A PURPOSIVE ANALYSIS OF MEDICAL ASSISTANCE IN DYING WHERE MENTAL ILLNESS IS THE SOLE UNDERLYING MEDICAL CONDITION

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Dedications

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Abstract

This thesis explores the polarizing topic of medical assistance in dying (MAiD) and the novel approach of incorporating mental illness into Canada's end-of-life regime. The purpose of this research is to investigate the constitutional implications of the current prohibition of MAiD for those whose sole underlying condition is mental illness. Through an exhaustive purposive analysis, this paper seeks to answer whether, under s. 241.2(2) of the *Criminal Code of Canada*, the eligibility exclusion of mental illness infringes upon the right to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*, and whether the impugned provision is saved by Section 1 of the *Charter.* Drawing from the judicial history relevant to MAiD and testimony given by medical professionals, the study provides an in-depth discussion and recommendations necessary for maintaining a balance between protecting vulnerable populations and respecting individual autonomy in end-of-life decisions. Furthermore, the judgement rendered as part of the purposive analysis highlights the need for policymakers to adopt terminology more compatible with mental illnesses. Additionally, the findings from this research paper underscore the limitations of the current MAiD framework, with an emphasis on the knowledge gap within the mental health field on reliably assessing the prognosis of psychiatric conditions. While direct Canadian research on mental illness and MAiD remains rare, this thesis hopes to contribute to the much-needed scholarly debates before the implementation of a system where Canadians can access MAiD when the sole underlying medical condition is mental illness.

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Purposive Analysis of Medical Assistance in Dying Where Mental Illness is the Sole Underlying Medical Condition

Within the sphere of constitutional law and medical ethics, there lies an intersection between individual autonomy, societal values, and the evolving landscape of Medical Assistance in Dying (MAiD) that has sparked a complex and contentious debate. Following the landmark Supreme Court of Canada's (SCC) ruling in *Carter v Canada* [2015], the development of the end-of-life regime in 2016 by the Canadian Parliament has been the subject of immense scrutiny. Initially, MAiD was focused on providing Canadians who were under intolerable suffering from a serious and incurable illness, disease, or disability the choice to have a medically assisted death. However, an evolving and intricate debate has emerged on medical assistance in dying where mental illness is the sole underlying medical condition.

The purpose of this research is to explore how the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 7 intersects with the framework of mental illness in MAiD within a socio-legal context. Through an examination of case law and the history of medically assisted suicide in Canada, this paper hopes to answer the question of whether the exclusion of mental illness as the sole underlying condition for access to MAiD under s. 241.2(2) of the *Criminal Code of Canada*, RSC 1985, c C-46 engages section 7 of the *Charter* and whether or not the impugned section is saved through a section 1 *Charter* analysis. This thesis will also provide recommendations for the Canadian Parliament on how the current MAiD legislation can be reformed in order to establish a constitutional balance between individual autonomy and protecting those most vulnerable. Lastly, it is important to highlight that, at present, eligibility for MAiD for persons whose sole underlying medical condition is a mental illness has been temporarily excluded until

March 2027. Therefore, this thesis will complete a purposive analysis utilizing the existing MAiD legislative framework in order to evaluate the constitutional implications of prohibiting access to MAiD for persons whose sole underlying medical condition is a mental illness.

Methodology

Through the theoretical approach of constitutionality, this paper utilizes a purposive analysis of the *Charter* in unison with a historical framework in order to create a more comprehensive understanding of the evolving legal landscape of MAiD. Furthermore, approaching the issue through a constitutional lens will enable the research to contribute to the ongoing scholarly discussion regarding the *Charter's* influence on MAiD and, subsequently, provide for an exhaustive analysis of the future implications of mental illness as the sole underlying condition for access to MAiD. A purposive analysis looks at the legislation and Parliament's intention when they created the legislation, as well as the words written in the law (Department of Justice Canada, 2022 at para 1). Paired with the historical design framework, a purposive analysis is best suited for research in identifying trends within the literature and providing context to the interpretation of a research problem (University of Southern California, 2023).

Data Collection

Historical data analysis uses secondary sources such as scholarly articles, government and legal reviews, and news reports to synthesize existing literature and substantiate the primary documentation, including statutes, government bills and the respective Canadian case laws:

> *Rodriguez v British Columbia (Attorney General)* [1993], *Carter v Canada (Attorney General)* [2015], *Truchon v Attorney General* [2019], *Hunter et al. v Southam Inc* [1984], *R v Oakes* [1986].

The primary sources encompassed in this research will be collected from the jurisprudence databases CanLII and Lexum, along with government bills and Hansard found in the LEGISinfo database. Subsequently, the secondary sources accessed for this research will come from several databases, including: the MRU database, Google Scholar, Canadian law journals, and the Canada Commons database. In order to compile and synthesize the vast amount of literature within the Canadian socio-legal landscape, the researcher will use keywords such as;

> *Canadian Charter of Rights and Freedoms, Section 7* (life, liberty and security of the person), *Principles of fundamental justice*, *Section 1* (reasonable limits), *Medical assistance in dying* (MAiD), *Mental illness as the sole underlying condition*, *Constitutionality, Personal autonomy,* and *Protection of vulnerable people*.

Limitations

As with all research, there are some possible limiting factors to this paper. First, there is a limited number of existing literature pertaining to the specific issue of mental illness as the sole underlying condition of MAiD due to its legislative infancy. Furthermore, direct evidence published within Canada remains few to none. Secondly, regarding s. 7 of the *Charter*, there has yet to be a successful justifiable infringement of life, liberty and security of the person under s. 1 of the *Charter*. Whether this highlights the supremacy of the s. 7 rights under the *Charter*, or if seen as an impediment to the state's action, is up to the reader to decide following the conclusion of this paper.

The Charter as a Purposive Document

Following the enactment of the *Charter* in 1982, the interpretation of a constitutional document relied upon case law found in *Edwards v Attorney General for Canada* [1930], which

emphasized a large and liberal explication (p. 136). More recently, in *Minister of Home Affairs v Fisher* [1980], Lord Wilberforce asserted that a constitutional document is *sui generis*, which calls for a contextual interpretation (p. 328). However, it was in *Hunter et al. v Southam Inc* [1984] that Justice Dickson established the foundations of *Charter* interpretation:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. (p. 156)

For that reason, it is imperative to adopt a purposive analysis in order to effectively assess the reasonable or unreasonableness of a mental illness as the sole underlying condition for access to MAiD within the context of s. 7 of the *Charter*. Thus, identifying the purpose underlying the rights or freedoms that s. 7 of the *Charter* sets out to protect becomes the first step. Once it is articulated what the right protects, the question to be answered is whether prohibiting MAiD where mental illness is the sole underlying condition under s. 241.2 of the *Criminal Code* is a state-imposed burden protected under s. 7 of the *Charter.*

MAiD Statutory Provisions

In order to understand the *Charter* implications of excluding mental illness as the sole underlying condition in access to MAiD, it is important to provide an overview of the legislation in question. Medical assistance in dying is defined under s. 241.1 of the *Criminal Code* as:

> **(a)** the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or

(b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.

