

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

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Chambre des notaires du Québec

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## Preamble

The Chambre des notaires du Québec (CNQ) is a professional order representing more than 3,900 notaries and legal advisors. Its main mission is to protect the public, in particular by promoting the practice of preventive law and supporting innovative notarial practice that strives for excellence while promoting access to justice for all. In addition to this primary mission, by sharing its views with legislators, the CNQ protects and promotes the values on which the legal system of Quebec and Canada is based: equality, equity and individual and collective responsibility.

The CNQ points out that notaries are local lawyers who assist members of the public at numerous important stages of their lives. They have developed expertise in protecting the vulnerable by offering them the necessary legal support to ensure that they clearly understand the applicable law and that their wishes are respected. The fact that notaries are public officers also enables them to act impartially in reaching a fair and ethical determination of the best interests of all parties involved in the situation.

## Introduction

For the past four years, medical assistance in dying has been a well-accepted reality in Quebec, by both the public and the healthcare community. Although still very recent, practice and use are beginning to reveal the shortcomings in the applicable legislation, which is unfortunately not fully consistent with the reality experienced by many Quebeckers.

One such major shortcoming is that no person may consent in advance to medical assistance in dying. In fact, the *Act respecting end-of-life care*<sup>1</sup> (**Quebec Act**) requires that before injecting the substances that will cause the person's death, the physician must verify the persistence of the person's suffering and that the wish to obtain medical aid in dying remains unchanged.<sup>2</sup> *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*<sup>3</sup> (**Canadian Act**), meanwhile, partially incorporates this principle by requiring the healthcare professional to obtain the express consent of the person immediately before administering medical assistance in dying.

Both statutes therefore currently require that the person retain the capacity to consent to care until the very end. This situation leads many people who are suffering to refuse their pain medication for fear of losing their faculties and not being able to confirm their consent when the time comes to receive medical assistance in dying. It is easy to see how intolerable pain that is somewhat controlled prior to the formal request will become even more unbearable in the absence of medical relief. When this situation became widely known, the public insisted that the Acts be amended to allow for advance consent to medical assistance in dying, thus avoiding a recurrence of this unfortunate and unacceptable situation.

Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*<sup>4</sup> (**Bill C-7**), addresses this issue in part by allowing a person whose natural death is reasonably

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<sup>1</sup> RSQ, Chapter S-320001.

<sup>2</sup> Ibid, paragraph 29(1)(c).

<sup>3</sup> Statute of Canada: 2016, c. 3, paragraph 241.2(3)(h).

<sup>4</sup> Second session, Forty-third Parliament, 69 Elizabeth II, 2020, introduced on 5 October 2020.

foreseeable to waive the final consent required prior to administration. Bill C-7 therefore opens the door to advance consent to medical assistance in dying under very specific conditions.

The CNQ supports Bill C-7. Through this bill, Parliament is complying with the conclusions of the September 2019 decision in *Truchon v. Attorney General of Canada*<sup>5</sup> (**Truchon**), which invalidated the criteria of “reasonably foreseeable natural death” in the Canadian Act and “end of life” in the Quebec Act. As previously mentioned, Bill C-7 also opens the door to advance consent in certain cases. The CNQ welcomes this measure, which remedies an unfortunate and unjust situation forcing people who meet all the criteria required by Parliament to needlessly endure intolerable suffering.

The CNQ also welcomes the relaxation of certain safeguards that in the current legislation often caused more harm than good. This was the case with respect to the reasonably foreseeable natural death requirement, which was found to be unconstitutional in *Truchon* and is repealed by Bill C-7. Other safeguards have also been relaxed by the bill. For example, the repeal of the 10-day delay between requesting medical assistance and its administration, and the obligation to make the request before one independent witness, rather than two, are both welcome measures that demonstrate that Parliament listened to the concerns of Canadians regarding the cumbersome nature of these safeguards and the difficulty of applying them in certain cases.

The principal focus of these comments will be on the possibility of advance consent to medical assistance in dying as provided for in Bill C-7. The CNQ also intends to use this forum to highlight the importance of beginning now to consider advance consent for persons whose death is not reasonably foreseeable, but who have been diagnosed with a serious, degenerative and incurable disease. These individuals, who know very well that their faculties will decline over time, must be given the opportunity to consent in advance to obtaining medical assistance in dying when the time comes, even if their natural death is not reasonably foreseeable. The CNQ will set out its position on this

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<sup>5</sup> 2019 QCCS 3792.

subject and illustrate how Quebec notaries, as public officers, can secure and authenticate the consent of such persons.

## Summary of recommendations

In this brief, the CNQ recommends the following:

<b>1</b>	<i>Allow persons who meet all the conditions of section 241.2 of the Criminal Code to waive final consent to medical assistance in dying regardless of whether or not their death is reasonably foreseeable.</i>
<b>2</b>	<i>Do not refer to the notion of “arrangement” in subparagraphs (ii) and (iv) of new paragraph 241.2(3.2)(a), but rather to the notion of the “clearly expressed wishes” of the person requesting that medical assistance in dying be administered to them, even if they are no longer able to consent.</i>
<b>3</b>	<i>Formalize the advance consent clause contained in the request in order to ensure the person’s informed consent and reassure medical personnel of the person’s effective desire to waive consent.</i>
<b>4</b>	<i>In light of society’s shift on the issue of medical assistance in dying, initiate discussions on extending advance consent to medical assistance in dying to persons diagnosed with a serious, degenerative and incurable disease.</i>
<b>5</b>	<i>Allow advance requests for medical assistance in dying for persons diagnosed with a serious, degenerative and incurable disease only through a notarial act in order to ensure the legal certainty of the request and the informed consent of the person.</i>
<b>6</b>	<i>Require that in an advance request for medical assistance in dying, the person diagnosed with a serious, degenerative and incurable disease name a trusted third party who will advise medical personnel as to when the medical assistance in dying should be administered.</i>



## Notaries and medical assistance in dying

Given the important role of notaries in protecting the vulnerable, the CNQ was quick to take a stand on the issue of medical assistance in dying. Its interventions have always been aimed at ensuring a balance between respecting the autonomy of individuals and protecting them.

