THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 11, 2020

Via email: hcminister.ministresc@canada.ca; mcu@justice.gc.ca; Carla.Qualtrough@hrsdc-rhdcc.gc.ca

The Honourable Patty Hajdu, P.C., M.P.
Minister of Health
House of Commons
Ottawa, ON K1A 0A6

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Honourable Carla Qualtrough, P.C., M.P.
Minister of Employment, Workforce Development and Disability Inclusion
House of Commons
Ottawa, ON K1A 0A6

Dear Ministers:

Re: Consultation on Medical Assistance in Dying (MAiD)

The Canadian Bar Association is a national association of 36,000 lawyers, Québec notaries, law teachers and students, with a mandate to promote improvements in the law and the administration of justice. The CBA End of Life Working Group (CBA Working Group) comprises a cross-section of members drawn from diverse areas of expertise, including criminal justice, constitutional and human rights law, health law, wills, estates and trusts law, elder law, children's law, privacy and access to information law, and dispute resolution.

We appreciated the invitation to the Ottawa ministerial roundtable on January 24, 2020 where Me. David E. Roberge represented the Working Group. We are writing to complement our participation in the roundtable and comment on the proposed legislative response to the Quebec Superior Court's decision in *Truchon v. Canada*[1].

The CBA has demonstrated an abiding commitment to clarifying the law about end-of-life decision-making and stressing the importance of a pan-Canadian approach. The CBA has adopted resolutions on medical assistance in dying (MAiD) addressing mature minors, advance requests, and eligibility of persons whose sole underlying condition is mental illness[2].

1 *Truchon v. Procureur général du Canada*, 2019 QCCS 3792 (*Truchon*).

2 See CBA Resolutions on Advance Requests, Psychiatric Conditions and Competent Minors

Judgment in *Truchon*

In *Truchon,* the Quebec Superior Court ruled that the criterion of "reasonably foreseeable natural death" was unconstitutional. The Court held that it was incompatible with the principles established by the Supreme Court of Canada in *Carter v. Canada*[3].

We support the Quebec Superior Court's decision and highlight its interpretation of *Carter* – that the essence of *Carter* is not proximity of death, but the prevention of intolerable suffering, as well as dignity and the autonomy of the person, for those who are capable to clearly consent to the termination of their life[4].

As a result of the *Truchon* decision, the federal government is considering if additional safeguards are required in the *Criminal Code*, for individuals eligible for MAiD who are not nearing the end of life. In our view, any additional measures must ensure eligibility for MAiD is aligned with the criteria established in *Carter*.

If the government decides to add safeguards for individuals eligible for MAiD who are not nearing end of life, the CBA Working Group recommends that you give guidance on how these new criteria should be interpreted. The former criterion of "reasonably foreseeable natural death" caused significant difficulty in practice and uncertainty. The scope of a similar criterion (without guidance) could have a chilling effect on practitioners and hinder access to MAiD.

The CBA Working Group believes that the response to vulnerability issues is to ensure informed consent. In *Carter*, the Supreme Court of Canada accepted evidence that vulnerability can be assessed on an individual basis by physicians. The Court pointed out that concerns about "decisionally vulnerable" patients arise in all end of life medical decision-making, for instance for those who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment. Those risks "are already part and parcel of our medical system"[5], and related matters are resolved through the assessment of informed consent and decisional capacity.

In the same vein, the Quebec Superior Court in *Truchon* stated that vulnerability must be assessed from an individual perspective rather than inferred on a collective basis, in reference to a group seen as vulnerable persons which may not adequately reflect the diversity of circumstances among that group[6]. We support this patient-centric approach for capacity and consent.

Beyond End of Life – Potential Additional Safeguards

Subject to the opportunity to add safeguards to the current *Criminal Code* MAiD framework, we believe that two additional measures compatible with the *Carter* decision may be considered:

- a longer reflection period before MAiD is administered; and
- a psychiatric assessment.

These measures address capacity and consent to the termination of one's life, which are instrumental to the *Carter* decision.

