

Brief: Proposal to Clarify Legislative Objectives of Medical Assistance in Dying

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The Issue

In June of 2016, Canada legalized medical assistance in dying. The adopted framework sought to balance the autonomy rights of competent adults with the substantive equality of vulnerable persons, ultimately to give Canadians more control in how they die while nonetheless fulfilling the State's role to protect life and protect equality. On September 11th, 2019, in the *Truchon* decision, the Quebec Superior Court struck down the requirement that restricted access to medical assistance in dying to those at the end of their natural lives.

The decision treated the expressly stated legislative objectives of affirming the equal and inherent value of all lives, avoiding encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled, and preventing suicide as mere guiding principles, thereby circumventing the need for a section 1 analysis on these objectives. Their inclusion as legislative objectives would have been particularly significant because, in dealing with a complex statutory scheme like MAiD, courts must accord deference "at all stages of the analysis required by s. 1".²

Without an end of life criterion in place, all those who suffer intolerably and who are in an advanced state of decline due to an irremediable disease, illness, or disability will be able to access medical assistance in dying³. Whereas the State asserts an interest in preventing acts that deliberately and prematurely end many human lives, including where the suffering of these individuals is intolerable, without an end of life criterion, the State would nevertheless provide MAiD as an option to individuals who have an irremediable disease, illness, or disability and report that they suffer intolerably.

This would provide for disability or illness to serve as a justification for the termination of life in a way that no other personal characteristic could. It would mark disability as a burden worse than death and will compound existing discrimination and devaluation. Systemically, those with disabilities and those who are elderly experience ableism and ageism intersecting with other forms of marginalization. Offering medical assistance in dying on these terms feeds into devaluing discourses, both reifying and exacerbating stigmatization, damaging Canada's social ethos and putting individuals in harms' way.

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² *Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 56 ("**Hutterian Brethren**"), at para 37.

³ This is not an exhaustive list of requirements or procedural safeguards. Others, like being an adult and having capacity to provide informed consent to receiving MAiD remain.

Factoring in Equality Rights

Protection from death is a matter of promoting and protecting equality rights for disabled and elderly persons. It is an issue with deep roots in the history of eugenics, and a live issue in an era of Darwinian ethics and genetic determinism. There is broad consensus across disability rights advocacy and scholarship in Canada and internationally that once disability, in and of itself, becomes a justification for interventions that prematurely terminate life, the pervasive force of ableism that thwarts the equal recognition and dignity of disabled citizens will have runaway impact on individuals and Canadian society as a whole.

The government must be alert to the stigmatization and perpetuation of prejudicial treatment that will result from a legislative imprimatur for untrammelled access to assisted dying. A formulation that equates significant disability with eligibility to die would be subject to challenge for violation of section 15. This is an area of constitutional vulnerability that the courts have not considered in any substantive way. At this stage in the judicial history of assisted dying legislation, it is more important than ever that the legislative objectives be clarified to give precedence to protection from unequal treatment on grounds of disability, illness or age. Otherwise the legislation will remain subject to challenge, for different reasons than before.

Legislative Objectives to Consider in Ensuring a Balance of Autonomy and Equality Rights

Any amendment to the current legislation should include as pressing and substantial objectives:

- Avoiding any termination of human life that is premised on personal characteristics associated with membership in a protected group;
- Establishing an objective, enforceable safeguard to protect the substantive equality rights and the right to life of people who are elderly, ill, or disabled;
- Ensuring equal protection of the lives of people who are elderly, ill or disabled, taking into consideration both individual vulnerabilities and broader societal patterns of historic disadvantage;
- Promoting and reaffirming the equal value of the lives of those who are ill, elderly, or disabled, in order to combat destructive stereotypes and the pernicious effects of ableism;
- Preventing health care professionals, family members, and society at large from adopting negative perceptions of the quality of life of people who are elderly, ill, or disabled, or permitting such perceptions to affect judgements about the treatment, care, and social support measures offered to these persons
- Clarifying the difference between suicide and MAID, by clearly defining the latter as a measure aimed at easing the transition between life and death for competent adults who are dying and to facilitate autonomous decision-making at the end of life.

Canada should re-write a new, more precise, end of life requirement to replace the reasonable foreseeability of natural death criterion, taking inspiration from the examples provided in Appendix A.

Questions related to the constitutional validity of a new end of life criterion, alongside the above legislative objectives, should be referred directly to the Supreme Court of Canada for clarity.

Conclusion

These are urgent and real issues. Persons with disabilities – indigenous persons and women in particular - experience higher than average rates of suicidality in large measure because of how they are not wholly included in society, as do the elderly. Disability is also compounded by the intersections of race, gender and class, among other things. There is evidence that in jurisdictions that allow MAID outside of the end of life context, MAID practice increases among elderly persons who are not close to the end of life, people with mental illness, and people with chronic disabilities.