### Select Committee on Dying with Dignity

Society is an ever-changing ecosystem, and legislatures were soon called upon to provide opportunities to debate the issue of the right to “die with dignity.” Thus, in the early 2010s, the Select Committee on Dying with Dignity was created, headed by MNA Véronique Hivon. During the consultations launched by this committee, the CNQ was one of the first organizations to make concrete and innovative proposals on the subject. Among other things, it took a position in favour of legal recognition by the State of an individual’s free choice with regard to euthanasia and assisted suicide.

### Bill 52 – An Act respecting end-of-life care

In the fall of 2013, consultations were held on Quebec Bill 52, *An Act respecting end-of-life care* (**Bill 52**). The CNQ participated in the consultation; the brief it submitted<sup>6</sup> was presented to the members of the Health and Social Services Committee by then-president Jean Lambert, accompanied by Alain Roy, professor of law at the University of Montreal.

In its brief, the CNQ, like the Collège des médecins du Québec, expressed its agreement with allowing access to advance consent to medical assistance in dying. It even proposed a process that would take advantage of the notary’s status as a public officer, with a requirement that a notary certify the legality of each case prior to the administration of the

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<sup>6</sup> CHAMBRE DES NOTAIRES DU QUÉBEC, *Mémoire portant sur le projet de loi no 52, Loi concernant les soins de fin de vie*, September 2013. See the discussions of the Health and Social Services Committee at [Journal des débats de la Commission de la santé et des services sociaux](#) [French only].

substances causing death in order to lend confidence and legal certainty to the operation. It also recommended that advance consent to medical assistance in dying require a notarial act.

In fact, the CNQ believed that proceeding in this manner would ensure that a person wishing to consent in advance would make an informed decision and be accompanied in this process by a legal professional whom they trusted. The consent could be included in a document describing the person's situation and clearly indicating their willingness to seek medical assistance in dying in advance. This documentation would be submitted to an impartial public officer, i.e., the notary.

### **Advance medical directives (AMD)**

In 2015, the Quebec legislature formally recognized the role of notaries in the area of advance consent to end-of-life care. In fact, Bill 52 created the advance medical directives (**AMD**) regime, a mechanism by which a person can accept or refuse in advance five specific types of care<sup>7</sup> that could be offered by the healthcare team when the person is at the end of life and suffers from advanced dementia, is in an irreversible comatose state or is in a permanent vegetative state with no possibility of improvement. The Quebec legislature opted for two ways in which a person may express their will to have an AMD: notarial act or the form prescribed by the Minister to be signed in the presence of witnesses.<sup>8</sup>

The Quebec legislature therefore recognized that the notary is a legal professional who provides the necessary legal certainty to persons wishing to prepare their AMD by ensuring that their wishes are respected and that their consent is given in a free and informed manner.

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<sup>7</sup> The five treatments are: cardiopulmonary resuscitation; respirator; dialysis; forced or artificial feeding; and forced or artificial hydration.

<sup>8</sup> *Act respecting end-of-life care*, CQLR, c. S-32.0001, section 52 subsection 1.

## CNQ panel of experts on medical assistance in dying

In fall 2017, a panel of experts was mandated by the Quebec government (**government experts**) to “examine the complex issue of the application of assisted dying for the clinically and legally incompetent, particularly with respect to advance medical requests.” [TRANSLATION] Given that the work of the expert panel was to conclude with a report to the Minister of Health and Social Services in spring 2019, the CNQ decided in April 2019 to set up its own expert panel on medical assistance in dying (**CNQ experts**). This panel was to specifically analyze the question of advance requests for medical assistance in dying. The purpose of establishing the panel was to enable the Order to respond promptly to the findings of the government’s expert panel. The CNQ’s expert panel was composed of notaries with extensive experience and expertise in this area. The deliberations and work of these experts form the core of this brief, which is now before the Standing Committee on Legal and Constitutional Affairs.

Although several studies, reports and scientific documents were analyzed as part of the work of the CNQ’s experts, the report of the Council of Canadian Academies (**CCA**) entitled *The State of Knowledge on Advance Requests for Medical Assistance in Dying*, published in 2018,<sup>9</sup> was without doubt a seminal document that the expert panel found useful in its deliberations. From the outset, the CCA experts provided a definition of advance requests for medical assistance in dying, a definition that was adopted by the CNQ’s experts. That definition is as follows:

An AR for MAID is a request for MAID, created in advance of a loss of decision-making capacity, intended to be acted upon under circumstances outlined in the request after the person has lost decisional capacity.<sup>10</sup>

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<sup>9</sup> [The State of Knowledge on Advance Requests for Medical Assistance in Dying](#), The Expert Panel Working Group on Advance Requests for MAID, Council of Canadian Academies, December 2018.