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3 [2015] 1 SCR 331 (Carter)

4 *Truchon*, par. 497.

5 *Carter*, par. 115.

6 *Truchon*, par. 466.

A longer reflection period (more than 10 days) before MAiD is administered might be warranted in cases where there are no time constraints to properly review the trajectory of the patient's medical condition and mental state.

In our view, once a person has received a medical diagnosis, there should be an initial period before filing a request for MAiD, to adjust to the shock of learning of the illness or injury and to allow for a fully informed consent. Once this initial period has elapsed, the subsequent reflection period between the MAiD request and its administration could also be longer than 10 days for individuals not nearing the end of life to ensure the patient has considered relevant alternatives to MAiD and could give informed consent. While the appropriate delay is open to discussion, the legislation should always permit the delay to be shortened in appropriate circumstances, taking into account the person's suffering and any imminent loss of capacity (for instance, as permitted under the current 10-day rule of section 241.2 (3) (g) of the *Criminal Code*).

The second potential measure is a psychiatric assessment. The CBA Working Group does not suggest that this assessment be mandatory, but recognizes that it may be warranted if there is an issue with the person's capacity to consent to MAiD (e.g. people with a recognized psychiatric condition susceptible to affect capacity, complex cases beyond the expertise of general practitioners). Another example might rest with patients not nearing death, to allow a thorough assessment of their mental state associated with the trajectory of their specific medical condition, if again there are concerns about capacity to consent to MAiD. That said, requesting a psychiatric assessment may cause difficulties and delays. We suggest more consultation to define the circumstances where this measure could be justified.

Other measures in the consultation questionnaire[7] do not seem appropriate nor justified, even less so for *Criminal Code* amendments. However, some of the suggestions on health care standards may be relevant for provinces or professional regulators.

Advance Requests

We believe that federal legislation should allow advance requests for MAiD – in certain circumstances and with adequate safeguards.

There is a growing consensus to permit MAiD by way of advance requests (i.e., not requiring confirmation of consent at the time of MAiD), after a person has received a diagnosis of serious and incurable disease and is still able to give consent – provided an adequate framework is in place. The Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying (November 2015)[8] and the Special Joint Committee on Physician-Assisted Dying (February 2016)[9] recommended advance requests for MAiD on that basis. More recently, in October 2019, experts from Quebec[10] made the same recommendations to the Quebec Ministry of Health. The Council of Canadian Academies (December 2018) also identified common grounds in its report on advance requests.[11]

Allowing advance requests once a person is diagnosed with a serious and incurable disease is consistent with *Carter*, as an extension of the autonomy of the person and self-determination. Using medical diagnosis as a trigger is adequate because it will prompt a dialogue between the patient and treatment team, ensuring better access to information to assess therapeutic alternatives including MAiD. This would be in line with the necessity to ensure informed consent.

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7 Released on January 14, 2020, online.

8 Report online.

9 Report titled "Medical Assistance in Dying: A Patient-Centred Approach" online.

10 Report online.

11 Report online.

We also support short-term advance requests for individuals approved for MAiD who are nearing death to protect their eligibility in case of loss of decision-making capacity in the days prior to MAiD. This would be compatible with the current framework already recognizing the possibility to shorten the 10-day delay for imminent loss of capacity.

Should the government permit MAiD by way of advance requests, the CBA Working Group stresses the importance of defining the mechanisms to designate a third party to initiate the MAiD application, based on the advance request consented to by the patient, and the limits of this party's authority. Challenges on the validity and currency of advance requests will also need to be addressed to ensure they remain representative of the person's wishes over time.

Given the complexity of these matters, we recommend additional consultations to define the relevant parameters and safeguards for advance requests.

Thank you again for the opportunity to address these important matters and we reiterate our willingness to assist going forward.

(original letter signed by Marc-Andre O'Rourke for Kimberly Jakeman)

Kimberly Jakeman
Chair, CBA End of Life Working Group

cc: Olivier Jarda, Policy Advisor, Office of the Minister of Justice and Attorney General of Canada