**APPENDIX A:
MEDICAL ASSISTANCE IN DYING LEGISLATION IN PERMISSIVE JURISDICTIONS (INTERNATIONAL)
– COMPARATIVE OF END OF LIFE REQUIREMENT**

JURISDICTION	LEGISLATION	CAUSE DEATH METHOD	END OF LIFE REQUIREMENT
Australia – Victoria	<i>Voluntary Assisted Dying Act 2017, No. 61 of 2017 (2019)</i>	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	<p>Yes (adult): disease, illness or medical condition that —</p> <ul style="list-style-type: none"> • is incurable; and • <u>is advanced, progressive and will cause death</u>; and • <u>is expected to cause death within weeks or months, not exceeding 6 months</u>; or if neurodegenerative, disease, illness or medical condition must be <u>expected to cause death within weeks or months, not exceeding 12 months</u>
Australia – Western Australia * pending	<p><i>Voluntary Assisted Dying Bill (No.139)</i></p> <ul style="list-style-type: none"> • passed Legislative Assembly and Legislative Council (with amendments) • sent back to Legislative Assembly 5 Dec 2019; amendments expected to be ratified by Leg Assembly 	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	<p>Yes (adult): disease, illness or medical condition that —</p> <ul style="list-style-type: none"> • <u>is advanced, progressive and will cause death</u>; and • <u>will, on the balance of probabilities, cause death 12 within a period of 6 months or, in the case of a disease, illness or medical condition that is neurodegenerative, within a period of 12 months</u>
Belgium	<i>28 MAY 2002 — Law on Euthanasia (2002)</i>	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	<p>No (adult and emancipated minor):</p> <ul style="list-style-type: none"> • medically futile (hopeless) condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident • if pursuant to advance directive: the patient must suffer from a serious and incurable disorder, caused by illness or accident, be unconscious, and the condition must be irreversible given the current state of medicine

	<i>28 FEBRUARY 2014 — The Law modifying the Law of 28 May 2002 concerning euthanasia with a view to extending euthanasia to minors (2014)</i>	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	Yes (non-emancipated minor with capacity for discernment): <ul style="list-style-type: none"> • medically futile (hopeless) condition of constant and unbearable <u>physical suffering</u>, resulting from a serious and incurable disorder caused by illness or accident, that cannot be alleviated and that <u>will result in death in the short term</u>
Luxembourg	<i>Law of 16 March 2009 on Euthanasia and assisted suicide (2009)</i>	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	No (adult): <ul style="list-style-type: none"> • “terminal medical situation” and shows constant and unbearable physical or mental suffering without prospects of improvement, resulting from an accidental or pathological disorder
The Netherlands	<i>Act of 12 April 2001, on termination of life on request and assistance with suicide (2002)</i>	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	No (adult; minor 12-18 deemed capable of making reasonable appraisal of own interests) <ul style="list-style-type: none"> • unbearable suffering with no prospect of improvement
New Zealand * pending	<i>End of Life Choice Act 2019</i> <ul style="list-style-type: none"> • Royal Assent, November 2019; • pending public referendum in 2020 	<ul style="list-style-type: none"> • Self-administration; or • Practitioner administration 	Yes (adult): <ul style="list-style-type: none"> • <u>terminal illness: likely to end the person’s life within 6 months</u>; and • is in an <u>advanced</u> state of irreversible decline in physical capability
The United States – California	<i>California End of Life Option Act (2015, in effect 2016)</i>	Self-administration only	Yes (adult): <ul style="list-style-type: none"> • “terminal disease”: an incurable and irreversible disease that has been medically confirmed <u>and will, within reasonable medical judgment, result in death within six months</u>
The United States – Colorado	<i>The Colorado End-of-Life Options Act (2016)</i>	Self-administration only	Yes (adult) <ul style="list-style-type: none"> • “terminally ill” with a “prognosis of six months or less” which means a <u>prognosis resulting from a terminal illness that the illness will, within reasonable medical judgment, result in death within six months</u> and which has been medically confirmed

The United States – District of Columbia	<i>The District of Columbia Death with Dignity Act (2016, in effect 2017)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> “terminal disease”: an incurable and irreversible disease that has been medically confirmed and <u>will, within reasonable medical judgment, result in death within 6 months</u>
The United States – Hawaii	<i>Our Care, Our Choice Act (2018, in effect 2019)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> “terminal disease”: an incurable and irreversible disease that has been medically confirmed and <u>will, within reasonable medical judgment, produce death within six months</u> “terminal disease” <u>does not include age or any physical disability or condition that is not likely to, by itself, cause death within six months</u>
The United States – Maine	<i>The Maine Death with Dignity Act (2019)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> "Terminal disease": an incurable and irreversible disease that has been medically confirmed and <u>will, within reasonable medical judgment, produce death within 6 months.</u>
The United States – New Jersey	<i>Medical Aid in Dying for the Terminally Ill Act (2019)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> “Terminally ill”: terminal stage of an irreversibly fatal illness, disease, or condition with a prognosis, <u>based upon reasonable medical certainty, of a life expectancy of six months or less</u>
The United States – Oregon	<i>The Oregon Death with Dignity Act (1994, in effect 1997)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> “terminal disease”: an incurable and irreversible disease that has been medically confirmed and <u>will, within reasonable medical judgment, produce death within six months</u>
The United States – Vermont	<i>Vermont Act No. 39, Patient Choice at the End of Life Act (2013)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> “terminal condition”: an incurable and irreversible disease <u>which would, within reasonable medical judgment, result in death within six months</u>
The United States – Washington	<i>The Washington Death with Dignity Act (2008, in effect 2009)</i>	Self-administration only	<p>Yes (adult)</p> <ul style="list-style-type: none"> "terminal disease" means an incurable and irreversible disease that has been medically confirmed and <u>will, within reasonable medical judgment, produce death within six months</u>