

[6] *Debates of the Senate*, 5th Parl, 3rd Sess, No 1 (26 March 1885) at 433.

[7] Aaron Wherry, “C-14 shows the Senate merely doing its job: The much-maligned Red Chamber passes legislation on medically assisted death”, *CBC News* (18 June, 2016), online: <www.cbc.ca/news/politics/wherry-senate-c14-1.3641211>.

[8] *Carter*, *supra* note 1 at para 147.

[9] *Ibid.*

[10] *Bill C-14*, *supra* note 3, cl 3.

[11] *Ibid.*

[12] Joan Bryden, “Assisted Dying Bill C-14 Is Unconstitutional: Leading Expert”, *Huffington Post* (6 June 2016), online: <www.huffingtonpost.ca/2016/06/06/leading-constitutional-expert-says-assisted-dying-law-unconstitutional_n_10317512.html>.

[13] *Canada (Attorney General) v EF*, 2016 ABCA 155.

[14] Globe Editorial, "Ottawa's assisted-suicide legislation contains a fatal flaw", *The Globe and Mail* (24 May 2016), A12, online: <www.theglobeandmail.com/opinion/editorials/ottawas-assisted-suicide-legislation-contains-a-fatal-flaw/article30130762/>.

[15] *Ibid.*

[16] Joan Bryden, "Assisted dying bill: Senate sends C-14 back to House with 7 amendments: Senators vote 64-12 with one abstention to pass amended bill, but head count obscures senators' mixed feelings", *CBC News* (16 June 2016), online: <www.cbc.ca/news/politics/assisted-dying-c14-senate-amendments-1.3638240>.

[17] *Debates of the Senate*, 45th Parl, 1st Session, No 45 (8 June 2016) at 938.

[18] *Ibid.*

[19] Patrick Malcolmson & Richard Myers, *The Canadian Regime: An Introduction to Parliamentary Government in Canada*, 4th ed (Toronto: University of Toronto Press, 2009) at 131.

[20] Goria Galloway & Josh Wingrove, "Trudeau cuts Liberal senators loose in push for a non-partisan Red Chamber", *The Globe and Mail* (29 January 2014), online: <www.theglobeandmail.com/news/politics/trudeau-to-boot-senators-from-liberal-caucus-in-bid-to-restore-senate-independence/article16567413/>.

[21] *Ibid.*

[22] Catherine Tunney, "Liberals' assisted-dying bill is now law after clearing final hurdles: Senate rejects amendment that would have sent bill to Supreme Court for review", *CBC News* (17 June 2016), online: <www.cbc.ca/news/politics/assisted-dying-bill-senate-approval-1.3640195>; Contra Chantal Hébert, "Canadian Senate's acceptance of bill C-14 start of a power struggle", *Toronto Star* (18 June 2016), online: <www.thestar.com/news/canada/2016/06/18/canadian-senates-acceptance-of-bill-c-14-start-of-power-struggle.html>.

[23] British Columbia Civil Liberties Association, News Release, "ASSISTED DYING: Woman with Spinal Muscular Atrophy and rights watchdog launch legal challenge for right to die with dignity" (27 June 2005), online: BCCLA <www.bccla.org/news/2016/06/lamb-legal-challenge-launch/>.