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Some Senators open to blocking government's MAID legislation, while others say that's 'overstepping'

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With a law already on the books that says an expansion of MAID will become legal on March 17, the Senate holds some leverage in the matter. If a bill does not pass both houses by that date, the sunset clause will expire.

As the government rushes to push through legislation that would further delay legalizing medical assistance in dying for those suffering solely from mental illness until 2027, it could all come down to the will of the Senate.

On Feb. 1, Health Minister Mark Holland (Ajax, Ont.) introduced legislation that would add a further three-year delay to the legalization of MAID where mental illness is the sole underlying cause. The move comes after a Special Joint Committee of the House of Commons issued a report saying that Canada was not ready for such an expansion, and the health ministers for seven provinces and three territories wrote a joint letter to Holland asking the federal government to "indefinitely pause" the expansion.

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gal on March 17, the Senate holds some leverage. If a bill does not pass both chambers by that date, the sunset clause—which was already extended for an extra year—will expire.

Advocates of expanding MAID have argued that the government's own readiness metrics it identified last year are now in place, and that the committee's study of the bill veered away from assessing readiness and instead became a relitigation of whether or not this form of MAID should be legalized.

Some proponents of expansion—such as University of Ottawa law professor Daphne Gilbert, who is also vice-chair of the board for Dying With Dignity Canada—have called for the Senate to block the legislation from the House.

In a Feb. 8 op-ed in The Hill Times, Gilbert argued the Senate should look to past instances when it stood against the House—particularly its 1991 defeat of the Mulroney government's attempt to pass new abortion legislation, after the previous law was struck down in *R v Morgentaler*. Gilbert wrote that delaying this expansion of MAID on the grounds

In 2021, a Senate amendment to Bill C-7 set Canada on the path to legalizing MAID for mental illness. Now, as the Senate prepares to receive legislation that would delay the expansion by another three years, some advocates are calling on it to block the will of the House of Commons. The Hill Times photograph by Andrew Meade

of readiness "flies in the face" of the evidence, and Senators should "fulfil their mandate to uphold the Constitution" by defeating the bill.

The Senate contains a number of strong supporters of expanding MAID, including ISG Senator Stan Kutcher (Nova Scotia), whose 2021 Senate amendment to Bill C-7 introduced the plan to legalize MAID where mental illness is the sole underlying cause—something which was explicitly ruled out in the government's original draft of that bill. C-7 was returned to the House, which accepted that amendment with the delay period to allow for readiness.

Senators weigh in The Hill Times spoke with several Senators for their views on the pending bill.

ISG Senator Paula Simons (Alberta), who noted that she "spoke passionately"

in favour of the 2021 amendment to C-7, said she has not reached a decision, but is open to the idea of blocking the bill.

Simons said it is not a question of whether the Senate is within its rights to vote it down, but whether that would be the best approach.

“It would be legitimate,” said Simons. “Whether it would be politically astute is a separate question.”

Simons said the Senate has a role as “a bulwark against majoritarian tyranny.”

“One of the Senate’s primary responsibilities is to uphold the Charter of Rights and Freedoms and protect individual rights. It’s what happened in 1991 with the abortion legislation,” said Simons. “What is a different question is whether this rises to that level politically. Because for the independent Senate to provoke a constitutional crisis over this is a very tough political decision.”

Simons said there is, at minimum, a strong desire among Senators to thoroughly study the bill at committee, and not simply send it through Committee of the Whole. She said she is “not happy” with “the government’s attempt to ram this through the Senate.”

“Wherever you stand on the issue ... it is making very few people in the Senate happy—the idea that we should just do Committee of the Whole, and whip this through without having debate and discussion in our chamber,” said Simons.

Kutcher told The Hill Times that he is calling on the bill to be sent to the Senate’s Legal and Constitutional Affairs Committee and to its Social Affairs, Science, and Technology Committee to “conduct a pre-study of this bill to help

inform our debates and deliberations.”

Simons added there is another political consideration that could affect her vote. Conservative Leader Pierre Poilievre (Carleton, Ont.), who currently holds a large lead in most public opinion polls, has indicated he would permanently scrap the expansion if he forms government.

“Mr. Poilievre has made it very plain his opposition to this,” she said. “So this is the last chance for people for a long time.”

ISG Senator Tony Dean (Ontario) raised similar concerns, and left the door open to blocking the bill.

“Canadians seeking access to MAID, as well as those who support having this choice, will look to the Senate as their only and possibly last hope for the foreseeable future,” Dean told The Hill Times, noting Poilievre’s position on the issue, as well as the “alarm” expressed by those who have been waiting to access this form of MAID. “This is the context in which the Senate will now be reviewing Bill C-62.”

Non-affiliated Senator Frances Lankin (Ontario), who recently took on the role of government liaison in the Senate, took a different view.

Lankin had supported Kutcher’s 2021 amendment to C-7, and told The Hill Times she continues to support this form of MAID eventually being legalized. However, she believes a delay is the right choice, and that the Senate should abide by the will of the House.

