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15 Gage Avenue, Toronto, ON M1J 1T1 | 807-473-0909 (voice) or cwdo@tbaytel.net

February 22, 2021

Hon. David Lametti
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, ON
K1A 0A0
VIA Email: David.Lametti@parl.gc.ca

RE: Reference Required on Bill C-7 (*An Act to amend the Criminal Code (medical assistance in dying)*)

Overview

I am writing to request that Bill C-7 *An Act to amend the Criminal Code (medical assistance in dying)* (2nd Sess, 43rd Parl, 2020) be submitted to the Supreme Court of Canada for a reference.

I note that the Governor in Council has the authority under the *Supreme Court of Canada Act*, RSC, 1985, c. S-26, at s. 53(1)(b) to call for such a reference. Alternatively, I call on the Lieutenant Governors in Council of the provinces to send the Bill to the Courts of Appeal for consideration and constitutional scrutiny. Such power is conferred upon them pursuant to provincial legislation.

The Bill in its current form violates the right to life, liberty and security of the person and equality in violation of sections 7 and 15 respectively of the *Canadian Charter of Rights and Freedoms* (Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

I am writing in my capacity as President of Citizens With Disabilities – Ontario (CWDO). CWDO is a provincial, non-profit organization that actively promotes the rights, freedoms and responsibilities of persons with disabilities through community development, social action, and member support and referral. CWDO's primary activity is public education and awareness about the social and physical barriers that prevent the full inclusion of persons with disabilities in Ontario (www.cwdo.org). CWDO has kept its membership informed of the litigation and legislative processes because of the devastating impact Bill C-7 will have on persons with disabilities. We are sending this letter now, while at the same time inviting

others to add their names as signatories. Together, we urge that Bill C-7 be sent to the Courts for review.

This is a matter of life and death. I request you give this letter due consideration.

***Charter* Violations**

Carter, *Truchon*, and Bill C-7

Bill C-7 was initiated in the wake of the Quebec Superior Court's ruling in *Truchon v Canada*, 2019 QCCS 3792 ("*Truchon*"), which held that the "reasonably foreseeable" death criterion in the medical assistance in dying regime was unconstitutional. Since then, the Government has rushed to pass Bill C-7 without fully recognizing the harms associated with it.

Those in favour of the Bill consider it to be confirmation of their right as articulated by the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter*"). But the Supreme Court of Canada did not declare a right to medically assisted suicide generally, it declared a right to medical assistance in dying to those ***at the end of their lives***. It ruled that medical assistance in dying had to be made available where an individual "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" (*Carter*, at para 127). Importantly, this declaration was limited to the facts of the case.

The Supreme Court of Canada specifically stated: "the scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought" (*Carter*, at para 127). Gloria Taylor, the Applicant, was dying (at paras 22, 23, 106-07, 115). The right to MAiD was declared in the context where a person was already dying. There was and is no proclamation to an all-encompassing right to medical assistance in dying.

Truchon was a Superior Court level decision and is not binding in any other superior court or court of appeal in any other province, let alone the Supreme Court. While it ruled that the "reasonably foreseeable" criterion for MAiD eligibility was unconstitutional, the decision was problematic in many ways.

Truchon interpreted the right articulated by the Court in *Carter* by focusing predominantly on autonomy of the individual applicants and without due

consideration for the social context in which MAiD is accessed or the inherent risks associated with MAiD. This balancing of interests was crucial in *Carter*. The Government of Canada should have appealed the *Truchon* decision in order to secure the opinion on the Supreme Court of Canada on a complex issue of overriding importance. Having failed in its duty to secure the opinion of the country's highest Court based on an appeal, where the full record would be available, the matter should be referred to the Court on all issues that depart from *Carter* together with the full evidentiary record from *Truchon*.

Before it comes into force, vulnerable Canadians, whether they are disabled, elderly, Black, Indigenous, People of Colour (BIPOC), low income, prisoners, or persons living in areas without adequate palliative or long-term care, require the assurance that the proposed law meets constitutional and quasi-constitutional human rights requirements. Assurances that the Bill conforms with Canada's international human rights obligations is also required (see below). Only the Supreme Court of Canada can provide these assurances.

