BRIEF ON BILL C-7, *An Act to amend the Criminal Code (medical assistance in dying)*

Presented to the Standing Committee on Justice and Human Rights

by

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SUMMARY

Bill C-7[1] was introduced in the House on 14 September 2020. It follows on the decision of the Quebec Superior Court in *Truchon*.[2] In that case, the Court declared that the requirement that natural death be reasonably foreseeable and the end-of-life test in the Quebec law were unconstitutional because they were contrary to sections 7 and 15 of the Canadian Charter of Rights. Quebec has not appealed that decision, and the Canadian government has seen fit to make certain amendments to the *Criminal Code*.

The bill that has been introduced largely maintains the current provisions of section 241.2 of the *Criminal Code* with respect to most of the existing safeguards. The bill also provides for a number of measures that simplify and facilitate access to medical assistance in dying (standing and number of witnesses required,[3] 10-day waiting period between the two assessments repealed,[4] possibility of waiving final consent[5]). We support these changes, which we believe are in the best interests of Canadians.

However, the bill creates additional and distinct safeguards for persons whose natural death is not reasonably foreseeable.[6] These measures are based on a criterion that the Quebec Superior Court did not consider justified by the objective of protecting vulnerable persons.[7] Moreover, the criterion is vague, lacks a precise time limit and will be difficult for the physicians or nurse practitioners who have to use it to apply uniformly.

Finally, Bill C-7 provides for a new absolute prohibition on access to medical assistance in dying for a certain category of persons with mental illness. This prohibition is set out in new subsection 241.2(2.1), which stipulates that mental illness is not considered an illness within the meaning of subsection 241.2(2).[8] As such, mental illness is excluded from the health conditions that may allow access to medical assistance in dying when it is the sole underlying condition.

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[1] An Act to amend the Criminal Code (medical assistance in dying) 1st Session, 43rd Parliament, 68-69 Elizabeth II, 2019–2020, House of Commons of Canada.
[2] *Truchon c. Procureur général du Canada*, 2019 Q.C.C.S. 3792 (CanLII) (hereinafter *Truchon*).
[3] Bill C-7, subclause 1(8), adding subsection 5.1 to current subsection 241.2(5).
[4] Ibid., subclause 1(5), replacing current paragraph 241.2(3)(g).
[5] Ibid., subclause 1(7), adding subsection 3.2 to current subsection 241.2(3).
[6] Ibid., subclause 1(7), adding subsection 3.1 to current subsection 241.2(3).
[7] *Truchon*, paras 618–636.
[8] Bill C-7, subsection 1(2).

The inclusion of such a provision in the new Act raises significant doubt as to its validity, as this absolute prohibition constitutes, in our view, discrimination on the basis of mental disability that cannot be justified by the objective to protect. The safeguards in the Act already ensure the protection of these persons.

RECOMMENDATION 1:

Remove from the bill the new subsection 3.1 applying specific additional safeguards to persons whose death is not reasonably foreseeable.

RECOMMENDATION 2:

Remove from the bill the new subsection 2.1 excluding mental illness from the illnesses, diseases or disabilities allowing access to medical assistance in dying.

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Subject: Brief on Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*

Please find attached our brief on *Bill C-7, An Act to amend the Criminal Code (medical assistance in dying)*. This bill is a direct result of the Quebec Superior Court decision in *Truchon et Gladu* c. *Procureur général du Canada*,[9] in which we acted as counsel for the applicants. The Court's decision, rendered by the Honourable Christine Baudouin, has not been appealed by any of the governments involved in the case.

We will begin with a short history of the events leading up to the introduction of Bill C-7. This will be followed by a brief overview of the provisions contained in the bill. Finally, we will focus on the problems raised by some of the specific provisions.

Our brief deals only with the federal law, although Bill C-7 does raise a number of issues with respect to provincial legislation related to end-of-life care. Nor will we address the difficulties raised by Bill C-7 with respect to the Quebec legislation.

[9] *Truchon*.