Furthermore, the eligibility requirements, all of which must be met by an individual in order to receive MAiD, are listed under s. 241.2(1):

(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.

For the purposes of subsection (c) of s. 241.2(1), a grievous and irremediable medical condition is defined under s. 241.2(2) as:

(a) they have a serious and incurable illness, disease or disability;

(b) they are in an advanced state of irreversible decline in capability; and

(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.

Although not an aspect of significant importance to this research paper, ss. 241.2(3) and s. 241.2(3.1) of the *Criminal Code* details a list of several existing safeguards for those whose death is reasonably foreseeable and for those whose natural death is not reasonably foreseeable, respectively.

Lastly, for the purposes of this research paper, it is important to reiterate that at the time of this research, mental illness is excluded from being characterized as an illness, disease or disability under s. 241.2(2.1) of the *Criminal Code*.

Rodriguez v British Columbia (Attorney General) [1993] 3 SCR 519

Rodriguez v British Columbia (Attorney General) [1993] was the first case heard by the SCC concerning physician-assisted suicide and the *Charter*. Prior to *Rodriguez* [1993], the act of assisting or aiding another party in the process of suicide was prohibited under s. 241(b) of the *Criminal Code*. Moreover, at the time of *Rodriguez* [1993], s. 7 of the *Charter* was somewhat underdeveloped as the constitutional document was still in its infancy. Nevertheless, the case heard by the SCC marked the beginning of a long road to the legalization of an end-of-life regime in Canada by bringing the complex and contentious issue of physician-assisted suicide to the public eye.

Case Facts

Sue Rodriguez, a 42-year-old wife and mother, suffered from amyotrophic lateral sclerosis (ALS), and her condition was rapidly deteriorating (*Rodriguez*, 1993, pp. 530-531). Given a life expectancy of two to fourteen months, Ms. Rodriguez would soon be unable to swallow, speak, or walk without assistance and would inevitably be confined to a bed (*Rodriguez*, 1993, p. 531). Knowing that she would be losing her personal autonomy due to the

debilitating nature of her condition, Ms. Rodriguez wished to take control of the circumstances surrounding her end of life.

In 1993, s. 241 of the *Criminal Code* prohibited individuals from assisting in the act of committing suicide, leaving Ms. Rodriguez with the grim realization that she would be forced to live through immense anguish until her natural death. Understanding that her condition would soon leave her physically unable to terminate her own life and that a natural death was not a viable option, Ms. Rodriguez began her journey to obtaining a "physician-assisted suicide" in Canada by a qualified medical practitioner (*Rodriguez*, 1993, p. 531).

Confident that medically assisted suicide was the only reasonable path forward, allowing her to exercise her own free will, Ms. Rodriguez filed a constitutional challenge to the Supreme Court of British Columbia (*Rodriguez*, 1993, p. 531). After being struck down by the Supreme Court of British Columbia and subsequently having her appeal dismissed in the British Columbia Court of Appeal, Ms. Rodriguez eventually had her case heard by the Supreme Court of Canada (*Rodriguez*, 1993, pp. 535, 541-543). Ms. Rodriguez argued that the blanket prohibition of assisted suicide under provision s. 241(b) in the *Criminal Code* infringed upon her ss. 7, 12, and 15(1) rights enshrined within the *Charter*.

Section 7

The majority, delivered by Sopinka J., began with examining whether s. 241(b) of the *Criminal Code* violated the appellant's rights under s. 7 of the *Charter*. Section 7 of the *Charter* states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (1982, s. 7).

Section 7 Argument

The appellant argued that by inhibiting the ability to exercise personal autonomy over her body and inducing unnecessary physical pain and psychological stress, Ms. Rodriguez's rights to liberty and security under s. 7 of the *Charter* were violated by the threat of criminal prosecution under s. 241(b) of the *Criminal Code* (*Rodriguez*, 1993, p. 583). Ms. Rodriguez contends that the impugned provision is a form of governmental interference on her right to live out her life with dignity (*Rodriguez,* 1993, p. 583).

Section 7 SCC Rationale

The s. 7 analysis began with first determining whether the absolute prohibition on medically assisted suicide engaged Ms. Rodriguez's s. 7 rights, and subsequently, whether such violations were inconsistent with the principles of fundamental justice (*Rodriguez*, 1993, p. 583). In their reasoning, the majority agreed with Ms. Rodriguez's contention that preventing a medically assisted suicide violated her s. 7 right to liberty and security of the person (*Rodriguez*, 1993, p. 583). Drawing from *R. v Morgentaler* [1988], the majority highlighted the analysis by Beetz J., that "security of the person must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction (p. 90, as cited in Rodriguez, 1993, p. 586). In addition, the majority found that Ms. Rodriguez's choice of death over life sufficiently establishes that the right to life under s. 7 should be considered (*Rodriguez*, 1993, pp. 585-586). However, the court emphasized that the values enshrined within s. 7 are to be equally represented, and, therefore, the right to maintain the liberty and security of the person does not supersede the duty of protecting the sanctity of life (*Rodriguez*, 1993, pp. 584-586).

Principles of Fundamental Justice.

Having established that s. 241(b) of the *Criminal Code* violated s. 7; the majority next examined whether the impugned provision was consistent with the principles of fundamental

justice. Sopinka J. began by cautioning that the court, as discerning the applicable principles of fundamental justice, requires significant personal judgment with the potential to become principles "in the eye of the beholder only" (*Rodriguez*, 1993, p. 590). Furthermore, the majority noted that historical case analysis alone is not sufficient, but also consideration of the rationale and underlying principles of an absolute prohibition on medically assisted suicide is required to establish the relevant principles of fundamental justice (*Rodriguez*, 1993, p. 592).

The appellant's argument asserts that it is a principle of fundamental justice that human dignity and personal autonomy be protected and that the ensuing physical and psychological suffering resulting from removing the appellant's control of her end-of-life decision is unconstitutional (*Rodriguez*, 1993, p. 592). In response, although in agreement with the appellant that the values of autonomy and human dignity are foundational to the *Charter*, the majority found difficulty in establishing autonomy and human dignity as principles of fundamental justice (*Rodriguez*, 1993, pp. 592-593). By recognizing human dignity as a fundamental principle, the majority demonstrated that any future violation of s. 7 would be considered inconsistent with fundamental justice and, therefore, unconstitutional (*Rodriguez*, 1993, p. 592). As a result, the function of the principles of fundamental justice would be rendered futile (*Rodriguez*, 1993, p. 592).

Instead, the majority turned to *Thompson Newspapers Ltd. v Canada (Director of Investigation and Research Restrictive Trade Practices Commission* [1990] to affirm that establishing the relevant principles of fundamental justice requires analyzing and balancing the interests between the state and those of the individual (as cited in *Rodriguez*, 1993, p. 593).

Arbitrariness.

Therefore, the issue at hand is whether an absolute prohibition on medically assisted suicide is arbitrary in that it bears no connection to the interest of protecting vulnerable

populations and that the motivation for the prohibition is devoid of legal and societal norms (*Rodriguez*, 1993, p. 595).