Lankin moved into the role of government liaison just over a week ago on what she calls a “sixmonth secondment”

to further implement some Liberal government reforms around making the chamber more non-partisan.

She said her decision is based on concerns around readiness, as well as the position taken by provincial health ministers in their letter to Ottawa, and a number of mayors and Indigenous leaders she has consulted. She said these voices should inform the Senate’s position, even if some experts say the readiness component is in place.

“I’m really tough on jurisdictional issues. I think the feds have a role, and the provinces have a role, and we’ve got to respect each other in terms of the kind of federal system that we have,” said Lankin.

As a former elected member of the Ontario legislature, Lankin said she has “a lot of respect for the boundaries on the role of the Senate” and blocking the bill could be “overstepping.”

Conservative Senator Don Plett (Landmark, Man.), who serves as his party’s leader in the Senate, also spoke strongly against the idea of overriding the House.

A long-standing opponent of all forms of MAID, Plett noted he “opposed the amendment as strenuously as [he] could” in 2021.

Plett, who has sat in the Senate while his party has been in both government and opposition, said he believes the Senate must follow the will of the House.

“I hear more often from across the country... ‘you have an obligation to support what the House of Commons is saying, and you have no right to defeat government legislation,’” he said.

While the House did accept the Senate amendment to C-7 in 2021, Plett said it appears that “over the last year, the Parliament has clearly come to the realization that Canada is not yet ready for it,” and that he looks at this “more as the House rejecting the amendment” that was made to C-7 in 2021.

NDP MP Alistair MacGregor (Cowichan–Malahat–Langford, B.C.), who was his party’s sole member on the Special Joint Committee, also raised concerns about the idea of the Senate blocking the bill. The NDP does not have Senators, and the party’s long-standing position is to abolish the Senate.

MacGregor said the current scramble to extend the sunset period in advance of the looming deadline stems from the fact that C-7 was amended in the Senate in 2021.

“We are in this mess because of a Senate amendment to bill C-7 in the 43rd Parliament ... which drastically changed the nature of the bill,” said MacGregor. “So all the problems we’re experiencing now—whether it’s the game of catch up, the constant punting down the road of the date—those all stem from a Senate amendment.”

To any Senators considering blocking the bill, MacGregor said he would “caution them greatly on this issue.”

“The House of Commons is a direct representation of the people of Canada. We were elected here,” said MacGregor. “And I think our voice necessarily has to be given greater weight when it comes to an impasse between both chambers.”

Senate should maintain status quo, says professor Dave Snow, a political science

professor at the University of Guelph who studies constitutional law and the Charter, said the Senate absolutely has the power to block the bill if it chooses, but that doesn’t mean it should.

“They technically could, and I don’t think that there’s anything approximating a constitutional convention that they can’t,” said Snow. “But I think it would be a big mistake in terms of the Senate’s democratic legitimacy and traditional role.”

Snow said that other cases where the Senate attempted to block government legislation—such as the Mulroney government’s abortion bill, free trade bill, and introduction of GST—were all instances where the Upper Chamber was seeking to maintain the status quo. However, by bringing a new form of MAID into effect, the Senate would be changing the status quo, and speeding up the process of change rather than serving as a sober second thought to slow that process down.

“That makes this very different, and makes it sort of more direct and explicit policymaking against the wishes of the democratically elected House of Commons in a way that I find much more problematic,” said Snow.

Snow added that, while the Senate is meant to stand up for Charter rights, the fact that there are competing rights claims being made in this situation complicates the matter.

Those concerns have been raised by advocates like Krista Carr, executive vice-president of Inclusion Canada, who noted that there is also the question of Charter protections for people with mental illnesses to ensure that they are receiving adequate supports when it

comes to suicide prevention. She also noted that the view of most opponents of this expansion of MAID is that the case law to date does not necessitate the government legalizing MAID for mental illness.

Gilbert told The Hill Times that when it comes to whether the Senate should maintain the status quo rather than accelerating the pace of change, one factor it should consider is that the government has maintained its position that this form of MAID should be legalized, and a six-year delay—the length of time that will have passed from when C-7 was passed to when the new sunset period would end in 2027—is a length of delay “unknown in law in terms of remedy.” She said usually when a law is found unconstitutional, a government has only about 12 to 18 months to address it.

The Hill Times reached out to the offices of Holland and Justice Minister Arif Virani (Parkdale—High Park, Ont.) for comment, but they did not reply by deadline.

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Figure:

ISG Senator Paula Simons says the Senate is ‘a bulwark against majoritarian tyranny,’ but must decide if blocking the bill is ‘politically astute.’ Photograph courtesy of Paula Simons

Non-affiliated Senator Frances Lankin, who serves as government liaison in the Senate, says she has ‘a lot of respect for the boundaries on the role of the Senate.’ The Hill Times photographs by Andrew Meade

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Conservative Senator Don Plett, who serves as his party's leader in the Senate, says Canadians often tell him that 'you have no right to defeat government legislation.' The Hill Times photograph by Andrew Meade
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