1. BACKGROUND

1.1 The *Carter* decision[10]

In the *Carter* decision of 6 February 2015, the Supreme Court of Canada found that the provisions prohibiting physician-assisted dying (paragraph 241(b) and section 14 of the *Criminal Code*) infringed the right to life, liberty and security of the person conferred on Ms. Taylor by section 7 of the *Canadian Charter of Rights and Freedoms*.[11] According to the Court, this infringement of rights was not in accordance with the principles of fundamental justice and was not justified under section 1 of the Charter.[12]

To the extent that the impugned legislative provisions denied the section 7 rights of individuals such as Ms. Taylor, the Court found that the laws were void by operation of section 52 of the *Constitution Act, 1982*.[13]

> [127] The appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 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 his or her condition. "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.[14]

The Supreme Court concluded that it was for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the stated constitutional parameters.[15] The Court also suspended execution of its judgment for a period of 12 months to

[10] *Carter v. Canada (Attorney General)*, 2015 S.C.C. 5, [2015] (hereinafter *Carter*).
[11] *Canadian Charter of Rights and Freedoms, Canada Act 1982 (UK)*, 1982 c. 11.
[12] *Carter*, para 12.
[13] Ibid., para 126.
[14] Ibid., para 127.
[15] Ibid., para 126.

allow Parliament and the provincial legislatures to enact legislation giving effect to the judgment should they deem it necessary.[16]

In January 2016, the Supreme Court granted a four-month extension to the deadline to give the newly elected government time to consult with Canadians.[17] The Court also granted a constitutional exemption to Quebec and to any persons in Canada wishing to obtain medical assistance in dying by applying to the superior court of their province.[18]

Three committees studied the amendments suggested by the Supreme Court: the External Committee on Options for Legislative Responses to Carter v. Canada, the Provincial-Territorial Expert Advisory Group on Physician Assisted Dying and the Special Joint Committee of the Senate and House of Commons. All three committees produced reports.[19]

1.2 Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)[20]

Bill C-14 was introduced on 14 April 2016 and was finally passed on 17 June 2016, following a difficult debate. The new Act described the eligibility requirements for medical assistance in dying in terms identical to those proposed by the Supreme Court in *Carter*, with one exception. As such, a competent adult with a grievous and irremediable medical condition who freely consents to medical assistance in dying is eligible to receive it.[21]

[16] *Carter*, para 128.
[17] *Carter v. Canada (Attorney General)* [2016] 1 .S.C.R. 13.
[18] Ibid., paras 3–4; for example, *Canada (Attorney General) v. E.F.*, 2016 ABCA 155 (CanLII).
[19] EXTERNAL PANEL ON OPTIONS FOR A LEGISLATIVE RESPONSE TO *CARTER v. CANADA*, *Consultations on Physician-Assisted Dying. Summary of Results and Key Findings. Final Report,* 15 December 2015; PROVINCIAL-TERRITORIAL ADVISORY GROUP ON PHYSICIAN-ASSISTED DYING, *Final Report,* 30 November 2015; CANADA, PARLIAMENT, SPECIAL JOINT COMMITTEE ON PHYSICIAN-ASSISTED DYING, *Medical Assistance in Dying: A Patient-Centred Approach*, 25 February 2016.
[20] S.C. 2016, c. 3.
[21] *Criminal Code*, subsection 241.2 (1).

However, the following paragraphs of section 241.2 (2) of the *Criminal Code* define a grievous and irremediable medical condition of a person eligible for medical assistance in dying as follows:

(a) They have a serious and incurable illness, disease or disability;

(b) They are in an advanced state of irreversible decline in capability;

(c) That illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and

(d) Their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.[22] (Our emphasis)

The condition set out in paragraph (d) of subsection 241.2 (2) does not fall within the parameters defined by the Court in *Carter*. This provision restricts a right—that of a person to seek and have access to medical assistance in dying—to those persons whose death is reasonably foreseeable. None of the groups that were established following *Carter* recommended adoption of such a provision. The measure was widely criticized by lawyers, physicians and other interested groups.[23] All in vain, however, as not even the prospect of a constitutional challenge could cause the government to reconsider its position, and the rule was eventually approved by Parliament at third reading.

[22] *Criminal Code*, subsection 241.2(2).

[23] Langlois. The Right to Die with Dignity: Superior Court, 30 September 2019; see also https://quebec.huffingtonpost.ca/2016/06/15/ [FRENCH ONLY] [TRANSLATION] Medical assistance in dying: the Senate adopts the amended bill: "For some of his colleagues, on the other hand, the elimination of the criterion of reasonably foreseeable natural death, criticized by the Quebec Bar, the Collège des médecins du Québec and the Quebec Minister of Health, Gaétan Barrette, remains a prerequisite."