The majority begins addressing the principle of arbitrariness by drawing on the *Criminal Code* and the respective common law through Williams Blackstone's interpretation in Commentaries on the Laws of England (1769, p. 189), recognizing that legislation has long prohibited the act of suicide and murder to protect the sanctity of human life (*Rodriguez,* 1993, pp. 595-596). In addition to the case law, consideration of legislation in other Western democracies where there are no countries that explicitly permit medically assisted suicide nor have any less restrictive safeguards as those set out in s. 241(b) of the *Criminal Code* provided valuable insight into societal norms (*Rodriguez*, 1993, pp. 602-605). Lastly, the majority shared a deep concern about the potential for abuse by decriminalizing medically assisted suicide, especially for those with physical and psychological disabilities (*Rodriguez*, 1993, pp. 600-601). Expanding further on the concern for exploitation, the majority gave great significance to the caution for a "slippery slope" (*Rodriguez*, 1993, p. 603) that has been central to the Law Reform Commission of Canada's continued opposition to repealing s. 241(b) of the *Criminal Code* (p. 46, as cited in *Rodriguez*, 1993, p. 566).

However, the majority also recognized the right of patients to refuse treatment, despite refusal leading to death, by drawing from *Ciarlariello v Schacter* [1993] (p. 135). Additionally, further support of the appellant's argument is highlighted in the dissent by Cory J., referencing *Ciarlariello* [1993] further in the perspective that there is no difference between a patient of sound mind exercising a right to die and the common law right of patients to refuse treatment (*Rodriguez*, 1993, p. 630).

Through consideration of all relevant support brought forward by Ms. Rodriguez and the State, the majority concluded that the blanket prohibition of medically assisted suicide under s. 241(b) of the *Criminal Code* did not violate any of the principles of fundamental justice enshrined within s. 7 of the *Charter* (*Rodriguez*, 1993, p. 608). In their reasoning, the majority relied on the notion that the longstanding history of the preservation of life within Canada would be jeopardized by encouraging medically assisted suicide (*Rodriguez*, 1993, p. 608). Furthermore, by considering other Western democracies and strong opposition to decriminalizing assisted suicide from several medical associations, including the Canadian Medical Association, the British Medical Association, the Council of Ethical and Judicial Affairs of the Medical Association, the World Medical Association and the American Nurses Association, the majority found that absolute prohibition to be the most logical mechanism for protecting vulnerable populations from prematurely ending their life in moments of weakness (*Rodriguez*, 1993, pp. 601-605, 608). Although the court recognizes that some individuals like Ms. Rodriguez will be deprived of their rights under s. 7 of the *Charter*, the majority communicated that without extensive changes regarding the safeguards for medically assisted death, there is significant hesitancy at this time for legislative reforms on an issue that degrades the sanctity of life (*Rodriguez*, 1993, pp. 582, 607-608).

Section 12

The court's consideration of the appellant's contention that s. 241(b) of the *Criminal Code* infringed upon the rights and protections under s. 12 of the *Charter* remained brief, as the majority found that s. 12 was not applicable (*Rodriguez,* 1993, pp. 611-612). Nevertheless, s. 12 is concerned with ensuring the Canadian government and the Canadian criminal justice system's conduct is justifiable and protects individuals against disproportionate treatment or punishment.

Under s. 12 of the *Charter,* "everyone has the right not to be subjected to any cruel and unusual treatment or punishment" (1982, s. 12). In order to engage s. 12, the appellant must demonstrate that she has been subjected to treatment or punishment at the hands of the state and that said treatment or punishment is cruel or unusual in nature (*Rodriguez,* 1993, p. 609).

Section 12 Argument

The appellant argued that the prohibition of medically assisted suicide violated s. 12 because the provision forced Ms. Rodriguez to choose between prematurely ending her own life in a manner contrary to her personal desire or continue living a life void of free will and human dignity (*Rodriguez,* 1993, pp. 530-531). In addition, the appellant contends that the oppressing nature of the impugned provision will inevitably lead to physical and psychological suffering while waiting for her natural death, which constitutes a form of cruel and unusual punishment (*Rodriguez,* 1993, pp. 530-531).

Section 12 SCC Rationale

In the opinion of the majority, Sopinka J. found it difficult to establish that a prohibition on medically assisted suicide is a form of punishment by the government (*Rodriguez,* 1993, p. 609). In contrast, the question of whether the appellant has been subject to a form of treatment was open to more speculation by the majority. To better understand what constitutes treatment. Sopinka J. referred to *Soenen v Director of Edmonton Remand Centre* [1983], where the court found that treatment was much broader in scope compared to punishment (p. 372).

Nevertheless, the majority found that the prohibition on medically assisted suicide under s. 241(b) of the *Criminal Code* did not sufficiently qualify as treatment under s. 12 of the *Charter* (*Rodriguez,* 1993, p. 612). In their reasoning, the majority highlighted that the suffering experienced by Ms. Rodriguez was not the direct result of the state and was caused by the

appellant's condition (*Rodriguez,* 1993, p. 611). In addition, the majority recognized that Ms. Rodriguez was subject to the same provisions of the *Criminal Code* that all individuals in society are and rendering the appellant's circumstances as a s. 12 violation would stretch the ordinary meaning of treatment (*Rodriguez,* 1993, pp. 611-612).

Section 15

The majority in addressing s. 15(1) of the *Charter* was again short as the court found that any violation of s. 15(1) would be saved by s. 1 of the *Charter* (*Rodriguez,* 1993, p. 613). Under s. 15*,* "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law" (*Charter*, 1982, s. 15). More specifically, s. 15(1) provides that no individual shall be discriminated against based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (*Charter*, 1982, s. 15). As a guarantee of equal representation within Canada, this section maintains that all individuals be recognized as equally capable and equally deserving humans with innate traits and characteristics that shall not be referenced as a form of inadequacy.

Section 15 Argument

The appellant claimed her rights under s. 15(1) of the *Charter* was violated by discriminatory treatment resulting from her disability (*Rodriguez,* 1993, pp. 534-535). Ms. Rodriguez argued that due to her debilitating condition and diminishing physical capacity, she would be unable to terminate her own life without assistance from a third party (*Rodriguez,* 1993, pp. 534-535). Referencing the autonomy of individuals living without a disability to terminate their life at the time and manner of their choice, the appellant contends that s. 241(b) of the *Criminal Code* sets forth restrictions on accessibility to end-of-life decisions that would otherwise be absent if not for her disability (*Rodriguez,* 1993, p. 544).

Section 15 SCC Rationale

For the majority, Sopinka J. began by highlighting the two main issues that must be answered to determine a violation of s. 15(1). First, the appellant must demonstrate that s. 241(b) of the *Criminal Code* was universally discriminatory against all disabled persons who are unable to commit suicide (*Rodriguez,* 1993, p. 612). Secondly, answering whether the s. 241(b) of the *Criminal Code* is beneficial or burdensome by absolute prohibition gives rise to the application of s. 15(1) of the *Charter* (*Rodriguez,* 1993, p. 612). However, the majority declined to address any of the above issues as they felt it would be better left to a judgment where its resolution is essential to the outcome (*Rodriguez,* 1993, p. 613). As a result, the majority made the assumption that s. 241(b) of the *Criminal Code* violates s. 15(1) of the *Charter,* yet Sopinka J. emphasized that the impugned provision would be saved by s. 1 of the *Charter* regardless (*Rodriguez,* 1993, p. 613).