<sup>10</sup> Ibid, p. 34.

The summary report of the CCA's experts suggested three possible scenarios:

- (1) The advance consent of a person who has already made a valid formal request for medical assistance in dying and who wants to continue taking pain medication without fear of being deprived of it;
- (2) The advance request of a person who has been irreversibly diagnosed with a fatal disease causing the degeneration of their cognitive capacities in the more or less long term, without being at the end of their life; and
- (3) The advance request prepared based on principle without any diagnosis having preceded it.

The Canadian experts ruled out the third scenario because in addition to the fact that it is currently controversial, it will not be retained by Parliament at this time. On that basis, the deliberations and recommendations set out in this brief will focus on scenarios (1) and (2), i.e. where the person has been deemed eligible for medical assistance in dying but fears the loss of capacity to consent again immediately prior to the procedure (advance consent), and where the person has been diagnosed with a condition that will likely result in a loss of capacity and wishes to consent in advance to medical assistance in dying (advance request).

## Advance consent (Scenario 1)

As previously mentioned, advance consent corresponds to the scenario where a person who meets all the criteria for obtaining medical assistance in dying can give consent in advance to receive it. Note that at this point in their illness, the requesting patient will have received all relevant and up-to-date information, and the treating personnel will ensure their informed understanding of it. Normally, a few days will elapse before the medical assistance in dying is administered. However, as mentioned above, during these few days the person will often refuse to take pain medication in order to maintain their capacity to consent immediately when the time comes, which is a requirement of the Canadian and Quebec Acts.

### **New subsection 241.2(3.2): Final consent — waiver**

New subsection 241.2(3.2) amends a safeguard that was put in place with the adoption of Bill C-14, the bill that decriminalized medical assistance in dying in Canada in June 2016. Paragraph 241.2(3)(h) of the *Criminal Code*,<sup>11</sup> introduced by that bill, states that a medical practitioner or nurse practitioner must:

Immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying.

However, as noted above, and as the Minister of Justice of Canada, the Honourable David Lametti, himself acknowledged when the bill was tabled on October 5, 2020, the requirement to obtain consent immediately before administering medical assistance in dying is currently the cause of sad and unfortunate situations where people who are eligible to receive medical assistance in dying refrain from taking medication that would relieve their pain so as not to lose their faculties and be unable to give informed consent when the time comes.

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<sup>11</sup> R.S.C., 1985, c. C-46.

This situation was repeatedly raised at the January 2020 meetings led by Minister Lametti with groups concerned with the issue of medical assistance in dying. The Minister took note of this and in Bill C-7, created an exception to this safeguard measure by adding subsection 3.2. This subsection indicates that a person who requested medical assistance in dying, and who meets all the criteria and conditions, may waive the requirement to give final consent immediately prior to administration of the medical assistance in dying. Subsection 3.2 added by the bill thus corrects the above situation, which the CNQ welcomes.

However, the first paragraph of this subsection indicates that the waiver of final consent applies only in cases covered by subsection 3, which deals with persons whose **death is reasonably foreseeable**. Parliament is therefore denying persons whose death is not reasonably foreseeable, a criterion that was deemed unconstitutional by the Quebec Superior Court in *Truchon*, the right to waive final consent. It is therefore clear from this situation that Bill C-7 in its current form creates inequality between persons whose death **is** reasonably foreseeable and those whose death is **not** reasonably foreseeable, the former being able to waive final consent in advance while the latter is not.

While the CNQ understands that given the seriousness of the issues related to medical assistance in dying, there must be significant and sufficient safeguards to avoid mistakes, it finds it unfortunate that Parliament has created two categories of persons and is prohibiting those whose death is not reasonably foreseeable from availing themselves of the waiver of final consent.

#### **Recommendation 1**

*Allow persons who meet all the conditions of section 241.2 of the Criminal Code to waive final consent to medical assistance in dying regardless of whether or not their death is reasonably foreseeable.*

## The advance consent clause

As noted above, Bill C-7 allows persons who qualify for medical assistance in dying and whose natural death is reasonably foreseeable to waive the consent required immediately prior to the administration of medical assistance in dying. To this end, subparagraphs (ii) and (iv) of paragraph 3.1(a) added by the bill provide that prior to losing the capacity to consent, the person must have requested assistance in dying and entered into a written arrangement with the medical practitioner or nurse practitioner in which the person agreed that in the event they could no longer consent, the medical practitioner or nurse practitioner could still administer the assistance in dying on the day specified in the arrangement.

With respect, the CNQ believes that it is a mistake to reduce this advance consent to the contractual level (“the arrangement” specifying a day). First of all, a person’s consent belongs to that person. Early expression of this consent should not be considered to be a contract (arrangement), any more than the current final consent is considered part of a contract. Indeed, we might ask what would happen if the medical practitioner or nurse practitioner who is a party to the arrangement were unable to perform these services for a reason beyond their control. In the case of an “arrangement,” could another healthcare professional who is authorized by law but not a party to the arrangement be substituted for the one who entered into the arrangement? Also, what happens if it becomes impossible to proceed on the date specified in the arrangement? Worse yet, what if it becomes medically indicated to proceed earlier than the day specified in the arrangement?