1.3 The legal challenge

In June 2017, two residents of Quebec, Mr. Jean Truchon and Ms. Nicole Gladu, filed a constitutional challenge of section 14 and paragraph 241.2 (2)(d) of the *Criminal Code* in the Quebec Superior Court. On 11 September 2019, the Honourable Christine Baudouin rendered a detailed decision granting the application and declaring the provision in question—paragraph 241.2 (2)(d)—to be unconstitutional.[24]

The applicants' challenge in *Truchon* was to the effect that this condition of access to medical assistance in dying was too restrictive and contravened the *Canadian Charter of Rights and Freedoms* and the principles enunciated by the Supreme Court of Canada in *Carter*.

In spite of the magnitude of their disabilities, Mr. Truchon and Ms. Gladu remained capable of consent, and were experiencing intolerable suffering that did not endanger their lives.

Both applicants had been assessed and were found to meet all but one of the conditions for medical assistance in dying, namely, reasonably foreseeable natural death. They therefore applied to the Court for a declaration of unconstitutionality of this criterion, which they felt was too restrictive in both the federal legislation and the provincial, which used the end of life criterion.[25]

1.4 The Superior Court decision in *Truchon*

In its decision, the Quebec Superior Court reiterated the *Carter* criteria. For the Court, these criteria are clear: there is no temporal relationship between the administration of medical assistance in dying and the imminence of death. The Superior Court distinguished between the intolerable nature of the suffering (the *Carter* test) and its terminal nature (the test in the federal law). In fact, the Court found the criterion in the federal law to be inconsistent with the parameters set out by the Supreme Court in *Carter*.[26]

[24] *Truchon*, paras 3–4.
[25] Act respecting end-of-life care, R.S.Q. c. S-32.0001, subsection 26(3).
[26] *Truchon*, para 495.

Secondly, the Court determined that the reasonably foreseeable death requirement in the federal law infringed the right to life, liberty and security of the person in a manner that was inconsistent with the principles of fundamental justice.

The right to life was infringed because the criterion of reasonably foreseeable death obliges people in the same position as the applicants to live with intolerable suffering due to serious and irremediable medical conditions, or forces them to die prematurely, often in undignified and degrading conditions.[27]

The right to liberty and security of the person is also affected by the reasonably foreseeable death criterion as it prevents the person from exercising a fundamental choice that respects their values, dignity and physical integrity.[28]

The Court concluded that the reasonably foreseeable death requirement was overbroad and disproportionate to the object of the legislation[29] and that it could not be justified under the current section 1 of the Charter because it did not constitute a reasonable infringement.

Justice Baudouin also found that the reasonably foreseeable natural death requirement violated the applicants' right to equality under section 15 of the Charter, and could not be saved by section 1 of the Charter.[30]

The Court suspended the declaration of unconstitutionality for six months and granted the applicants a constitutional exemption.

[27] *Truchon*, para 521.
[28] Ibid., paras 573 and 582.
[29] Ibid., para 638.
[30] Ibid., paras 685–690; para 732 for the invalidity of subsection 26(3) of the Act respecting end-of-life care, R.S.Q. c. S-32.0001).

The Court subsequently extended that period by four months, and later by another five months, to 21 December 2020. In the meantime, individual recourse remains available to persons whose death is not reasonably foreseeable but who are eligible for medical assistance in dying because their situation meets all the other criteria.[31]

2. BILL C-7

This is the context in which Bill C-7 was introduced by the federal government, having decided not to appeal the decision of the Quebec Superior Court in *Truchon*.

The bill that has been introduced largely maintains the current provisions of section 241.2 of the *Criminal Code* with respect to most of the existing safeguards. However, the bill creates additional and distinct safeguards for persons whose natural death has not become reasonably foreseeable. For persons whose natural death is reasonably foreseeable, the bill provides some flexibility and streamlining of the access process.

Bill C-7 died on the Order Paper due to the prorogation of the parliamentary session. It was reintroduced in the current session on 28 September 2020. However, the new Bill C-7 is exactly the same as the previous one and does not introduce any changes.

2.1 Natural death has become reasonably foreseeable

The reasonably foreseeable natural death test has been repealed and is no longer a necessary condition for access to medical assistance in dying in the proposed legislation.[32]

However, the criterion of "natural death has become reasonably foreseeable" has been reintroduced as a distinguishing criterion for determining the rules of access to medical assistance in dying.[33] We will return to this criterion, which the government has chosen to

[31] See, for example, *Payette c. P.G. Canada, 2020 Q.C.C.S. 1604.*
[32] Bill C-7, subclause 1(1).
[33] Ibid., subclause 1(7).

retain, as it poses the same challenges as those that arose following passage of the legislation in 2016.

