Brief from the Barreau du Québec

Bill C-7—An Act to amend the Criminal Code (medical assistance in dying)

2020-10-29

Mission of the Barreau du Québec

To protect the public, the Barreau du Québec oversees professional legal practice, supports member practitioners, fosters a sense of belonging within the membership and promotes the rule of law.

Acknowledgements

The Barreau du Québec would like to thank the members of its Task Force on Medical Assistance in Dying:

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Support for this committee is provided by the Barreau du Québec Secretariat and Legal Affairs:

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Published in month year by the Barreau du Québec

ISBN (PDF): 978-2-924857-81-6

Legal Deposit— Bibliothèque et Archives nationales du Québec, year
Legal Deposit — Library and Archives Canada, year

Overview of the Barreau du Québec's position

✓ **The Barreau du Québec welcomes many of the amendments brought by the bill**

In addition to abolishing the criterion of reasonably foreseeable death, the bill also seeks to abolish the 10-day waiting period between the request for medical assistance in dying and the provision of such care, as well as the final consent of the requester. It also requires that only one independent witness sign the request for medical assistance in dying, as opposed to the two witnesses currently required. In addition, it recognizes the need for further reflection with respect to (1) access to medical assistance in dying for persons living with mental illness (2) and advance requests for medical assistance in dying.

✓ **The Barreau du Québec is seeking the elimination of the new minimum 90-day delay before receiving medical assistance in dying that is being imposed exclusively on persons requesting medical assistance in dying whose death is not reasonably foreseeable**.

A person requesting medical assistance in dying must meet several strict criteria, one being that they be suffering intolerably. This delay appears unreasonable on its face. Furthermore, since this criterion is only applicable in cases where the person's death is not reasonably foreseeable, it will have the effect of creating separate eligibility regimes for medical assistance in dying based on whether or not the person's death is reasonably foreseeable, which is inconsistent with the principles set out in *Truchon* and *Carter*.

✓ **The Barreau du Québec is seeking the repeal of the criterion currently found in the *Criminal Code* regarding the advanced state of irreversible decline in capability of the person requesting medical assistance in dying**.

This criterion for eligibility for medical assistance in dying, which is not found in the scheme set out for this purpose in *Carter*, is constitutionally questionable.

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INTRODUCTION

The issue of medical assistance in dying (MAID) is a complex one given the underlying ethical and moral legal issues, such as the importance of human dignity, the right to self-determination and more broadly, access to a varied, comprehensive and appropriate range of care for all persons at the end of life in accordance with the right to life. In this regard, we encourage any initiative aimed at offering and improving the care and support services available to people considering MAID.

In Canada, the Supreme Court decision in *Carter v Canada (Attorney General)*[1] set the stage for the legal recognition of MAID. Parliament amended the *Criminal Code* to incorporate into Canadian law the right of any person to request MAID when certain conditions and safeguards have been met.

At the time, the Barreau du Québec pointed out that Parliament had added two criteria to the series of conditions to be met by any request for MAID.[2] The "advanced state of irreversible decline in capability" and "reasonably foreseeable death" tests were developed on the fringes of the *Carter* decision. As such, the Barreau pointed to the potential for these criteria to be challenged in the courts.

Indeed, in *Truchon v Attorney General of Canada*,[3] the Quebec Superior Court ruled on the test of reasonably foreseeable death of the person requesting MAID that was set out in the *Criminal Code*[4] and its provincial counterpart, the *Act respecting end-of-life care*.[5] In both cases, the Superior Court found these criteria to be unconstitutional and asked the two levels of government to remedy this illegality through legislative amendments. The federal government chose not to appeal this decision.

One of the purposes of Bill C-7 is to amend the *Criminal Code* to remove the criterion of reasonably foreseeable death as a condition of eligibility for MAID in order to comply with the request of the Quebec Superior Court.

It is in this context that the Barreau du Québec has reviewed the bill and is submitting to you its observations and recommendations.