The Supreme Court of Canada required the Government to create a complex regulatory regime with safeguards where Canadians had access to medical assistance in dying as a narrow exception to the *Criminal Code* provisions on assisted suicide (*Carter*, at para 105). But the judge in *Truchon* rejected key components of the interests at stake, namely, recognition of the inherent value of life, the prevention of suicide, and the importance of refraining from perpetuating negative stereotypes regarding the quality of life of persons with disabilities (*Truchon*, at paras 252, 673, 680-82). By rejecting these goals, in favour of an approach which focuses primarily on individual autonomy, the decision failed to undertake any assessment of the interests to be balanced. Bill C-7 has the same critical flaw. As such, it violates section 7 and 15 of the *Charter*.

Section 7

Bill C-7 contemplates two streams of eligibility for medical assistance in dying. One where death is reasonably foreseeable and one where it is not. For the latter, the alleged "safeguard" of informing individuals of life-affirming options, does not address what happens when those options are not available in a timely manner or cost too much to be a viable option. As such, like *Truchon*, Bill C-7 fails to contemplate the social context in which decisions to pursue MAiD take place.

Bill C-7 will expand access to MAiD without a corresponding commitment to expanding access to any supports which would alleviate suffering through the enhancement of an individual's quality of life. For example, persons with

disabilities rarely have access to the full range of services and supports they require. When they do have such services, they are often difficult to secure because of wait times or bureaucratic complications. Moreover, they are not always publicly funded. The only possible outcome for individuals in these circumstances are to continue suffering, or pursue MAiD. Access to MAiD in this context would endanger the lives and security of the persons in violation of section 7 of the *Charter*.

In addition, information is surfacing to illuminate the probability that people who are receiving MAiD suffer greatly during the medical process, but are unable to communicate their suffering because of the accompanying medication that paralyzes the person while the deadly chemicals take effect. To my knowledge, this information was not put forward or considered by the government as amendments to expand the scope of MAiD were accepted (Zivot, Op-Ed: Canada's Medical Assistance in Dying = Torturous Death).

Placing Bill C-7 within the relevant social context, MAiD will be sought and administered within a health care system which is already rife with ableism and one in which the supports to enable people with disabilities to live are hard to come by. In short, MAiD will be available to all those with disabilities who are suffering, but life affirming alternatives will not.

The Bill, as drafted, will lead to situations where persons do not have access to alternatives to alleviate their suffering and will select MAiD out of desperation. Black, elderly, racialized and Indigenous people with disabilities, as well as people with disabilities, are already marginalized and facing systemic discrimination in the health system, could be induced to end their lives prematurely due to poverty and lack of support services (Bryden, Senators demand race-based data for medical assistance in dying). These deaths are unnecessary.

The consequences of medical racism must be examined. The Disability Justice Network of Ontario illuminated the fact that Bill C-7 is anti-working class, racist and ableist (see "New Proposed assisted-dying law is 'racist,' says disability rights activist). The Bill makes it more accessible for people with mental health disabilities to kill themselves as a form of "treatment" without making mental health supports freely available.

If properly supported, suffering would be alleviated and life could continue. But Bill C-7 does nothing to protect against these premature deaths.

The security of the person is likewise jeopardized. The Bill creates a dangerous legislative context where death is the only option to alleviate

suffering which is reliably available. Knowing that other options exist but are inaccessible because of cost, wait times, rationing or other bureaucratic reasons, exacerbates suffering. The existence of alternative options but the knowledge that these are just out of reach to be effective, will inevitably lead to despair and a resignation to pursue MAiD for a lack of alternatives. This is not informed choice. This is a blatant violation of the *Charter*.

CWDO acknowledges the many historical and ongoing issues that have culminated in creating the adverse conditions which in turn, have led to a higher prevalence of disability among Indigenous people. The Bill contradicts many Aboriginal healing practices and Indigenous leaders have petitioned the Government arguing that they should not be compelled to facilitate access to MAiD (Ruck, First Nations leaders say Bill C7 goes against their beliefs and values: Feb. 17 vote on legislation to expand access to assisted suicide).

CWDO is also aware that Bill C-7 also risks unilaterally changing the standard of care expected of doctors. For example, the Bill would require doctors to inform and follow through with MAiD even if the doctor knows that alternative, life-affirming treatment exists and would be appropriate (Lemmens, Shariff & Herx, How Bill C7 will sacrifice the medical profession's Standard of Care: Amendments to assisted dying laws are a stunning reversal of the central role of the medical and legal concept of the standard of care).