Thus, for persons whose natural death is reasonably foreseeable, the bill provides for a relaxation of certain safeguards. Specifically:

1) The 10-day delay between the request for medical assistance in dying and its administration is repealed. There is no mandatory waiting period between the request for medical assistance in dying and its administration;[34]

2) A person may withdraw their request immediately prior to the provision of medical assistance in dying. The medical practitioner or nurse practitioner ensures that the person expressly consents to medical assistance in dying; however, the verification of final consent may be waived if certain criteria and conditions are met.[35]

   As such, final consent may be waived for a person whose death has become reasonably foreseeable, before the person loses the capacity to consent to medical assistance in dying, under the following circumstances:

   1) They satisfied the criteria for medical assistance in dying and all the relevant safeguards;
   2) They entered into an arrangement in writing with the medical practitioner or nurse practitioner for a substance to be administered to cause their death on a specified day;
   3) They were informed by the medical practitioner or nurse practitioner of the risk of losing the capacity to consent prior to the specified day;

[34] Bill C-7, subclause 1(5).
[35] Ibid., subclause 1(7), adding new subsection 3.2 to subsection 241.2(3) of the *Criminal Code*.

4) In the written arrangement, they consented to the administration of a substance to cause their death on or before the specified day if they lost capacity to consent prior to that day;
5) The person has lost the capacity to consent to medical assistance in dying;
6) The person neither demonstrates refusal by words, sounds or gestures, nor resists the administration of the substance;
7) Involuntary words, sounds or gestures made in response to contact do not constitute refusal or resistance;
8) Once the person demonstrates refusal or resistance, medical assistance in dying cannot be provided to them based on the written arrangement;
9) The substance is administered in accordance with the terms of the arrangement.[36]

2.2 Self-administration of medical assistance in dying

The bill also provides flexibility in the requirement for final consent in the context of self-administration of medical assistance in dying. For example, in the case of a person who loses the capacity to consent to receiving medical assistance in dying after self-administering a substance—provided to them in accordance with the law so as to cause their own death—a medical practitioner or nurse practitioner may administer a substance to cause the death of that person if:

(a) Before the person loses the capacity to consent to receiving medical assistance in dying, they and the medical practitioner or nurse practitioner entered into an arrangement in writing providing that the medical practitioner or nurse practitioner would:
    i. Be present at the time the person self-administered the first substance, and

[36] Bill C-7, subclause 1(7), adding new subsection 3.2 of section 241.2 of the *Criminal Code.*

ii. Administer a second substance to cause the person's death if, after self-administering the first substance, the person lost the capacity to consent to receiving medical assistance in dying and did not die within a specified period;

(b) The person self-administers the first substance, does not die within the period specified in the arrangement and loses the capacity to consent to receiving medical assistance in dying; and

(c) The second substance is administered to the person in accordance with the terms of the arrangement.[37]

2.3 Death not reasonably foreseeable

The bill creates specific additional safeguards for obtaining medical assistance in dying when natural death is not reasonably foreseeable. These provisions are Parliament's response to the *Truchon* decision. The following provisions of the bill apply specifically to this category of person when they request medical assistance in dying.[38]

Before a medical practitioner or nurse practitioner provides medical assistance in dying to a person whose natural death is not reasonably foreseeable, taking into account all of their medical circumstances, the medical practitioner or nurse practitioner must:

(a) Ensure that a written opinion confirming that the person meets all of the criteria set out in subsection (1) has been provided by

(i) If they do not have expertise in the condition that is causing the person's suffering, a medical practitioner or nurse practitioner with that expertise, or

(ii) If they have that expertise, another medical practitioner or nurse practitioner.

(Our emphasis)

[37] Bill C-7, subclause 1(7), adding subsection 3.5 to current subsection 241.2(3) of the *Criminal Code.*

[38] Ibid., subclause 1(7), adding subsection 3.1 to current subsection 241.2(3) of the *Criminal Code*, paras (e), (g), (h) and (i).