Lastly, regarding the impugned provision under s. 1 of the *Charter,* the majority briefly addressed the justification of a blanket prohibition through an Oakes analysis which sets forth the test developed in *R v Oakes* [1986] for whether an infringement can be saved under s. 1 of the *Charter*. The majority, in agreeance with Chief Justice Lamer, found that s. 241(b) of the *Criminal Code* has "a clearly pressing and substantial legislative objective" for the purpose of protecting the value of human life (*Rodriguez,* 1993, p. 613). Furthermore, in their reasoning, the majority found that the proportionality test of s. 241(b) of the *Criminal Code* was satisfied as the prohibition on medically assisted suicide is rationally connected to its objective of protecting the vulnerable, and the restrictions are minimally impairing (*Rodriguez,* 1993, pp. 613-615).

Remedy

Upon completion of examining the blanket prohibition of medically assisted suicide under provision s. 241(b) of the *Criminal Code* and its infringements regarding ss. 7, 12 and 15(1) of the *Charter,* the majority dismissed the appellant's claims without cost (*Rodriguez,* 1993, p. 615). Although s. 12 of the *Charter* was deemed inapplicable, the majority concluded that the violation of the appellants s. 7 rights under the *Charter* were nevertheless consistent with the principles of fundamental justice and, therefore, constitutional (*Rodriguez,* 1993, p. 615). In addition, the majority, in agreeance with dissenting members that s. 241(b) of the *Criminal Code* violated s. 15(1) of the *Charter* ruled that the infringement would be saved by s. 1 of the *Charter* regardless (*Rodriguez,* 1993, p. 615).

Carter v Canada (Attorney General) [2015] 1 SCR 331

In *Carter v Canada* [2015], the SCC heard the appellant's case where they advanced the main issue that blanket prohibition on physician-assisted death under s. 241(b) of the *Criminal Code* violated ss. 7 and 15(1) of the *Charter.* In a landmark decision after more than two decades since the issue of physician-assisted death was addressed, the SCC unanimously reversed the decision in *Rodriguez* [1993], solidifying their position on the matter. Furthermore, the SCC's decision in *Carter* [2015] played an influential role in the interpretation of s. 7 of the *Charter* for years to come.

Case Facts

In 2009, Gloria Taylor was diagnosed with amyotrophic lateral sclerosis (ALS), a fatal neurodegenerative disease (*Carter,* 2015 at para 11). By 2010, Ms. Taylor's condition had rapidly deteriorated and was suffering from immense pain (*Carter,* 2015 at para 12). Ms. Taylor described that her need for assistance with everyday life and an imminent bedridden state was an

assault on her "privacy, dignity, and self-esteem (*Carter,* 2015 at para 12). Like, Sue Rodriguez, Ms. Taylor was left with the cruel choice between the painstaking wait for natural death and what she called an "ugly death" by taking her own life while still physically capable (*Carter,* 2015 at paras 12-13). Knowing that the path to awaiting a natural death was not a viable option and after communicating her desire to take control over dying with dignity, Ms. Taylor filed a constitutional challenge of the *Criminal Code* provisions prohibiting physician-assisted death before the British Columbia Supreme Court (*Carter,* 2015 at paras 11-12).

Ms. Taylor was joined by Lee Carter and Hollis Johnson, who had assisted Ms. Carter's mother in achieving a physician-assisted death in Switzerland; William Schoichet, a physician from British Columbia willing to aid the physician-assisted death process; and the British Columbia Civil Liberties Association in their pursuit (*Carter,* 2015 at para 11). The five appellants argued that together, ss. 14 and 241(b) of the *Criminal Code* prohibiting assisted suicide unjustifiably infringed upon the rights enshrined within ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (*Carter,* 2015 at para 11).

The British Columbia Supreme Court ruled that prohibition under s. 241(b) of the *Criminal Code* deprived the claimants of their ss. 7 and 15(1) *Charter* rights and subsequently was not justifiable under s. 1 of the *Charter* (as cited in *Carter,* 2015 at paras 22-31). The trial judge granted a one-year suspension of invalidity and a constitutional exemption over that period for Ms. Taylor (as cited in *Carter,* 2015 at paras 32). Upon appeal by the Attorney General of Canada, the British Columbia Court of Appeal found that the trial judge erred in their judgement by departing from the precedent set out in *Rodriguez* [1993] (as cited in *Carter,* 2015 at para 34). As a result, the majority of the Court of Appeal reversed the decision at the lower court,

concluding that the trial judge was bound by the precedent set out in *Rodriguez* [1993] (as cited in *Carter,* 2015 at para 36).

Preliminary Issues

Before addressing the constitutional claims regarding ss. 7 and 15(1) of the *Charter*, the Court was tasked with addressing two preliminary issues. The first issue regarded answering the question of whether the court can depart from the precedent set out in *Rodriguez* [1993]. In their appeal, Canada argued that the trial judge was bound by *Rodriguez* [1993] and that recognizing *stare decisis* as a constitutional principle inhibited lower courts from deviating from the rulings of higher courts (*Carter,* 2015 at para 43). Although true that adherence to the rulings of higher courts by lower courts is a fundamental doctrine within the legal system, the Court draws from *Canada (Attorney General) v Bedford* [2013] to lay out the circumstances where *stare decisis* can be superseded (as cited in *Carter*, 2015 at para 44). A trial court may reconsider the ruling of a higher court under two scenarios: "where a new legal issue is raised; and where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (*Bedford*, 2013 at para 42). In this case, the Court finds that both conditions have been met, citing both the evolution of the principles of overbreadth and gross proportionality pertaining to s. 7 and new insight into safeguarding abuse (*Carter,* 2015 at para 46). The Court further justified revisiting the *Rodriguez* [1993] decision due to its dated moral beliefs and reliance on the general consensus among Western countries for the necessity of absolute prohibition (*Carter,* 2015 at para 47).

The second preliminary issue asked of the court was if interjurisdictional immunity under ss. 92(7), 13 and 16 of the *Constitution Act* (1867) applies to physician-assisted dying (*Carter,* 2015 at para 49). The appellants argued that the prohibition on physician-assisted dying

undermines the "protected core" of provincial health jurisdiction and is therefore beyond the scope of the Federal government's authority (*Carter,* 2015 at para 50). The Court turned to a similar argument in *Canada (Attorney General) v PHS Community Services Society* [2011] to assist in determining the merit of interjurisdictional immunity. The Court found that similar to the *PHS* [2011] rationale, the ambiguous definitions relied upon by the appellants of "core" powers did not sufficiently establish that prohibiting physician-assisted dying interferes with provincial jurisdiction (para 68, as cited in *Carter,* 2015 at para 53). In addition, the Court draws from *RJR-MacDonald Inc. v Canada (Attorney General)* [1995] (para 32 as cited in *Carter*, 2015 at para 53) and *Schneider v The Queen* [1982] legislation (p. 142, as cited in *Carter*, 2015 at para 53) to further establish the validity of concurrent jurisdiction between provincial and federal health legislation.