The primary focus on autonomy has led Canada to a place where through Bill C-7, the right to death, is being contemplated prior to the right to life. The option to alleviate suffering through death, is available before people can access supports and services which will enable life. This is a violation of section 7 of the *Charter*.

In *Truchon*, the Court considered that the purpose of the MAiD legislation was to protect vulnerable persons and the "reasonably foreseeability" requirement was overbroad and grossly disproportionate and thus in violation of the principles of fundamental justice (see paras, 556, 570-86). Bill C-7 likewise does not strike the right balance.

Notwithstanding the problematic nature of the analysis in *Truchon*, Bill C-7 is grossly disproportionate and overbroad. As outlined above, the law will lead to premature deaths. Persons will face increased suffering particularly where alternatives to MAiD exist but are inaccessible to such individuals for reasons of cost, wait times and/or rationing. In such circumstances, while the choice to pursue MAiD may be made as an expression of a person's autonomy, it

will be the result of external factors and a lack of true choice. It cannot be said that such persons are not vulnerable.

Section 15

The violation of section 7 described above will disproportionately impact persons with disabilities. Bill C-7 makes MAiD available contingent upon 1) the existence of a disability and 2) suffering. In this way, the Bill singles out persons with disabilities for access to MAiD. No other group protected under section 15 of the *Charter* has access to MAiD exclusively by virtue of their membership to a protected category and the presence of suffering.

Rather than make MAiD available to *anyone* who considers themselves to be suffering, MAiD will be expanded to any who have a disability. This creates a distinction between persons with disabilities and those without. This distinction perpetuates the stereotype that the lives of persons with disabilities are of less value. This is where the section 15 *Charter* violation lies.

Bill C-7 will permit persons with disabilities to request state-funded medical assistance in dying *on the basis of their disability* and their subjective, self-identification as "suffering". If the Government of Canada believes it is advisable to expand the declaration in *Carter* and permit state assisted death with the primary focus being on respecting individual autonomy, then this should not be limited to any particular enumerated category under section 15 of the *Charter*. Indeed, it could be said that to do so would be discriminatory to other protected groups. If autonomy is the key consideration, then all persons who identify as "suffering" should be permitted access to MAiD.

Based on the analysis of *Truchon*, no one should be forced to endure a "state-imposed obligation to live" (at para 583). To single out persons with disabilities and enable them to pursue MAiD on the basis of their belonging to this enumerated ground, the Government of Canada is confirming that such persons would have a reason to end their lives. Unless the Government of Canada intends to expand this further and offer MAiD to any who consider themselves to be suffering, Bill C-7 violates section 15 in that it discriminates against persons with disabilities. This perpetuates the negative stereotype that the lives of persons with disabilities are not worthy of living and therefore, can be ended with state assistance.

Bill C-7 expands the exception to the assisted suicide provisions in the *Criminal Code* well beyond the bounds of *Carter* and even *Truchon*. The speed at which the Bill is being debated and moving through the legislative

process has not permitted a proper or fulsome exploration of the issues. Without a reference, the interests at stake will not be fully adjudicated. This is a matter of life and death. The Supreme Court of Canada required the government to create a complex regulatory regime with safeguards where Canadians had access to medical assistance in dying as a narrow exception to the Criminal Code provisions on assisted suicide (*Carter*, at para 105). The only way to ensure that the MAiD regime provides sufficient safeguards and balances all the interests at stake, is to ask the Supreme Court of Canada or a Court of Appeal to weigh in. A reference is required.

United Nations Human Rights Experts and Canada's International Human Rights Obligations

In language that is respectful but clear, a panel of UN Rapporteurs have passed judgement on the proposed legislation, legislation which has subsequently become more problematic. The UN Special Rapporteur on the rights of persons with disabilities, the Independent Expert on the enjoyment of all human rights by older persons and the Special Rapporteur on extreme poverty and human rights wrote a letter to the Government of Canada ("the Letter") (Link).

The Letter states that if passed, Bill C-7 would violate the right of persons with disabilities to life and equality in accordance with Canada's domestic and international obligations (ps. 4-5).

The Letter further states that:

> From a disability rights perspective, there is a grave concern that, if assisted dying is made available for all persons with a health condition or impairment, regardless of whether they are close to death, a social assumption might follow (or be subtly reinforced) that it is better to be dead than to live with a disability. Therefore, a major concern must be that persons with a disability (and perhaps especially those with newly acquired impairment) may opt too readily for assisted dying, based on the internalisation of prejudices, fears and low expectations of living with a disability, even before having the chance of coming to terms with and adapting to their new disability status (p. 5).