(b) Ensure that the person has been informed of the means available to relieve their suffering, including, where appropriate, counselling services, mental health and disability support services, community services and palliative care and has been offered consultations with relevant professionals who provide those services or that care;

(c) Ensure that they and the medical practitioner or nurse practitioner referred to in paragraph (e) have discussed with the person the reasonable and available means to relieve the person's suffering and they and the medical practitioner or nurse practitioner referred to in paragraph (e) agree with the person that the person has given serious consideration to those means;

(d) Ensure that there are at least 90 clear days between the day on which the first assessment under this subsection of whether the person meets the criteria set out in subsection (1) begins and the day on which medical assistance in dying is provided to them or — if the assessments have been completed and they and the medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the loss of the person's capacity to provide consent to receive medical assistance in dying is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances.

2.4 Reduction in the number of witnesses to the patient's signature

Bill C-7 also includes two changes with regard to the witnesses required at the time of the patient's signature.

The first change concerns the number of witnesses required. The requirement has been changed from two witnesses to one witness to the signing of the request for medical assistance in dying, regardless of whether or not the person's death is foreseeable.[39]

The second amendment increases the number of people who can serve as witnesses. Currently, any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may act as an "independent witness," except if they

(a) Know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;
(b) Are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;
(c) Are directly involved in providing health care services to the person making the request; or
(d) Directly provide care to the person making the request.[40]

The bill relaxes the rules on the standing of independent witnesses, as follows:

> Despite paragraphs (5)(c) and (d), a person who provides health care services or personal care as their primary occupation and who is paid to provide that care to the person requesting medical assistance in dying is permitted to act as an independent witness, except for:
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> (a) The medical practitioner or nurse practitioner who will provide medical assistance in dying to the person; and;

[39] Bill C-7, subclause 1(4), amending paragraph 241.2(3)(c) of the *Criminal Code,* and subclause 1(7), adding paragraph (3.1)(c) to current subsection 241.2(3) of the *Criminal Code.*
[40] *Criminal Code*, subsection 241.2(5).

(b) The medical practitioner or nurse practitioner who provided an opinion under paragraph (3)(e) or (3.1)(e), as the case may be, in respect of the person;[41]

3. PROBLEMS RAISED BY CERTAIN PROVISIONS OF THE BILL

3.1 Reasonably foreseeable death

3.1.1 The *Carter* decision

In the *Carter* decision of 6 February 2015,[42] the Supreme Court of Canada established the criteria for a person to obtain medical assistance in dying.[43]

According to the Supreme Court, in addition to the other criteria determined by the Court, a person's eligibility for medical assistance in dying rests on the existence of enduring and intolerable suffering, and nowhere does the Court indicate the need for any temporal link between the suffering experienced by the person and the proximity of his or her death.

3.1.2 The *Truchon* decision

In its decision, the Quebec Superior Court reiterated the *Carter* criteria. For the Court, these criteria are clear: there is no temporal relationship between the administration of medical assistance in dying and the imminence of death. The Superior Court distinguished between the intolerable nature of the suffering (the *Carter* test) and its terminal nature (the test in the 2016 federal law). In fact, the Court found the criterion in the federal law to be inconsistent with the parameters set out by the Supreme Court in *Carter*:[44]

> [495] First, the criteria in paragraph 127 are clear. The Supreme Court neither expressly nor implicitly limits or restricts access to medical assistance in dying

[41] Bill C-7, subclause 1(8), adding subsection 5.1 to current subsection 241.2(5) of the *Criminal Code.*
[42] *Carter*.
[43] Ibid., para 127.
[44] *Truchon*, paras 495–497

> exclusively to people whose natural death is reasonably foreseeable or who are at the end of life. Had the Supreme Court wanted to establish or impose a temporal relationship between the administration of medical assistance in dying and the imminence of death, it would certainly have stated it explicitly in its reasons for judgment, whereas it actually took great care to set out the conditions giving rise to access.
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> [496] Second, medical assistance in dying exists in Canada primarily so that those who make this choice avoid a life of suffering. The "cruel choice" referred to by the Supreme Court between taking one's life prematurely or suffering until one's natural death occurs is not linked to the terminal nature of the medical condition causing the suffering. A suffering person lives in a cruel situation, regardless of the terminal stage of his or her illness. Paradoxically, the more distant in time the death appears, the more cruel the situation.
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> [497] In the Court's view, the basis of the ruling in *Carter* is not the proximity of death or the temporal relationship with the expected natural death but, instead, the respect for the person's wishes, the preservation of the person's dignity and, above all, the alleviation of the person's intolerable suffering associated with a grievous and irremediable illness. The rationale is to allow a person suffering from a grievous and irremediable medical condition, who no longer has any hope of improvement, to end his or her suffering and to avoid living until the final agonizing breaths have been drawn, should the person so desire.