The CNQ therefore believes that it is preferable for this consent to remain outside the contractual field and to maintain the voluntary nature of the right of any person to express their will with regard to the care to be provided. In fact, this is currently the case with the request for medical assistance in dying where there is no other party to an arrangement. The role of the medical practitioner or nurse practitioner is to verify whether the requester is eligible under the law. That role should remain as is. The CNQ therefore recommends that the wording of subparagraphs (ii) and (iv) of paragraph 3.2.(a) in the bill not refer to

an “arrangement” between the person and the medical practitioner, but rather to the person’s clearly expressed wishes to receive medical assistance in dying, even if they are no longer able to consent.

**Recommendation 2**

*Do not refer to the notion of “arrangement” in subparagraphs (ii) and (iv) of new paragraph 241.2(3.2)(a), but rather to the notion of the “clearly expressed wishes” of the person requesting that medical assistance in dying be administered to them, even if they are no longer able to consent.*

Also, in order to simply and effectively implement the formulation of advance consent, the CNQ believes that the text provided for this purpose and included in the current ministerial (Quebec) application form for medical aid in dying should be sufficiently formal to ensure the confidence and the necessary safety of persons wishing to give their consent in advance. This formality would also provide ethical support for health professionals called upon to carry out this request.

The CNQ is proposing wording that could be provided on the back of the request form for medical assistance in dying in order to facilitate the expression of advance consent. The proposed text is set out in Appendix 1 to this brief. It should be noted that as recommended by the CNQ (Recommendation 2), the text refers to the notion of the person’s “expressed wishes,” rather than an “arrangement.”

**Recommendation 3**

*Formalize the advance consent clause contained in the request in order to ensure the person’s informed consent and reassure medical personnel of the person’s effective desire to waive consent.*



## Advance request (Scenario 2)

Since *Truchon*, in which Justice Baudouin invalidated the criteria of “reasonably foreseeable death” and “end of life,” the issue of expanding access to medical assistance in dying has been at the heart of Canadians’ debates and concerns. Specifically, there appears to be a growing awareness and popular support for the right of people diagnosed with serious and incurable diseases to request medical assistance in dying in advance, given that their cognitive abilities and capacity to consent will inevitably decline over time. A recent Léger survey indicates that 85% of Quebecers believe that people who wish to express in advance their will to obtain medical assistance in dying should they one day be diagnosed with a serious, neurodegenerative and incurable disease should be allowed to do so.<sup>12</sup>

Support for expanding medical assistance in dying has been echoed among experts from all spheres. Indeed, in November 2019, the Government of Quebec’s expert panel, composed of representatives from the medical, legal and social communities, tabled a comprehensive and very thorough report on the issue of advance consent to medical aid in dying.<sup>13</sup> Recommendation 3 of the report is unequivocal:

That an advance request for medical aid in dying may be prepared.

That the advance request for medical aid in dying be prepared following a diagnosis of a serious and incurable disease.

Although not enforceable, this request should nevertheless be considered and assessed, at the appropriate time, in accordance with the conditions set out in this report.<sup>14</sup> [TRANSLATION]

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<sup>12</sup> Léger poll, Perception of medical assistance in dying, 30 October 2019.

<sup>13</sup> [L’aide médicale à mourir pour les personnes en situation d’inaptitude : le juste équilibre entre le droit à l’autodétermination, la compassion et la prudence](#), Ministère de la Santé et des Services sociaux du Québec, November 2019.

<sup>14</sup> Ibid, p.6.

The CNQ is well aware that Bill C-7 does not go that far and does address Scenario 2, i.e., allowing a person who has been diagnosed with a serious, degenerative and incurable disease to consent to medical assistance in dying upon learning of that diagnosis. However, the door opened by the new subsection 3.2 proposed in the bill, which allows for the waiver of advance consent immediately prior to the administration of the medical assistance in dying, inevitably leads Parliament to consider, at this time, allowing advance consent under Scenario 2. The CNQ would like to make its position known on this subject and illustrate the role that the notary can play in ensuring the free and informed consent of persons and the legal certainty of the advance request, while preserving the balance between a person's autonomy and their protection.

#### **Recommendation 4**

*In light of society's shift on the issue of medical assistance in dying, initiate discussions on extending advance consent to medical assistance in dying to persons diagnosed with a serious, degenerative and incurable disease.*

### **The uncertainty inherent in advance requests**

Even if the will of Canadians on advance requests for medical assistance in dying is very real, it is important to analyze the issue of the certainty of the request in order to minimize any risk of abuse or mistakes, thereby giving sufficient legal value to the will of those who wish to make such a request.

According to the Canadian experts, implementation of an advance request for medical assistance in dying may involve uncertainties related to the following three dimensions:

1. *Status of the patient* (level of alignment between their current state, their current desire for medical assistance in dying and the conditions described in their advance request);
2. *Clarity of communication* (how well the patient described the circumstances that represent their idea of intolerable suffering in their advance request for medical

assistance in dying, how often they described their wishes, and how consistent these wishes were);

3. *Strength of relationships* (whether the patient had strong and open relationships with their healthcare practitioners and loved ones, and whether at least one trusted person was familiar with and supportive of their advance request for medical assistance in dying).<sup>15</sup>

The potential uncertainty raises questions about the application of legislative criteria, clinical practice guidelines and relevant ethical concepts, according to the Canadian experts.<sup>16</sup> They identify four areas of uncertainty that are of particular interest to the CNQ, which believes they can be remedied through recourse to an act by a public officer, i.e., the notary. They are briefly described below:

1. The criterion of intolerable suffering presents a difficulty, particularly with regard to the evolution of the level of suffering, since suffering is a subjective experience for the patient who can no longer communicate its intensity.<sup>17</sup>
2. Informed consent, which must be voluntary, poses the challenge of having to be based on truthful and adequate information provided by a healthcare professional. A request made well in advance raises the question of the conditions that existed when the request was made. Was there any serious discussion with a healthcare professional? Were family and friends involved in the patient's decision? Were there credible witnesses to the signing of this request for medical assistance in dying?
3. The role of third-party decision-makers is important because they come into play when the person who gave the directions has lost the capacity to consent to care.<sup>18</sup>

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<sup>15</sup> Summary of three reports of the Expert Panel on Medical Assistance in Dying: *State of Knowledge on Medical Assistance in Dying for Mature Minors, State of Knowledge on Advance Requests for Medical Assistance in Dying and State of Knowledge on Medical Assistance in Dying Where a Mental Disorder is the Sole Underlying Medical Condition*; prepared by the Council of Canadian Academies, Ottawa 2018, [Summary of Reports](#), p. 18.

<sup>16</sup> Ibid.

<sup>17</sup> "The need to make this interpretation could be substantially reduced if a patient clearly defined the conditions that represent intolerable suffering to them," Ibid, pp. 18–19.

<sup>18</sup> "In the case of ARs for MAID, it could be valuable to consider how the written wishes of a patient, the views of a legally authorized substitute decision maker, the views of family members, and the opinions of healthcare practitioners would be accommodated, particularly if disagreement occurred." Ibid, p. 20.

4. Finally, there are potential contradictions between the anticipated situation and present circumstances. The person who has made the advance request will have to rely on others to recognize when the conditions described as intolerable suffering in their request have been met.<sup>19</sup>

Despite these questions, the Canadian experts say that “ARs for MAID would give some people who anticipate a loss of decision-making capacity the opportunity to have their previously expressed wish for MAID followed, even if they could not provide consent immediately prior to the procedure. Having some assurance that their request for MAID would be honoured could provide comfort and relieve anxiety and distress at end of life.”<sup>20</sup>

The analysis of the Canadian experts demonstrates that adequate protections must be in place in order to properly address the uncertainties related to the implementation of an advance request for medical assistance in dying. These protections or “safeguards” must be able to guarantee both respect for the self-determination of the person and their protection.<sup>21</sup>

## The notary and the notarial act as a safeguard

As it proposed in its brief on Bill 52, the CNQ believes, even today, that the advance request for medical assistance in dying for a person with a serious and incurable disease **should only be made in notarized form**. The role of the notary and the notarial act in the advance request will therefore be discussed in this section.

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<sup>19</sup> “An AR for MAID would have to specify what criteria the person considers intolerable (e.g., being bedridden, not recognizing family members, difficulty breathing, or experiencing pain), but these are circumstances of anticipated suffering that may not reflect the lived experience of the person when they reach those circumstances.” Summary of three reports of the Expert Panel on Medical Assistance in Dying: *State of Knowledge on Medical Assistance in Dying for Mature Minors, State of Knowledge on Advance Requests for Medical Assistance in Dying and State of Knowledge on Medical Assistance in Dying Where a Mental Disorder is the Sole Underlying Medical Condition*; prepared by the Council of Canadian Academies, Ottawa 2018, [Summary of Reports](#), p. 21.

<sup>20</sup> Ibid, p. 22.

<sup>21</sup> “Safeguards can respond to risks by reducing potential impact and/or likelihood, though none can remove a risk entirely. Safeguards represent an effort to mitigate risk to achieve benefits for people in Canada; policy-makers will need to judge whether and/or where safeguards can adequately do so.” Ibid, p. 23.

## The integrity of the consent

The linchpin of our private law obviously remains the person's consent. The legal framework applicable to wishes relating to end-of-life care must therefore guarantee the integrity of the consent provided. If, as proposed by the CNQ, Parliament agrees to expand access to medical assistance in dying by allowing advance requests, an increase in the guarantees applicable to expressed consent will be necessary.

The notary's involvement would help dispel the fear or uneasiness that might be experienced when dealing with a request formulated in advance. The notary would be able to explain to the person expressing their advance wishes the content of the applicable legal framework and the human values underlying it. In a context imbued with the emotions that accompany receipt of a medical diagnosis, the notary could reassure the person that an advance request for medical assistance in dying is completely revocable.

The notary's mission would also be to inform the person that health professionals will have to take into account the existence of the advance request in the event that the person loses their incapacity to consent. A person who is capable of consenting would therefore have full knowledge of the facts when making an advance request for medical assistance in dying. The presumption provided for in section 53 of the Quebec Act respecting end-of-life care is that the author of advance medical directives has obtained the information necessary to enable them to make an informed decision at the time of signing. This principle recognized in Quebec law must, in the CNQ's view, necessarily be transposed to the advance request for medical assistance in dying.

## The notary's status as a public officer: a situation unique to Quebec<sup>22</sup>

The Quebec notary is a public officer.<sup>23</sup> As such, it is the notary's duty to assess the legal capacity of any person appearing before the notary from the following standpoint: is that

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<sup>22</sup> Certain passages in this section are taken from the brief of the Chambre des notaires that was tabled on 22 May 2013, in the context of the study of Bill 35 - *An Act to amend the Civil Code as regards civil status, successions and publication of rights*. CHAMBRE DES NOTAIRES DU QUÉBEC, [Mémoire sur le projet de loi n° 35 - Loi modifiant le Code civil en matière d'état civil, de successions et de publicité des droits](#), May 2013.

