FROM: Senate Hansard, Thursday June 2, 2016

…

Hon. Murray Sinclair: Honourable senators, I couldn't help but have a feeling of déjà vu here as I was listening to the debate this afternoon — not because I'm standing for the second time today, but because I left a job in which I had to sit and listen to lawyers argue over constitutionality all day. All we have been doing all afternoon is arguing constitutionality. Therefore, I think I will make some comments about that.

I wanted to add my voice to the other senators who are speaking about this particular bill on medical assistance on dying. I have a number of comments I want to make about the provisions of the bill, and I also want to talk about the constitutionality question.

I want to begin by noting for the record that, as you all know, I have been a senator here now for exactly two months, having been summoned to this chamber on April 2 of this year. I am told — and I can certainly see from not only the level of the debate and nature of the debate but also from the bill itself and from the public comments that we have all observed — that this bill is one that is going to define this country for some time to come. It certainly represents an opportunity for Parliament, including this chamber, to make a bold statement about the character of this country and about who we are, about our sense of compassion, about our courage as human beings, about our kindness to each other and about our respect for life and for each other.

Yesterday, as I sat in this chamber listening to the questions that were asked of the ministers involved — along with the several comments that many of you sly, veteran senators tagged on to your questions — I felt a significant degree of pride in this place and in all of you.

In this place, I heard hard questions being asked and answered. I heard references to mothers, fathers and the impact that this proposed law might or might not have for them and for others in like circumstances. I observed your intelligence and heard and felt your passion about this bill, and I certainly felt your humanity.

While I heard the occasional partisan jab, such comments were usually spoken as gentle jabs toward each other and not as a means to score empty points. Perhaps, as was mentioned, the presence of cameras broadcasting the proceedings yesterday brought about an added air of civility and positive behaviour and all of that which has been mentioned on Twitter and Facebook.

That may, in fact, speak to the need to reconsider allowing them into this chamber. But it certainly did show that this chamber can be a strong, passionate, dignified place of wise and careful deliberation. I therefore wanted to extend to you my personal

congratulations for showing this country what this place really stands for and to thank you for making me feel proud to stand among you.

That brings me to a consideration of how I believe we ought to proceed and how I am going to proceed in my assessment of this bill and other legislation that comes before us.

I begin with this thought: Based upon my experience and the way that I have been raised, I am going to believe and treat this place, the Senate of Canada, as though it is the place of "Canada's Council of Elders." Among my people, elders are treated with great respect, for it is recognized that their experience and life achievements have given them the right to be seen as wise people, and the responsibility to behave as such.

Elders are the ones consulted about the communities or the individual's most significant problems, and their advice is sought to help those who have the ultimate responsibility to make the final decisions about their lives.

Elders do not become or take up the cause of one side or the other in a dispute, but work to help others overcome their differences.

Elders are the ones to whom young leaders come with their proposed plan or a problem and are asked what do you think of this. They listen, discuss and advise. Ultimately, they recognize that the ultimate decision rests on those whose actions must be taken or problem must be solved to accept the elder's advice or not, for it is they who must live with the consequences of their decision.

As I said, I see many similarities with this place. We must not forget that we are not elected. We are not accountable to the citizens of this country for our actions in the same way as those who are elected. Like judges, we are appointed. Like judges, we are entrusted with plenary powers which, if we exercise too often, too easily, or inappropriately, we run the risk of bringing disrepute to this place, and we do not want that.

We hold office until the age of 75, which means that we are expected to bring the wisdom of our life experiences to bear on those issues that come before us.

When legislation is forwarded to us for consideration, we have an obligation to proceed carefully, in full recognition that it is here before us because 337 men and women elected by the people of this country to govern them have given it every consideration and that the majority of them, who have been selected to administer the government of this country, have proposed and passed the bill in order to meet their governmental objectives.

In other words, the people elected to govern have exercised their right to govern in this way. We must not interfere easily with that right.

(1800)

None of us should believe that we are here as opponents or proponents of the government in power. We are here to consider, to discuss, to bring our collective wisdom to bear and to decide what to advise those who govern about what we think. We are entrusted to ensure that regional interests are properly considered, that the citizenship and legal rights of minorities are protected, that there is an overall fairness to each law and that the proposed law is clear, concise and constitutional. We do not have to agree with the law. If it is properly passed and meets the test of Senate consideration, we must allow it to proceed, in my view.

With the greatest of respect to those who think otherwise, we were not appointed to govern. We were appointed primarily to review and to advise, but with an inherent power to prevent government abuses.

I was a judge in this country for 28 years and I can assure you that there were times I applied a law which I did not personally agree with because that was required of the office I held. That is also true here.

During our time here, we have an obligation to show Canadians that they expect this place to abide by those two important principles. We will allow and we will assist the government to govern and we will protect the rights of those whose minority positions are threatened by majority rule. We must abide by the proverb that when two foxes and a chicken are voting on what to have for dinner we will stand up for the chicken.