Bill C-7 therefore repeals this temporal criterion and removes it from the elements required to access medical assistance in dying. However, the government has chosen to retain this same criterion to distinguish between two groups of people eligible for medical assistance in dying. The objective remains "the protection of vulnerable persons from being induced to end their lives and the important public health issue that suicide represents."[45]

It is therefore with a view to protecting vulnerable persons that additional safeguards are being applied in the case of persons whose natural death is not reasonably foreseeable.

[45] Bill C-7, Preamble, para 6.

3.2 Specific provisions of Bill C-7

3.2.1 Reasonably foreseeable death as the differentiation criterion for the application of additional safeguards

Bill C-7 introduces additional safeguards and a different process for accessing medical assistance in dying by creating two categories of eligible persons. For persons whose death is reasonably foreseeable, the mandatory ten-day waiting period between the request for medical assistance in dying and its administration has been repealed.[46] For persons whose death is not reasonably foreseeable, Bill C-7 introduces a mandatory 90-day waiting period between the day the first assessment is made and the provision of medical assistance in dying.[47] It also provides that a person whose death is not reasonably foreseeable must obtain the opinion of a medical practitioner or nurse practitioner who is an expert in the person's condition, confirming that the general safeguard criteria for access to medical assistance in dying have been met.

Persons whose death is not reasonably foreseeable do not have the option of signing an agreement in advance to waive final consent immediately prior to the administration of medical assistance in dying. Only persons whose death is reasonably foreseeable can choose to waive final consent: these persons will therefore be able to receive medical assistance in dying even if they have become incapacitated at the time of its administration.

In addition, persons whose death is not reasonably foreseeable must discuss and consider the means available to relieve their suffering.

Including additional safeguards in the bill for persons whose death is not reasonably foreseeable to allow them access to medical assistance in dying seems to us difficult to reconcile with the Court's decision in *Truchon*.

[46] Bill C-7, subclause 1(1).
[47] Ibid., subclause 1(7), adding new paragraph 3.1 (g) to the current subsection 241.2(3).

We must question here the rational connection between the government's objective and integrating such a distinction into the process for accessing medical assistance in dying. Indeed, Justice Baudouin clearly indicated in her decision that the reasonably foreseeable death criterion could not be justified by the objective of protecting suicidal or incompetent persons. She stated as follows:

> [630] The Court can perceive how the reasonably foreseeable natural death requirement may, from the Attorney General of Canada's perspective, have general salutary effects that preserve the life of persons who are not near death and who would nonetheless like to end their lives given their conditions. This criterion would, therefore, have the effect of excluding suicidal people or those with a psychiatric condition who would like to use this method to end their days although they are not eligible under the other statutory criteria.
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> [631] In the Court's opinion, however, the deleterious effects on persons who, like Mr. Truchon and Ms. Gladu, are not dying, but whose condition remains serious and irreversible, are in an advanced state of irreversible decline in capability without any hope of improvement and who, above all, experience enduring and intolerable physical or psychological suffering, are by far greater than the expected benefits to society as a whole, <u>given the sufficiency of the other legislative safeguards</u>. **(our emphasis)**
>
> [634] Also and above all, the requirement forces these persons to continue a life that no longer has any meaning for them, in conditions they consider undignified and at the cost of intolerable suffering. In so requiring, the state sends them the message that the expression of their wishes and their devastating suffering are neither important nor considered.

It is difficult to reconcile the principles on which the Quebec Superior Court based its decision in *Truchon* with the creation of a category of persons who, despite meeting all of the safeguard criteria already provided for in the current *Criminal Code* and the bill, will have additional mandatory conditions imposed on them in order to obtain access to medical assistance in dying, based solely on the fact that they are not at the end of their life.