[1] 2015 SCC 5, [2015] 1 SCR 331, hereinafter "*Carter*."
[2] Brief from the BARREAU DU QUÉBEC | Bill C-14 — An Act to amend the *Criminal Code* and to make related amendments to other Acts (medical assistance in dying), page 4.
[3] 2019 QCCS 3792, hereinafter "*Truchon*."
[4] R.S.C. (1985), c. C-46.
[5] Act respecting end-of-life care S-32.0001.

1. THE BARREAU SUPPORTS SEVERAL AMENDMENTS BROUGHT BY THE BILL

The Barreau du Québec welcomes several amendments included in Bill C-7. In addition to repealing the criterion of the person's reasonably foreseeable death, the bill will also repeal the 10-day delay between the request for MAID and its administration, and creates the possibility of not requiring the person's final consent in cases where they have become incapacitated prior to receiving MAID, if they meet all the other conditions. In addition, the bill provides that only one witness will now be required to sign the request for MAID, as opposed to the two witnesses currently required by law. In our opinion, these amendments resolve an important problem that had arisen in practice, namely the difficulties in finding witnesses who met the criteria to act in this capacity, particularly in the context of people who are more isolated or living alone.

In addition, the bill recognizes the need for further reflection with respect to (1) access to MAID for people living with mental health problems and (2) advance requests for MAID. We consider this additional period to be quite appropriate.

Indeed, we consider these amendments and principles to be essential from the standpoint of the accessibility, feasibility and legality of medical assistance in dying, and ultimately from the perspective of the right to equality[6] and dignity of the person.[7] Clearly, these amendments are essential for the effective implementation of the right to self-determination of the person.[8]

2. THE BARREAU DU QUÉBEC HIGHLIGHTS TWO MAJOR ISSUES

2.1 The amendment regarding the 90-day waiting period before receiving MAID

Clause 1(7) of the bill amending section 241.2 of the *Criminal Code* (addition of new subsection 3.1)
Safeguards — natural death not foreseeable **(3.1)** 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: . . . **(i)** 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 10 out in subsection (1) begins and the day

[6] Section 15 of the *Canadian Charter of Rights and Freedoms* The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (hereinafter, the Canadian Charter); section 10 of the Quebec Charter of human rights and freedoms, Chapter 12 (hereinafter, the Quebec Charter).
[7] Section 15 of the Canadian Charter, section 4 of the Quebec Charter.
[8] Known as "liberty" in section 7 of the Canadian Charter and "freedom" in section 1 of the Quebec Charter.

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;

The bill provides that a mandatory minimum of 90 days must have elapsed between the day the first assessment of eligibility begins and the day that medical assistance in dying is administered to the person. This criterion is intended to establish a "safeguard" to be applied when natural death is not foreseeable.

In our view, this addition is questionable, if not problematic. Indeed, a 90-day waiting period for a person who would otherwise meet all the criteria for receiving MAID seems unreasonable. We must bear in mind that currently,[9] only someone living with serious and irremediable health problems is eligible for MAID, i.e. if:

(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.[10]

In addition, there are two conditions concerning voluntary and informed consent and the ability of the person to formulate a request for MAID.[11]

We are therefore concerned that in requiring a minimum of 90 days before the person can receive MAID simply because their death is not naturally foreseeable, the bill would have the effect of unduly maintaining the person in a situation of intolerable suffering, even though they meet all the conditions for receiving MAID established by *Carter*. Moreover, the length of the delay itself is questionable given that it does not appear to be based on any empirical data or objective justification. We are concerned that this delay may place an unnecessary burden on the person, whether it be over-confirmation of their consent by treating staff or unhealthy pressures. We therefore consider the 90-day waiting period to be prejudicial—even unreasonable—from the standpoint of the individual's right to self-determination, and find it difficult to reconcile with the notion of a safeguard, as it is presented by Bill C-7.

Exceptionally, the bill provides that "if the assessments have been completed and they and the medical practitioner or nurse practitioner. . . 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 [they] consider[s] appropriate in the circumstances," may be applied.

[9] We did not include the "reasonably foreseeable natural death" test, given that its removal is already proposed in the bill.
[10] Paragraph 241.2(2)(c) of the *Criminal Code*.
[11] Paragraphs 241.2(1) (d) and (e) of the *Criminal Code*.