In light of these issues, the UN representatives called on the Government of Canada to explain how the Bill is *not* discriminatory against elderly persons and persons with disabilities (the Letter p.7).

The Letter was addressed to Canada's head of state, the Governor General. To our knowledge the Government has not had the courage nor courtesy to respond. Unfortunately, at the present time, Canada's acting Governor General is the Chief Justice of the Supreme Court of Canada. It would be inappropriate in the extreme, and undermine the separation of powers, for the government to require Chief Justice Wagner to respond on the proposed legislation's compliance with Canada's international human rights obligations. Indeed, it is highly likely that if passed, this Bill will be challenged in Court. The Government of Canada should not put Chief Justice Wagner in a position where he could be conflicted out of presiding over such a case in the future. Rather, the issue should be referred to the Supreme Court of Canada now, before the Bill is passed, and the Rapporteurs should be granted standing to make representations to the Court on these issues.

Conclusion

What the Government does next is crucial. Canadians are watching. The world is watching (Braswell, Canada is plunging toward a human rights disaster for disabled people: A well-meaning expansion of 'medical aid in dying' laws could lead to inadequate care). With life and death at stake, this matter must be referred to the Supreme Court of Canada for adjudication. A proper balancing of interests and rights are essential to ensure the outcome is appropriate.

The Bill contemplates that individuals will be informed and consider other options available, but does not address the situations where such alternatives are not available, or are only available after a lengthy wait period and/or at a high cost. Informed consent cannot be provided in such circumstances. Moreover, Bill C-7 will inevitably perpetuate the stereotype that the lives of persons with disabilities are less worthy of living. After all, these are the only individuals who are allegedly suffering so much that they should be able to choose death. Both of these are *Charter* violations. Guidance from the Court should be sought to address the serious implications of Bill C-7.

On behalf of Citizens With Disabilities – Ontario, I urge and demand that a reference be held to adjudicate the constitutionality of Bill C-7. This is a matter of life and death. Given what is at stake, a reference is required to ensure the proper balance is struck.

Sincerely,

Tracy Odell
President
Citizens With Disabilities - Ontario (CWDO)

Pronouns: She/her/hers

Together we are stronger.

15 Gage Avenue,
Toronto, ON M1J 1T1
Phone: 807-473-0909 (voice)
Email: cwdo@tbaytel.net
Website: www.cwdo.org
Like us at www.facebook.com/cwdont/
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With the support of:

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Signature

Individual / Organization Name

CC. David Baker & Kimberly Srivastava, *bakerlaw*, Counsel to CWDO

Rob Frater, Chief General Counsel, Department of Justice Canada
Via Email: rfrater@justice.gc.ca

The Honourable Kaycee Madu, Minister of Justice and Solicitor General of Alberta
Via Email: ministryofjustice@gov.ab.ca

The Honourable David Eby, Attorney General of British Columbia
Via Email: AG.Minister@gov.bc.ca

The Honourable Cameron Friesen, Attorney General of Manitoba
Via Email: minjus@leg.gov.mb.ca

The Honourable Steve Crocker, Attorney General of Newfoundland & Labrador
Via Email: justice@gov.nl.ca

The Honourable Ted Fleming, Attorney General of New Brunswick
Via Email: DPS-MSP.Information@gnb.ca

The Honourable R.J. Simpson, Attorney General of Northwest Territories
Via Email: Rj_simpson@gov.nt.ca

The Honourable Mark Furey, Attorney General of Nova Scotia
Via Email: JUSTMIN@novascotia.ca

The Honourable George Hickes, Minister of Justice for Nunavut
Via Email: info@gov.nu.ca

The Honourable Doug Downey, Attorney General of Ontario
Via Email: attorneygeneral@ontario.ca

The Honourable Bloyve Thompson, Attorney General of Prince Edward Island
Via Email: MinisterJPS@gov.pe.ca

The Honourable Simon Jolin-Barrette, Attorney General of Québec
Via Email: ministre@justice.gouv.qc.ca

The Honourable Gordon Wyant, Attorney General of Saskatchewan
Via Email: jus.minister@gov.sk.ca

The Honourable Tracy-Anne McPhee, Minister of Justice of Yukon
Via Email: tracy.mcphee@gov.yk.ca