It is true that there is no longer an absolute prohibition on access to assisted dying for these people, and in that sense, the bill complies with the conclusions in *Truchon*. However, the effect of applying the criterion of reasonably foreseeable death to determine the process for access to

medical assistance in dying would impose on a category of competent adults who are experiencing constant and intolerable suffering, and who are otherwise eligible for assisted dying, a significant additional period of time (90 clear days) during which they must continue to endure constant and intolerable suffering under conditions they deem undignified. The additional conditions imposed on them (the requirement to seek an expert opinion and the impossibility of waiving final consent) cannot, in our view, be justified by an objective of protection. The vulnerability of this group of persons cannot be established simply because they are not at the end of life, and introduction of this distinguishing criterion constitutes an infringement of the right to equality of persons whom the government persists in grouping together.

Thus, although the Superior Court's decision was rendered in the context of an absolute prohibition imposed by the federal legislator on persons who are not at the end of life, we believe that its conclusions would be equally applicable in a context where this same criterion is being used to create additional obstacles (conditions and delay) to obtaining medical assistance in dying. It is worth quoting verbatim the Court's conclusions in this regard:

> [618] The Attorney General has not established that the reasonably foreseeable natural death requirement is the least drastic method of protecting vulnerable persons who might be induced to end their lives in a moment of weakness.
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> [619] The Court accepts from the evidence that physicians are capable of assessing, with the necessary diligence:
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> 1. the capacity, lack of ambivalence and deep convictions that motivate a person to request medical assistance in dying, on a case-by-case basis;
> 2. the presence of any possible coercion or external pressure on the patient;
> 3. the advanced state of irreversible decline in capability;
> 4. that presence of enduring intolerable suffering related to the person's condition that cannot be relieved under conditions that the person deems acceptable;
> 5. that the person who made the request is suicidal with or without an underlying psychiatric condition.
>
> [620] The evidence presented does not convince the Court that, without the reasonably foreseeable natural death requirement, Canada will see an exponential or unreasonable spike in the number of requests for medical

> assistance in dying, especially from vulnerable persons, which would lead to a slippery slope.
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> [621] The Court instead accepts that the other eligibility criteria and safeguards already in place in the legislation are sufficient to ensure that the system can provide medical assistance in dying to individuals who are entitled to it.
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> …
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> [635] The applicants have established that the imposed requirement denies persons who are disabled and grievously ill the right to make fundamental decisions, and this, out of a desire to protect them. Yet these persons have the same rights to self-determination and dignity as any other person. By seeking to protect them from themselves, and by denying them the right to express that autonomy, the state is sending the message that it does not consider them to be persons truly capable of making decisions.
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> [636] The evidence adduced by the applicants, which the Court accepts, establishes instead that the legislative regime in place is fully able, even without the challenged requirement, of screening and identifying persons who do not meet the other eligibility criteria, such as incompetent or suicidal persons.

It appears to us that the creation of additional safeguards applicable to only one category of persons grouped according to the test that the Superior Court has already invalidated is inconsistent with the principles established by the Court. The use of this test and the effect of the measures related to it may therefore be challenged under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

4. MENTAL ILLNESS

4.1 The *Truchon* decision

In *Truchon*, the Court addressed the issue of mental illness and its consequences for access to medical assistance in dying. The mere fact that a person is mentally ill does not preclude them from accessing medical assistance in dying as long as the other statutory criteria are met. The Court stated:

> [420] Therefore, and despite what Dr. Kim claims, nothing establishes that it is impossible to reliably assess the mental capacity of patients with a psychiatric condition. The Supreme Court reached this same finding in *Carter*.[441] The Attorney General of Canada has failed to establish that the situation in Canada has changed since then.
>
> [421] Last, it bears repeating that neither *Carter* nor the federal legislation excludes people with a psychiatric condition from requesting and being granted medical assistance in dying like any other Canadian who meets the legislative requirements. These people are, therefore, eligible, regardless of their official diagnosis, once they are deemed competent by two independent physicians and meet the other legal requirements.

To the extent that the person with a mental illness is capable of making such a decision, they are therefore entitled to access medical assistance in dying. Bill C-7 does not exclude such persons from access to medical assistance in dying.

4.2 Absolute prohibition on access when mental illness is the sole underlying condition

However, Bill C-7 introduces a new absolute prohibition on access to medical assistance in dying for a certain category of people with mental illness. This prohibition is set out in new subsection 241.2 (2.1), which specifies that mental illness is not considered an illness within the meaning of subsection 241.2(2).[48] This means that when mental illness is the only underlying condition, it is excluded from the health conditions that may allow access to medical assistance in dying. The need to include such a provision in the new Act raises a significant doubt as to its validity.