This raises a number of questions for the Barreau: are we to understand that a person whose death is not reasonably foreseeable, but who suffers from an illness that is progressing towards incapacity in a predictable manner, may be granted a shorter wait time than a person whose illness is not predictably progressing towards incapacity?

In our view, the inclusion of the 90-day time limit as a condition of eligibility for medical assistance in dying is highly problematic since it creates eligibility regimes for MAID at different levels, depending on the one hand on whether or not the person's death is reasonably foreseeable and on the other hand, whether incapacity will result from the normal progression of their illness.

Condition of the MA applicant	What C-7 provides
Death that is reasonably foreseeable	No wait time
Death that is not reasonably foreseeable	90 days from first assessment to administration of MAID EXCEPT If physicians believe incapacity is imminent THEN Time limit they consider reasonable

In our opinion, this condition is likely to compromise the right to equality of persons as established in *Truchon* and ultimately the right to life, recognized in *Carter*. The Barreau therefore recommends that any distinction based on the reasonably foreseeable death criterion be removed from Bill C-7.

2.2. Maintaining the "advanced state of irreversible decline in capability" test for eligibility for MAID.

In 2016, Bill C-14 incorporated into the *Criminal Code* the regime applicable to access to medical assistance in dying. This regime is essentially found in section 241.2 of the *Criminal Code*, which reads as follows:

Section 241.2 of the *Criminal Code*
Eligibility Criteria for Medical Assistance 241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria: (a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;

(b) they are at least 18 years of age and capable of making decisions with respect to their health;

(c) they have a grievous and irremediable medical condition;

(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(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.

Bill C-14, it should be remembered, followed on the Supreme Court of Canada's decision in *Carter*, which declared unconstitutional the prohibition on medical assistance in dying in Canada, which at the time was enshrined in sections 241(b) and 14 of the *Criminal Code*. Specifically, the Supreme Court concluded:

> Section 241 (*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that 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.

When Bill C-14 was introduced, the Barreau du Québec expressed itself in the following terms:[12]

> To obtain medical assistance in dying, it must be demonstrated that the person is in an advanced state of irreversible decline in capability and that the person's natural death has

[12] Brief from the BARREAU DU QUÉBEC | Bill C-14 — An Act to amend the *Criminal Code* and to make related amendments to other Acts (medical assistance in dying), page 4.

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.

These criteria are not in Carter v. Canada (Attorney General). The Supreme Court of Canada makes no mention of an advanced state of irreversible decline in capability or death being reasonably foreseeable. We wish to bring this point to Parliament's attention, since this opens up the possibility of challenges if the federal legislation does not provide for at least the scenarios presented in *Carter*: that medical assistance in dying must be available to "a competent adult … where (1) the person affected clearly consents to the termination of life; and (2) the person 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."

We hasten to point out that it is undesirable that persons who meet all the criteria set out in *Carter* be refused medical assistance in dying because of the restrictive criteria in the bill. These are individuals with intolerable suffering who will have to challenge the law in court.

With respect to our comment on the legality of the "reasonably foreseeable death" criterion, the *Truchon* decision proved us right and led Parliament to reconsider its position, as reflected in Bill C-7.

We remain convinced of the continuing validity of our observation regarding the "advanced state of irreversible decline in capability" test for persons requesting MAID. As such, we recommend that Bill C-7 be used as an opportunity to abolish this test, which is not consistent with the *Carter* decision. As a result of this inconsistency, this criterion too is likely to be challenged in the courts by people who are suffering intolerably and will bear the heavy burden of proving its unconstitutionality.

CONCLUSION

The Barreau du Québec believes that significant amendments to Bill C-7 are necessary to ensure that the right to equality and the right to self-determination of the person are truly implemented, in accordance with the lessons of the *Carter* decision. In *Carter*, the Supreme Court established a clear regime for eligibility for MAID for all persons at the end of life, and any additional conditions imposed in this regard are likely to be successfully challenged in court.

We hope that the recommendations and observations presented in this brief will provide useful insights for the important debate about medical assistance in dying.