<sup>23</sup> *Notaries Act*, N-3, section 10.

person mentally capable of consenting to the act? In fact, “an individual may be temporarily unable to give consent: at that time, the person is incompetent, but still has legal capacity.”<sup>24</sup> [TRANSLATION] In this regard, articles 1398 and 1399 of the *Civil Code of Quebec* provide that consent must be given in a free and enlightened manner by a person who, at the time of manifesting it, either expressly or tacitly, is capable of binding himself. This means that consent must be given voluntarily, in full knowledge of the facts, without fear, undue influence or improper solicitation and must be free of error or deceit.<sup>25</sup>

The notary is therefore obliged to take the necessary steps to verify the capacity of the parties to consent to an act, while providing helpful and necessary explanations to enable them to understand the intricacies of that act.<sup>26</sup> To this end, the notary may, in particular, question the person concerned in order to determine their capacity. The notary also has tools and tests to assess the capacity of a party to consent to the act. Finally, where necessary, the notary may obviously entrust this evaluation to a health professional (doctor, psychiatrist, occupational therapist, etc.).

As a public officer, the officiating notary must personally verify the validity and quality of the consent of the persons appearing before him.<sup>27</sup> Once the act has been read and the notary has fulfilled his obligation to provide advice, he must personally ensure that the act being executed is in accordance with the wishes expressed to him. A notarial act received without this essential formality having been accomplished will lose its authenticity.<sup>28</sup> **It is therefore the very essence of the notarial act that the notary be able to communicate directly with each of the parties.**<sup>29</sup> On this subject, Professor Alain Roy writes:

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<sup>24</sup> See Christine MORIN and Katherine CHAMPAGNE, “L’aptitude requise pour rédiger des directives médicales anticipées,” *Repères*, June 2016, Reference EYB2016REP1985; and Robert P. KOURI and Suzanne PHILIPS-NOOTENS, “Le majeur inapte et le refus catégorique de soins de santé : un concept pour le moins ambigu,” (2003) 63 R. du B. 1, 6, EYB2003RDB66.

<sup>25</sup> See Christine MORIN and Katherine CHAMPAGNE, “L’aptitude requise pour rédiger des directives médicales anticipées,” *Repères*, June 2016, Reference EYB2016REP1985.

<sup>26</sup> See Robert DUGUAY, “Critères à considérer pour évaluer le degré d’inaptitude à faire un testament ou autres transactions,” (2000) 1 C.P. du N. 17, p. 19; and Gérard GUAY, “Problématiques et nouveautés quant à la protection des personnes vulnérables,” (2012) 1 C.P. du N. 155, p. 160.

<sup>27</sup> As per the second paragraph of section 50 of the *Notaries Act*, a party’s consent and signature may, however, be given in the presence of a notary other than the officiating notary, provided that the latter witnesses the last signature.

<sup>28</sup> *Notaries Act*, N-3, section 51.

<sup>29</sup> In France, despite the lack of legislative precision, doctrine and caselaw have accepted the use of an interpreter in the notarial act. According to Roger Comtois, such openness could be explained by certain factors specific to the French notarial

The reading and concomitant explanation of the content of a notarial act, as well as the verification of consent, is not a simple technical operation that can be validly performed by just anyone. The responsibilities assumed by the notary are not entrusted to him for reasons of accommodation, but because he has the training, qualifications and legal knowledge to carry out the required verifications effectively. ... If we accept that a notary may relinquish control to another person, regardless of the context, this opens up a major breach in the foundations of the notarial institution.<sup>30</sup>  
[TRANSLATION]

Informed consent will therefore be clearly inferred from the description of the steps taken by the requester to obtain information, the nature of the information received and the seriousness of the sources consulted, which must be noted in the act. This will allow for determining the extent to which the person was informed about their situation when the request was drafted. From this exercise is inferred the advisory duty of the notary, who, through his questions and verifications, will ensure that the requester has indeed signed in full knowledge of the facts, by validating that the person has obtained the information necessary for informed consent. Discussion with the person about their values

Verification of identity, date of signature of the document “It is not insignificant to state that the notarial act confirms the exact date as well as the identity of the person appearing before the notary.” [TRANSLATION]

In light of these explanations, the CNQ believes that requiring the advance request for medical assistance in dying to be in notarized form would remedy the shortcoming associated with the integrity of consent that was identified by the Canadian experts.

#### Clarity of communications to reduce uncertainty

In its report, the Quebec panel of experts recommends the following (Recommendation 4):

That an advance request form be developed, distinct from the advance medical directives form under the Act respecting end-of-life care, and that this form be entitled “Advance request for medical aid in dying.” The person must request medical aid in dying themselves, in a free and

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profession, where the notary is [TRANSLATION] “more here than a public official and less here than a public officer,” Roger COMTOIS, “L’interprète est-il admissible dans les actes notariés ?” (1956) 59 *R. du N.* 99, 103.

<sup>30</sup> Alain ROY, *Déontologie et procédure notariales*, Montréal, Éditions Thémis, 2001, p. 53.

informed manner, by means of the form prescribed by the Minister. The form is dated and signed by the person in the presence of a physician, who also signs and confirms:

- the diagnosis of a serious and incurable illness;
- the person's capacity to consent to care and to make an advance request for medical aid in dying;
- the free and informed nature of the request.