Section 7

The SCC began their analysis of s. 7 of the *Charter* by examining whether ss. 241(b) and 14 of the *Criminal Code* interferes with, or deprives life, liberty or security of the person.

Section 7 Argument

The appellants argued that ss. 241(b) and 14 of the *Criminal Code* violated all three rights under s. 7 of the *Charter*, in that it forces individuals to take their life prematurely in fear of lacking the capacity to do so as a result of their grievous and irremediable medical condition (*Carter*, 2015 at para 57). Furthermore, the appellants assert that the impugned provisions interfere with the fundamental right to exercise personal autonomy over medical decisions and as a result induces prolonged physical and psychological suffering (*Carter*, 2015 at para 65).

Section 7 SCC Rationale

Starting with the right to life, the Court found no basis in amending the trial judge's determination that the prohibition of physician-assisted dying effectively engaged the right to life in fear that an individual's diminishing physical capacity would force some to prematurely end their life (*Carter*, 2015 at para 58). Despite concurring with the trial judge's conclusion, the Court did address the trial judge's determination that only when there is a threat of death from state action does the right to life come into effect. Drawing from *Chaoulli v Quebec (Attorney General)* [2005] (paras 38, 50, 123, 191 and 200, as cited in *Carter,* 2015 at para 62) and *PHS* [2011] (para 91, as cited in *Carter,* 2015 at para 62), the Court recognized that in both cases, the right to life is engaged only by death or the threat of death at the hand of the government. However, the Court made clear the distinction that the right to live does not correspond to a "duty to live" (*Carter,* 2015 at para 63), as this logic would call into question the common law concept of a patient's right to refuse treatment recognized in *Ciarlariello v. Schacter* [1993] (*Rodriguez,* 1993, p. 630, as cited in *Carter,* 2015 at para 63). In the words of Sopinka J., the sanctity of life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez,* 1993, p. 595, as cited in *Carter,* 2015 at para 63).

After establishing that the appellant's desire to access a physician-assisted death sufficiently engages the right to life under s. 7 of the *Charter,* the Court turned to liberty and security of the person. Liberty is set forth to protect an individual's right to "make fundamental personal choices free from state interference" (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 at para 54). On the other hand, security of the person, per Sopinka J. is concerned with personal autonomy regarding bodily integrity without state intrusion (*Rodriguez*, 1993, pp. 587-588). While liberty and security of the person are distinctive, underlying both

rights are the protection of individual autonomy and dignity, and for the purpose of their analysis, the Court considered them together. Drawing from the trial judge's judgement, The Court was in agreeance that by prohibiting access to physician-assisted dying, the state was infringing on fundamental and personal health decisions (*Carter,* 2015 at paras 65-66). In addition, the blanket prohibition caused individuals like Ms. Taylor to suffer severe physical and psychological pain imposed by the state under ss. 241(b) and 14 of the *Criminal Code* (*Carter,* 2015 at paras 65-66). The Court went on to further justify its reasoning by highlighting the longstanding history of protecting personal autonomy in medical decision-making and, at its core, the law is intended to guarantee that individuals are free to exercise their free will regarding bodily integrity (*A.C. v Manitoba (Director of Child and Family Services)*, 2009 at para 39). While an individual's decision to end their life is one that seems contradictory to the preservation of human life, per *Fleming v Reid* [1991], serious risk or consequences, including death, does not void a patient of the right to exercise personal autonomy regarding medical decision-making (as cited in *Carter,* 2015 at para 67). As a result, the Court concluded that both the values of life, and liberty and security of the person are infringed upon by ss. 241(b) and 14 of the *Criminal Code* insofar as they deny competent adults with a grievous and irremediable medical condition that causes enduring and intolerable suffering to seek physician-assisted dying (*Carter,* 2015 at para 68).

Principles of Fundamental Justice.

Once the Court had satisfied the condition that a prohibition on physician-assisted dying is contrary to the values of life, liberty and security of the person, the SCC must consider whether the impugned provisions are in accordance with the principles of fundamental justice. As set out in s. 7 of the *Charter*, the right not to be deprived of life, liberty and security of the person is not boundless and may be encroached upon as long as the state's action is consistent

with the principles of fundamental justice. Since the *Charter's* inception, adjudication through the years has identified several principles of fundamental justice. However, recent jurisprudence has established three central concepts to the application of s. 7: laws must not be arbitrary, overbroad, or grossly disproportionate to the rights of life, liberty and security of the person (*Carter,* 2015 at para 72).

Objective.

In order to effectively analyze the principles of arbitrariness, overbroad, and grossly disproportionate, each of the three must be compared with the objective of the legislation under dispute. Therefore, the first step is to establish the state's intention of criminalizing assisted dying. The Court relied upon *Rodriguez* [1993] to establish that the objective of a blanket prohibition was to "protect vulnerable persons from being induced to commit suicide at a time of weakness (para 1190). Canada although in agreeance with this objective, argued for the objective to be defined more broadly as "the preservation of life" (*Carter,* 2015 at para 75). In response, the Court was unable to accept the submission by the respondents and turned to the case law to justify their rejection. In *RJR-MacDonald Inc.* [1995], this court emphasized the hesitancy to define an objective broadly for fear that an ambiguous interpretation can immunize a law from further challenges under the *Charter* (para 144). In the present case, the Court found that the same applies to recognizing the objective of prohibition as "the preservation of life," for it leaves proving the law as overbroad or grossly disproportionate improbable (*Carter,* 2015 at para 77). Furthermore, the Court references *Bedford* [2013] in stating that only the direct measures under the aim of the law can be used in characterizing the objective (para 132). Similarly, in the present case, the Court found that recognizing the objective of s. 241(b) of the *Criminal Code* as preserving life or the prevention of suicide is beyond the narrow goal of protecting vulnerable populations from committing suicide in moments of weakness (*Carter,* 2015 at para 78).

Arbitrariness.

The principle of arbitrariness forbids state action when "there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person" (*Bedford*, 2013 at para 111). The Court found that preventing the exploitation of those most vulnerable from being forced or coerced into ending their life is definitively achieved through an absolute prohibition and therefore s. 241(b) of the *Criminal Code* does not deprive individuals of rights arbitrarily (*Carter,* 2015 at paras 83-84).

Overbreadth.