Bill C-14, as has been mentioned many times here and elsewhere, is unique legislation. It essentially allows a person to have another person help them to die. The prohibition against assisting someone to commit suicide is one of long-standing basis in Canadian and English law. Life is sacred to us and we, as a nation, believe that should be continued as such. People should not have it taken away from them, even at their own hand.

It has been illegal in this country to attempt to end your own life since our first Criminal Code. That amendment occurred not too long ago within the lifetime of all of us here. Committing suicide as an act in and of itself could not be rendered an offence since of course if you were successful in committing suicide you were dead and beyond the reach of the law, at least the law of humans.

But often committing suicide had legal ramifications for those left behind. It was part of the common law of England for example for members of a suicide to be legally punished. Their property could be forfeited, they could be ejected from their lands, they could be excommunicated, and burial of suicide victims or family members in a community or church-run cemetery could be denied.

We have come a long way from this, but it is to be noted that it is still common practice in our law in this country, and elsewhere, for us to allow insurance companies and pension companies to deny benefits to the families of suicide victims.

Suicide was not easily condoned in any nation, and we do not want a society to think that suicide is always an option. We certainly do not want others encouraging others to end their lives. Those prohibitions continue in our law.

As a matter of principle, we still believe that life ought to be sacred. Therefore, when we are asked to consider a bill which undermines that principle, we must proceed cautiously. Our obligation as senators is to ensure that this law protects the weak, the impressionable and the vulnerable from themselves if necessary but certainly from others.

We must ensure that as a matter of principle taking one's life is not undertaken easily. We must not open the door too wide or try to imagine every possible scenario where one might want to die and facilitate, in law, such potential wishes or scenarios. We must proceed cautiously and we should proceed incrementally.

We must also recognize that the limiting factor here is that the federal government is limited to dealing with the criminal law and public health aspects of this.

I would like to consider the issue that has been raised here throughout the day, and that has to with the constitutionality issue. Some in this chamber have suggested that the bill fails and may be unconstitutional because it fails to uphold the principles set out in the *Carter* decision.

We should not be surprised that there are disagreements over issues of legality and interpretation. Lawyers are notorious for being able to dance on the head of a legal pin. But we must take those concerns seriously here for that is our obligation.

I would point out though, as would many of my former judge colleagues, that half of all lawyers who appear in our courtroom are wrong. Most seem to suggest that the bill fails because it recognizes a constitutional right in a manner that is less than what*Carter* said. They suggested that it is only the four principles set out by the court in paragraph 127 of that decision that can be enacted and that anything less is unconstitutional. Those principles have already been enunciated to you here today. The allegation that the law is unconstitutional arises, as I understand it, because of the addition of the words "natural death that is reasonably foreseeable" as well. I agree that those words are not found in *Carter*. I do not agree however that renders the bill unconstitutional.

I have presided as a judge over many cases involving laws enacted after constitutional invalidation where the government enacted something less than what the Supreme Court of Canada has stated. *O'Connor* applications, referenced by Senator Baker here today, are the best example of that. Hundreds of such applications are heard by judges every year.

Judges of course are all familiar with the Supreme Court's holding in *Mills* again referenced by Senator Baker here today where the Supreme Court of Canada rejected an argument that the legislation following an earlier invalidation must comply totally

with its earlier decision. It does not. It must comply with the Charter, and in my opinion, in this case it does.

As Thomas McMorrow in an on-line article noted:

The Court in *Carter* noted: "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."

Those words have been referenced here many times.

Importantly the Court stressed that "complex regulatory regimes are better created by Parliament than by the courts." Moreover, why would the Court be willing to twice extend Parliament's deadline to tailor a new law, if *Carter* imposed a legislative straitjacket?"

In her testimony before the standing committee Diane Pothier testified that in her opinion the proposed bill was constitutional. As we heard in the house yesterday, the government considers that it is constitutional. It has considered the issue of limiting the right to medical assistance in dying very carefully. They have reviewed the public willingness to support this bill. They conclude that Canadians want the right to medical assistance in dying limited to those cases where a person's natural death is reasonably foreseeable.

They have done what appears to me to be an appropriate Charter analysis. In doing their work in enacting a bill, every government has a responsibility as does this Senate, to take a look at section 1 of the Charter and ask ourselves whether the law complies with it.

(1810)

The Hon. the Speaker: Senator Sinclair, your time is up. Are you asking for an additional five minutes?

Senator Sinclair: I will take two.

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

Hon. Senators: Agreed.

Senator Sinclair: It says:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Charter itself recognizes the right of governments to legislate for less than what the Charter contains in its provisions.

If there is a constitutional challenge to this bill then the government would likely, in my view, be able to sustain a strong argument that the requirement that the applicant had to be able to show that natural death is reasonably foreseeable would be sustainable.

Therefore, while I understand all of the arguments that have been put forward here today on the constitutionality question, I, with respect, disagree with them. I suggest that the bill does not have to comply with *Carter*, but the bill does have to comply with the Charter and, in my view, the government has acted appropriately to do so.

Thank you.