In the preamble to Bill C-7, the government "recognizes the need to **balance** several interests and societal values, including the **autonomy of persons who are eligible** to receive medical assistance in dying, the **protection of vulnerable persons** from being induced to end their lives and the important public health issue that suicide represents." The absolute exclusion from access to

[48] Bill C-7, subclause 1(2).

medical assistance in dying for people suffering only from mental illness does not represent an appropriate reconciliation of those fundamental interests. In fact, it seems to us that this prohibition prioritizes only the protection of vulnerable persons, to the detriment of personal autonomy.

We believe that this addition in Bill C-7 constitutes **discrimination** on the basis of mental disability. Indeed, this wording clearly excludes a portion of the Canadian population from access to medical assistance in dying, namely, persons suffering from a mental illness, even if the person with the mental illness is an adult and competent, and the illness is serious and irreparable and results in enduring and intolerable suffering. As drafted, this provision of Bill C-7 constitutes, in our opinion, an unjustified infringement of the right to equality of persons with mental illness and their right to life, liberty and security of the person as established in *Carter* and *Truchon*. Moreover, Justice Baudouin addressed the subject of vulnerable persons in her decision, and was careful to distinguish between mental illness and the capacity to consent:

> [422] The Court concludes that physicians in Canada are able to conduct such an assessment and eliminate non-eligible patients, not because they have a psychiatric illness, but because they do not have the capacity to decide and make this fundamental choice due to their mental condition.[49]

The bill already protects vulnerable people through a set of eligibility criteria for medical assistance in dying, particularly those related to competency and the degree of suffering experienced by the person. Thus, it seems clear to us that an absolute prohibition that applies specifically to one group of people, namely persons suffering from mental illness, constitutes a serious infringement of their right to equality in the recognition and exercise of their right to liberty. Moreover, such an exclusion does not constitute a proportionate infringement of their rights, given that appropriate safeguards could clearly meet the objective of protecting vulnerable persons without excessively infringing on the right to equality of persons suffering from mental illness.

[49] *Truchon*, para 422.

Justice Baudouin quoted Dworkin on the right to equality as follows:

> [679] The illustrious jurist and philosopher Ronald Dworkin eloquently described the concept of the right to equality applicable here:
>
> … Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. …[50]

Distinguishing between mental illness and other physical ailments also risks creating additional societal stigma towards people with mental illness, and an absolute prohibition would perpetuate this stigma. We believe Justice Baudouin's finding in *Truchon* applies here:

> [681] By seeking to counter only one of the stereotypes that the disabled face – vulnerability – the challenged provision perhaps perpetuates another probably more pernicious stereotype: the inability to consent fully to medical assistance in dying. Yet the evidence amply establishes that Mr. Truchon is fully capable of exercising fundamental choices concerning his life and his death. As a consequence, he is deprived of the exercise of these choices essential to his dignity as a human being due to his personal characteristics that the challenged provision does not consider. He can neither commit suicide by a method of his own choosing nor legally request this assistance.[51]

It seems to us that this absolute prohibition should not be adopted because it would constitute an infringement of the right to equality of persons with mental illness. Requests for medical assistance in dying that are based exclusively on the existence of a serious and irreparable mental illness that causes enduring and intolerable suffering should be assessed on a case-by-case basis, taking into account the individual factors in each instance and the existing criteria for eligibility for medical assistance in dying.

[50] *Truchon*, para 679.
[51] Ibid., para 681.

In order to reconcile the autonomy of these persons with the protection of vulnerable persons, we believe that certain additional safeguards could be introduced that respect the rights set out in the *Canadian Charter of Rights and Freedoms* while meeting the objective of protection. Thus, an additional safeguard requiring, for example, a psychiatric expert to rule on the admissibility of these persons would strike a balance between respecting their autonomy and protecting them. The psychiatrist, a specialist with in-depth knowledge of mental illness, would be able to accurately establish the person's competency and verify whether they truly meet all the eligibility criteria for medical assistance in dying.

A less restrictive provision would be more consistent with the evolution of the law and jurisprudence regarding the rights to autonomy and equality. Such a measure might read as follows:

> *A person who suffers solely from mental illness and is seeking medical assistance in dying must undergo a psychiatric assessment to certify their competence, and the psychiatrist will discuss available treatment options with the person. If the person is competent and has not been diagnosed with a serious impairment of judgment, medical assistance in dying may be granted, if the other criteria have been met.*

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