The Court then went on to analyze the principle of overbreadth in which the inquiry asks whether a law is formulated in a manner that deprives the rights of some individuals that bears no relation to its objective (*Carter*, 2015 at para 85). Overbreadth is not concerned with whether the law imposes a burden on life, liberty or security of the person in the least restrictive manner but focuses on whether the legislation constrains individuals who are outside the scope of the targeted conduct. The respondents acknowledged that an absolute prohibition on physician-assisted dying would restrict individuals like Ms. Taylor, who is "competent, fully informed, and free from coercion or duress" (*Carter*, 2015 at para 86). However, Canada argues that in relation to the objective, any person could be deemed vulnerable and as a result, the law is not overly broad due to the complexity of establishing what constitutes a vulnerable person (*Carter*, 2015 at para 87). In response, the Court referrers to the rationale in *Bedford* [2013] where the ambiguity between exploitative and non-exploitative punished everyone who was involved with prostitution and therefore was overly broad (paras 134-144 as cited in *Carter*, 2015 at para 88). The Court found that the situation in *Bedford* [2013] to be analogous to the case in that s. 241(b) of the *Criminal Code* had the potential to limit the rights of individuals who were outside the realm of

vulnerability and therefore concluded the provision to be drawn overly broad (*Carter*, 2015 at para 88).

Grossly Disproportionate.

The final principle of fundamental justice addressed by The Court was whether the objective of the law is grossly disproportionate to the infringements of life, liberty or security of the person. The inquiry into gross disproportionality compares the correlation between the purpose of protecting the exploitation of vulnerable people with the negative effects of prohibiting individuals from seeking physician-assisted dying (*Carter*, 2015 at para 89). The Court found that due to concluding s. 241(b) of the *Criminal Code* as overly broad, it was unnecessary to address gross disproportionality (*Carter*, 2015 at para 80). However, the Court highlighted the standard of finding a law to be grossly disproportionate is high and the protection of vulnerable persons from being induced to commit suicide at a time of weakness is of great significance (*Carter*, 2015 at paras 89-90). On the other hand, the Court additionally acknowledged the trial judge's conclusion, concurring that the prohibition imposes severe and unnecessary suffering and may force those affected to end their life prematurely (*Carter*, 2015 at para 90).

Parity.

Before moving to the s. 1 *Charter* analysis of s. 241(b) of the *Criminal Code*, the appellants asked for the principle of parity to be recognized as a principle of fundamental justice. Parity requires imposing sanctions of corresponding severity on offenders who commit acts of comparable blameworthiness (*Carter*, 2015 at para 91). The appellants argued that the principle of parity was violated by enforcing the punishment of culpable homicide for those seeking a physician-assisted death, while similar end-of-life practices are exempt from receiving a comparable criminal sanction (*Carter*, 2015 at para 91). In response, the Court declined to

consider the appellants argument given their conclusion of overbreadth and on the grounds that to date, the principle of parity had not been recognized in the relevant case law (*Carter*, 2015 at para 92).

Section 1 Analysis of Section 7

In light of the Court's finding that the prohibition of physician-assisted dying under s. 241(b) of the *Criminal Code* violated the appellant's rights under s. 7 of the *Charter,* the impugned provision is subject to an analysis of s. 1 of the *Charter*. Under s. 1, the rights and freedoms set out in the *Charter* are guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (*Charter,* 1982, s. 1). In contrast to the s. 7 analysis which is concerned with the impact on the rights of the claimant, s. 1 places the burden of justification on the state and is concerned with the effects of the impugned provision on society or the public. To date, there is yet to be a successful s. 1 validation of a s. 7 infringement as the rights enshrined within s. 7 are "not easily overridden by competing social interests" (*Charkaoui v Canada,* 2007 at para 66). In order to uphold an infringement of the *Charter* under s. 1, the government must demonstrate the impugned provision has a pressing and substantial purpose and that the restrictions are proportionate to the law's objective (*Carter*, 2015 at para 94). The criteria for evaluating s. 1, which is known as an Oakes Analysis, states a law to be proportionate if:

(1) the means adopted are rationally connected to that objective;

(2) it is minimally impairing of the right in question; and

(3) there is proportionality between the deleterious and salutary effects of the law (*Oakes,* 1986, as cited in *Carter*, 2015 at para 94).

Limit Prescribed by Law with a Pressing and Substantial Objective.

In the case at hand, the appellants concede that the restriction is prescribed by law under s. 241(b) of the *Criminal Code* and that an absolute prohibition has a pressing and substantial objective (*Carter*, 2015 at para 96). The question then turns to whether a blanket prohibition of physician-assisted dying is proportionate.

Rationale Connection.

To establish a rational connection, the government needs only to demonstrate a causal connection between the infringement and the benefit sought by prohibiting physician-assisted dying "on the basis of reason or logic" (*RJR-MacDonald Inc.,* 1995 at para 153). The Court, in agreement with Finch C.J.B.C in the Court of Appeal, found that in situations involving an activity that poses significant risks, a logical measure to prevent such a risk is a prohibition (para 175, as cited in *Carter*, 2015 at para 100). Therefore, the Court found there to be a rational connection between the prohibition and the objective under s. 241(b) of the *Criminal Code* *Carter*, 2015 at para 100). Expanding on their rationale, the Court stated that it can be concluded that legislation preventing all individuals from access to assisted suicide will halt vulnerable people from being coerced to commit suicide at a time of weakness *Carter*, 2015 at para 101).

Minimal Impairment.

After affirming the rational connection of the impugned provision, the next step of the analysis is establishing whether the impediment on the right is minimally impairing. To be deemed minimally impairing, the government must demonstrate that the limit on a right is confined to what is reasonably necessary and that no alternatives of lesser detriment are available in order to achieve the legislation's objective (*Carter*, 2015 at para 102). Therefore, the Court was tasked with deciphering whether there was a viable option addressing risks associated with physician-assisted dying that was less impeding on the right to life, liberty and security of the

person or whether said risks could not be effectively safeguarded against by any other means besides a blanket prohibition. Much of the evidence needed to make this decision was brought forward in the trial, and therefore, the Court relied upon much of the trial judge's judgement (*Carter*, 2015 at para 104). From the trial judge's perspective, an absolute prohibition would be necessary only if evidence revealed physicians were unable to reliably assess competence or apply informed consent requirements for patients or if there was evidence with explicit indications of the potential for abuse and exploitation of an end-of-life regime (paras 1365-1366, as cited in *Carter*, 2015 at para 104).

Upon hearing testimony from scientists and medical professionals, along with evidence of success in physician-assisted dying in jurisdictions where the end-of-life regimes had been regulated, the trial judge concluded that physician-assisted dying could be implemented in a manner capable of safeguarding vulnerable people from abuse or coercion (para 883, as cited in *Carter*, 2015 at para 105). Furthermore, although the trial judge recognized the potential risks involved, she found that qualified medical professionals could accurately assess and safeguard the potential exploitation of a physician-assisted dying program, as there was no substantiating evidence of risk to vulnerable populations (paras 852, 1242, as cited in *Carter*, 2015 at para 107). In response to the trial judge's findings, Canada argued that the trial judge erred by ignoring that some of the evidence concerning safeguards was weak and relying upon the assumption that problems found in other jurisdictions would not arise in Canada due to the cultural differences was improper (*Carter*, 2015 at para 108). The SCC rejected Canada's argument on the basis that, similar to *Bedford* [2013], the trial judge is entitled to the same degree of deference in her conclusions as any other factual findings (para 48 as cited in *Carter*, 2015 at para 109). Furthermore, the Court indicated that Canada's submissions amounted to the mere highlighting

of conflicting evidence and, therefore, did not sufficiently establish the trial judge's findings as unsupported (*Carter*, 2015 at para 109). Additionally, Canada submitted evidence of a number of controversies found in the assistance in-dying regime in Belgium that highlighted shortcomings in establishing effective safeguards from abuse (*Carter*, 2015 at para 110). Similarly, the SCC concluded that Canada's contention did not undermine the trial judge's conclusion, stating that the permissive end-of-life regime found in Belgium is a result of a distinctive "medico-legal culture" than that found in Canada (*Carter*, 2015 at para 112).