This step is performed by the person themselves before two witnesses or a notary, in the form of a notarial act en minute.<sup>31</sup> [TRANSLATION]

The CNQ recalls that clarity of communication, i.e., the degree of precision and acuity with which a person is able to describe their suffering and their opinion as to the timing for medical assistance in dying, is of the utmost importance for alleviating the uncertainty associated with the advance request for medical assistance in dying. In fact, a clear description of the suffering and/or living conditions deemed intolerable by a sick person will enable the trusted third party (we will return to this notion further on) and the medical team to recognize when the “right time” has arrived. This occurs when the qualitative elements described by the requester as being intolerable living conditions and that justify the administration of medical assistance in dying have been met.

#### The notarial act as an instrument for clearly establishing the person's will

With the greatest respect, the CNQ does not believe that the form proposed by the Quebec panel of experts goes far enough in terms of the content of the request because it does not lend sufficient importance to the crucial element, i.e., “the right time,” which must be carefully defined and described by the author in the request. Indeed, it is on this essential description of the conditions and consequences of their illness that would make life intolerable that the decision of the caregivers to proceed with the administration of this care will be based, with full respect for the will of the person seeking medical assistance in dying.

It should go without saying that the more precise, personalized and understandable this description, the more comfortable the medical team and the medical third party, if any,

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<sup>31</sup> [L'aide médicale à mourir pour les personnes en situation d'incapacité : le juste équilibre entre le droit à l'autodétermination, la compassion et la prudence](#), Ministère de la Santé et des Services sociaux du Québec, November 2019, (Recommendation 4).



will be with the quality of the expression of the wishes they will be carrying out through the administration of this care. As such, the CNQ believes that the notion of “the right time” should be better defined in order to reduce uncertainty regarding the request for medical assistance in dying.

This is where the notarial act takes on critical importance. Indeed, having such a request drafted by a notary—a legal professional who is specifically trained and accredited for this purpose and a local lawyer who can accompany the person throughout the process—would ensure the accuracy, clarity and precision of the information recorded in it. The notarial act would then lend incomparable reliability to the process of the advance request for medical assistance in dying, since the notary would be able to truly interact with the person in order to verify that they have sufficient information.

The notarial act must therefore contain the most precise description possible of the conditions that represent intolerable suffering for the requester. This description will make it easier for the care team to decide whether they are satisfied by the patient’s condition. The elements that must be present for the “right time” will also have to be accurately described (for example, being bedridden, experiencing serious difficulty breathing, being overwhelmed by intense pain, no longer recognizing loved ones, being unable to eat, etc.).

### [Training and accreditation for notaries](#)

The CNQ is so convinced of the unique and unprecedented importance of this particular notarial act that it will require any notary wishing to execute such an act to undergo training on the medical issues involved, particularly the relevant basic psychological elements. This will better equip notaries to fully understand the context in which the requester is seeking to have their wishes carried out, and to be able to translate this reality into an unambiguous written document. This would not be a precedent, given that with the 1999 coming into force of the legislative provisions entrusting notaries with the entire process of executing protection mandates and opening state protective supervision regimes, the Quebec Minister of Justice and the CNQ believed that it was essential—to ensure public confidence, but above all the quality of the professional act—to oblige notaries interested in acting in this area to undergo training. In addition to informing

notaries about the new legal elements involved, this training was intended to familiarize them with certain psychiatric dimensions associated with the specific characteristics of persons who have become incapacitated and are often vulnerable. The CNQ therefore believes that in a matter as sensitive as medical assistance in dying, such training and accreditation are necessarily appropriate. Indeed, the notary must be able to deal with the particular psychological situation of a person who, having received an irreversible diagnosis of a terminal illness, will use the notary's services to establish an advance request for medical assistance in dying.

In addition, the notary will need medical knowledge relevant to exercising his duty to advise in order to help the requester express their wishes, particularly in the description of the conditions that will render suffering intolerable. The elements which, when taken together, signify that the time has come, must be precisely enumerated in order to lighten the burden on third party decision-makers. It is not a question of turning notaries into doctors, but of providing them with sufficient basic knowledge to carry out their duty to advise and to master the medical terminology involved in drafting the act.

The notary must therefore be perceptive in his dealings with the client in order to provide appropriate assistance in choosing the trusted person who will be called upon, when the time comes, to decide with the healthcare team to proceed with medical assistance in dying. If need be, the notary should suggest that the client establish an ongoing relationship with that person, and constantly remind that trusted person of their wishes. As we have seen, the Canadian group of experts considers this condition to be very important. Medical personnel will be all the more comfortable in proceeding if they observe the existence of this close relationship between the trusted person and the patient.

Given the uncertainties intrinsically associated with an advance request for medical assistance in dying and the irreversibility and finality of its purpose, it should necessarily be executed by a notary accredited in this area. As such, the CNQ believes that the extremely serious and often dramatic nature of the circumstances in which a person requests medical assistance in dying justifies recording this request in an authentic document<sup>32</sup> that provides unequalled legal certainty. The CNQ therefore feels that it would be inconsistent for the legislator to require a notarial act for certain acts that have significant consequences for the patrimony of individuals (immovable hypothecs<sup>33</sup> and marriage contracts,<sup>34</sup> for example), and not to require the same level of formality for a request for medical assistance in dying, the ultimate purpose of which is the greatest of all consequences, i.e., death.

#### **Recommendation 5**

*Allow advance requests for medical assistance in dying for persons diagnosed with a serious, degenerative and incurable disease only through a notarial act in order to ensure the legal certainty of the request and the informed consent of the person.*

### **The notary and the trusted person**

The Canadian expert panel believes that several people share the role of third party decision-maker: the healthcare professionals involved; the family; and in particular, the legally authorized substitute decision maker or protector. In Canada and Quebec, a legally designated substitute decision maker must follow the directions contained in a written healthcare directive.