In addition, Canada disputes the trial judge's findings on the issue of minimal impairment by putting forward the possibility of descending down a slippery slope into euthanasia and condoned murder (para 1241, *Carter*, 2015 at paras 114, 120). In their argument, Canada highlighted the potential for various errors in capacity assessments as a result of the manipulation of cognitive impairments, mental illnesses, undue influence, and systemic prejudice (*Carter*, 2015 at para 114). Accordingly, returning to their argument regarding a lack of definitive measures to identify vulnerable people, Canada states that decriminalizing physician-assisted dying "accepts too much risk" (para 154, as cited in *Carter*, 2015 at para 118), and, therefore, absolute prohibition is necessary to safeguard against misdiagnosis and coercion (*Carter*, 2015 at para 114). Responding to the slippery slope argument, the SCC found that the evidence accepted by the trial judge contradicts Canada's position by substantiating the ability to reliably diagnose on an individual basis and that the application of informed consent and decisional capacity by medical practitioners can sufficiently safeguard against exploitation of physician-assisted dying (*Carter*, 2015 at para 115). Furthermore, highlighting the established right to refuse life-sustaining treatment, the SCC finds it unreasonable to assume individuals who are disabled or injured are any less vulnerable than those seeking physician-assisted dying (*Carter*, 2015 at para

115). As a result, the Court asserts that the respondent's concern about bearing heightened risks is already a part of Canada's medical system and, therefore, finds the claim to be unfounded (*Carter*, 2015 at para 115).

Lastly, Canada argued that much of the evidence regarding safeguarding against many of the risks associated with an end-of-life regime submitted to the trial judge was speculatory and believes that the absolute prohibition of physician-assisted dying should be upheld unless the appellants can establish an alternative course of action that effectively eliminates all known risks (*Carter*, 2015 at para 118). The Court rejected this proposal for it would reverse the burden of minimal impairment under s. 1 from the government to the appellants (*Carter*, 2015 at para 118). In summary, the SCC found no errors in the trial judge's analysis and, therefore, concluded that the prohibition of physician-assisted dying under s. 241(b) of the *Criminal Code* is not minimally impairing.

Proportionality of the Effects.

The final aspect of the Oakes analysis is weighing the deleterious effects on the infringed rights with the salutary benefits of the law in terms of the greater public good (*Carter*, 2015 at para 118). However, considering the Court's findings on minimally impairing, it is unnecessary to continue the Oakes analysis. Therefore, the Court finds that ss. 241(b) and 14 of the *Criminal Code* are not saved by s. 1 of the *Charter* (*Carter*, 2015 at para 123).

Section 15

In light of the SCC's finding that ss. 241(b) and 14 of the *Criminal Code* violated s. 7 of the *Charter* and is subsequently not saved under s. 1, the Court found it unnecessary to address the appellant's claim that the impugned provisions also violated s. 15 of the *Charter* (*Carter*, 2015 at para 93).

Remedy

Concluding their judgement in *Carter v Canada* [2015], the Court found that ss. 241(b) and 14 of the *Criminal Code* infringe upon the rights to life, liberty and security of the person under s. 7 of the *Charter* in a manner that is contrary to the principles of fundamental justice (*Carter,* 2015 at para 127). Therefore, ss. 241(b) and 14 of the *Criminal Code* are declared of no force or effect pursuant to s. 52(1) of the *Constitution Act* (1867) insofar as they prohibit physician-assisted dying for a competent adult who:

(1) clearly consents to the termination of life; and

(2) has a grievous and irremediable medical condition that causes enduring suffering that is intolerable in the circumstances of their condition. (*Carter*, 2015 at para 127)

The declaration of invalidity is to last for a period of 12 months, and the Court awards the appellants with special costs on a full indemnity basis (*Carter*, 2015 at paras 147-148).

Truchon v Attorney General of Canada [2019] QCCS 3792

Truchon v Attorney General of Canada (*Truchon c. Procureur général du Canada*, 2019 QCCS 3792) is a pivotal legal case in the Quebec Superior Court that challenged s. 241.2(2)(d) of the *Criminal Code* under ss. 7, 15 of the *Charter* following the enactment of Bill C-14. The case also addresses whether s. 26(3) of Quebec's *Act respecting end-of-life care* is unconstitutional with respect to the same principles. The constitutional challenge in *Truchon* [2019] was the first ruling on the contention that one's death must be "reasonably foreseeable" (*Criminal* Code, 1985, s 241.2(2)(d)) and contributed to the ongoing discussions about the delicate balance between upholding the principles of individual autonomy and protecting vulnerable populations.

Case Facts

In *Truchon* [2019], the applicants, Mr. Jean Truchon and Ms. Nicole Gladu, who had been deemed ineligible for medical assistance in dying (MAiD), challenged the constitutionality of s. 241.2(2)(d) of the *Criminal Code* and s. 26(3) of the *Act respecting end-of-life care* (*Truchon,* 2019 at para 5). Truchon and Gladu argued that the requirement for natural death to be reasonably foreseeable infringes upon their right to life, liberty and security of the person under s. 7 and their right to equal treatment under s. 15(1) of the *Charter* (*Truchon,* 2019 at para 6).

The first plaintiff, Mr. Truchon, suffered from spastic cerebral palsy since birth and, as a result of his deteriorating condition, became completely paralyzed in 2012 (*Truchon*, 2019 at para 17). Nevertheless, Mr. Truchon's cognitive capacity remained above average and up until his paralysis, led a fulfilling and independent life (*Truchon*, 2019 at paras 17-18). Despite his disability, Mr. Truchon obtained an undergraduate degree in literature and enjoyed an active social life, regularly participating in sports and activities (*Truchon*, 2019 at paras 18-21). After being diagnosed with severe spinal stenosis and myelomalacia in 2012, Mr. Truchon's struggle with autonomy worsened, facing the reality of living a dependent life and an inability to participate in activities that previously brought him satisfaction (*Truchon*, 2019 at paras 23, 26, 28). As time passed, Mr. Truchon suffered from intense physical and psychological pain as a result of his deteriorating condition and began sharing his desire to exercise what autonomy he had left and end his life in a manner of his choosing (*Truchon*, 2019 at para 33). In 2016, with the support of his family, Mr. Truchon applied for MAiD (*Truchon*, 2019 at para 35). Despite constant suffering and meeting all other legislative requirements, Mr. Truchon's request for MAiD was denied on the grounds that he was not at the end of his life (*Truchon*, 2019 at para 36).