In the case of ARs for MAID, it could be valuable to consider how the written wishes of a patient, the views of a legally authorized substitute decision maker, the views of family members, and the opinions of

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<sup>32</sup> *Civil Code of Quebec*, art. 2814(6).

<sup>33</sup> *Ibid*, art. 2693.

<sup>34</sup> *Ibid*, art. 440.

healthcare practitioners would be accommodated, particularly if disagreement occurred.<sup>35</sup>

The Canadian expert panel recognized the enormous responsibility of healthcare professionals who are called upon to administer medical assistance in dying to a person who is no longer able to consent. The experts believe that a third party should also be involved in the implementation of medical assistance in dying. This trusted person will have been designated by the patient in the request, and should have sufficient knowledge of the patient's wishes to guide the decision based on their interpretation of the patient's current condition, specifically the intolerable nature of the patient's suffering.

The Canadian experts emphasize the importance of the trusted person as a factor in reducing the risk of abuse or danger to the requester. The CNQ therefore recommends that when requesting medical assistance in dying (Scenario 2), the person appoint a trusted third party whose task will be not to decide for the person who is no longer able to do so as a result of the decline in their faculties, but rather to indicate to the healthcare team that the time determined by the person in their request as the "right time" has arrived. With this indication, the process leading to administration of medical assistance in dying to the person who has made an advance request can begin.

#### **Recommendation 6**

*Require that in the advance request for medical assistance in dying, the person diagnosed with a serious, degenerative and incurable disease name a trusted third party who will advise medical personnel as to when the medical assistance in dying should be administered.*

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<sup>35</sup> Summary of three reports of the Expert Panel on Medical Assistance in Dying: *State of Knowledge on Medical Assistance in Dying for Mature Minors, State of Knowledge on Advance Requests for Medical Assistance in Dying and State of Knowledge on Medical Assistance in Dying Where a Mental Disorder is the Sole Underlying Medical Condition*; prepared by the Council of Canadian Academies, Ottawa 2018, [Summary of Reports](#), p. 20.

## Conclusion

Given that Bill C-14 was the first piece of federal legislation to recognize and decriminalize medical assistance in dying, it is understandable that Parliament sought to establish safeguards to prevent mistakes or abuse. With Bill C-7, Parliament has corrected several unfortunate situations resulting from some of the safeguards that were introduced in 2016. The most important relaxation of these safeguards is without a doubt the repeal of the “reasonably foreseeable natural death” criterion, which was invalidated by the *Truchon* decision of the Quebec Superior Court in September 2019, and which prevented many people experiencing significant suffering from obtaining medical assistance in dying. The reduction from two (2) witnesses to one (1) for a request for medical assistance in dying and the repeal of the mandatory ten (10) day waiting period between the request and the administration are also relaxations of the safeguards that are welcomed by the CNQ.

The CNQ is also pleased with the introduction in Bill C-7 of a measure to allow for waiving the consent required immediately prior to administration of medical assistance in dying. Parliament has demonstrated through this amendment a willingness to listen, as well as compassion for those who were eligible for medical assistance in dying and were demanding the right to have their wishes carried out even if they were no longer able to consent immediately prior to their death. The CNQ finds it unfortunate, however, that the bill limits the right to waive final consent in advance to those whose natural death is reasonably foreseeable. We would have liked to see the spirit of the *Truchon* decision respected and this possibility made available to all persons who are eligible for medical assistance in dying, regardless of whether or not their natural death is foreseeable.

The CNQ would also have liked Parliament to use Bill C-7 to lay the groundwork now for advance consent to medical assistance in dying for those diagnosed with a serious, degenerative and incurable disease. Indeed, this expansion is already widely desired by the public and has already received the support of the community of experts. The CNQ therefore hopes that the debates on Bill C-7 will lead Canadian parliamentarians to fast-track deliberations on this subject, and reiterates the important role that notaries can play in accepting the request, accompanying the person who makes it and safeguarding the

entire process owing to their function as public officers of whom impartiality, probity and advice are required.

The CNQ reiterates its willingness to collaborate with the principal stakeholders affected by Bill C-7 with a view to ensuring the protection of the public by striking the appropriate balance between respect for the autonomy of individuals and their protection.

## Appendix I

I (name of requester) am requesting the medical assistance in dying set forth in this form and I am concerned that I may lose my capacity to confirm my consent immediately prior to the administration of the substances that will cause my death.

Also, by affixing my signature below, I formally express, in advance and after careful consideration, my final consent to the medical assistance in dying that I have requested to be administered to me even if I have become mentally incapable of confirming my consent at that time.

I understand that as long as I retain my capacity to consent to care, I may revoke this request for medical assistance in dying.

I declare that prior to signing, I expressed, verbally or by meaningful signs, my final advance consent in the presence of (physician or witnesses) and that I answered in the affirmative to the following question:

“Is it your firm intention that you be administered medical assistance in dying even if you are no longer able to confirm your consent in the absence of your confirmed consent at the time of the administration of the substances that will cause your death from the terminal procedure?”

I declare and I sign in the presence of the witness, this (date) (signature)

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Physician or witness

By signing, I confirm that (name of requester), after reading the text of the consent set out above, clearly answered in the affirmative to the above question.

In witness whereof I sign this (date)

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