The other plaintiff, Ms. Gladu, was born before widespread vaccinations and, at the age of four, developed residual paralysis and severe scoliosis as a result of poliomyelitis (*Truchon*, 2019 at para 51). Although informed that she would never walk again, after years of physiotherapy, by the age of 10, Ms. Gladu beat the odds after undergoing three spinal grafts (*Truchon*, 2019 at para 52). Despite her physical limitations, Ms. Gladu went on to achieve impressive professional accomplishments, earning a master's degree and an internationally successful career in journalism and management (*Truchon*, 2019 at para 53). Unfortunately, at the age of 47, Ms. Galdu was diagnosed with degenerative muscular post-polio syndrome and began gradually losing the autonomy she once cherished (*Truchon*, 2019 at paras 55-57). Faced with constant pain and equal psychological suffering, Ms. Gladu rejected the prospect of spending the rest of her life dependent on others for everyday tasks (*Truchon*, 2019 at para 58). As a result, Ms. Gladu met with medical practitioners in 2017 to determine if she was eligible for MAiD (*Truchon*, 2019 at para 66). Similar to Mr. Truchon, Ms. Gladu met all eligibility requirements except for that her natural death being reasonably foreseeable and subsequently was denied access to MAiD (*Truchon*, 2019 at para 70). Although Ms. Gladu did not personally know Mr. Truchon, both plaintiffs were unwilling to continue the path they were on and faced the terrible choice of subjecting themselves to additional suffering through extreme measures in order to become eligible for MAiD or committing suicide. As a result, the two joined forces to bring forward the legal action to the Superior Court of Quebec, challenging the constitutionality of the provision that natural death be reasonably foreseeable (*Truchon*, 2019 at para 65).

Preliminary Issue

Before turning to the analysis of ss. 7 and 15(1) of the *Charter*, presiding over the case, The Honourable Christine Baudouin was first tasked with addressing whether *Carter* [2015]

created a constitutional right to MAiD. Following the SCC's decision in *Carter* [2015], the SCC enforced a one-year declaration of invalidity of ss. 241(b) and 14 of the *Criminal Code* to allow Parliament, should they choose, to reform legislation consistent with the principles set forth in their judgement (*Carter*, 2015 at para 126). Following an extension of the declaration of invalidity, Bill C-14 received royal assent on June 17, 2016, and *Criminal Code* amendments ss. 241.1 and 241.2 came into force (*Truchon*, 2019 at para 75).

The applicants argued that the judgement rendered in *Carter* [2015] was effectively enshrined within the *Charter,* and as a result, the provision requiring natural death to be reasonably foreseeable was inconsistent with the principles set out by the SCC and, therefore legislation enacted under Bill C-14 is unconstitutional (*Truchon*, 2019 at para 476). In essence, the applicants state that the SCC's judgement rendered a minimum threshold that legislators abide by, and the requirement for natural death to be reasonably foreseeable reinstates a prohibition for individuals that was found to be of no force or effect in *Carter* [2015].

In response, the Attorney General disputed the applicant's argument by insisting that the legislation corresponds to the circumstances regarding Ms. Taylor, who, at the time, was in the terminal stage of her condition and that her natural death was reasonably foreseeable (*Truchon*, 2019 at para 480). Furthermore, the defendants highlight the SCC's repetitive reference to the reasoning in their judgement being constrained to only those individuals under the circumstances, such as Ms. Taylor, with particular focus on paragraph 127, which states, "We make no pronouncement on other situations where physician-assisted dying may be sought" (*Carter,* 2015).

After examining the arguments set forth by both parties, Baudouin J.S.C begins with her rationale for concluding the position taken by the Attorney General to be erroneous. The Court

states that the defendant's interpretation of paragraph 127 of the *Carter* [2015] judgement is misguided as it is clear that the SCC does not explicitly or implicitly state that access to MAiD is dependent upon the individual's proximity to death (*Truchon*, 2019 at para 495). Nor does the SCC's ruling equate a life of suffering until one's natural death to a medical condition's terminal nature (*Truchon*, 2019 at para 496). In the Court's view, the breadth of the language used in paragraph 127 is instead designed to allow individuals access to MAiD who meet the criteria set out by the SCC, regardless of whether their natural death is reasonably foreseeable (*Truchon*, 2019 at para 499).

That said, in addressing the applicant's claim that the reasonably foreseeable provision is inconsistent with a constitutional right to MAiD, Baudouin J.S.C cannot accept the argument that legislation incorporating requirements not found in *Carter* [2015] is *de facto* unconstitutional (*Truchon*, 2019 at paras 502-503). The Court, in agreement with the Attorney General of Canada, referenced *R v Mills* [1999], in which provisions enacted by legislators that differ to a degree from a court ruling are justifiable insofar as the legislation remains constitutional (*Truchon*, 2019 at para 504). In *Mills* [1999], it was established that courts do not hold a monopoly over legislation and that establishing such autocratic powers would undermine an essential democratic relationship between the courts and parliament (para. 55). Therefore, the Court rejects the applicant's argument seeking dismissal of the foreseeable death provision on the sole grounds that it differs from the judgement in *Carter* [2015] (*Truchon*, 2019 at para 508).

Section 7

The argument of whether s. 241.2(2)(d) of the *Criminal Code* infringes upon s. 7 of the *Charter* begins with an examination of the right to life delivered by Baudouin J.S.C.

Section 7 Arguments

The applicants submit essentially the same argument found in *Carter* [2015] in that requiring natural death to be reasonably foreseeable is analogous to prohibiting MAiD for anyone who is not at the end of their life (*Truchon*, 2019 at para 517). Paralleling the rationale in *Carter* [2015], requiring an individual to endure suffering until a foreseeable natural death may force individuals to end their lives prematurely while they still have the physical capacity to do so (*Truchon*, 2019 at para 517). Furthermore, the appellants argue that although s. 7 is concerned with the "right not to die" (*Carter*, 2015 at para 61); it does not impose a duty to live, as doing so would undermine the established right to refuse lifesaving treatment (*Truchon*, 2019 at para 515).

In contrast, the Attorney General of Canada argues that although individuals may suffer during the period before their natural death is reasonably foreseeable, the requirement only forces individuals to prolong their lives rather than end their lives prematurely (*Truchon*, 2019 at para. 518).

Next, the applicants are to demonstrate that the reasonably foreseeable provision engages the right to liberty and security of the person under s. 7 of the *Charter*. Again, the applicants submitted an argument paralleling the rationale for a violation of liberty and security of the person used in *Carter* [2015]. In essence, the applicants argued that the reasonably foreseeable provision constitutes unjustifiable intrusion on behalf of the state with personal autonomy regarding medical decision-making and that such interference deprives the individual of preserving dignity and personal integrity (*Truchon*, 2019 at para 525). In addition, the impugned provision imposes unnecessary physical and psychological suffering by restricting access to MAiD (*Truchon*, 2019 at para 525).

From the opposing position, the Attorney General of Canada argues that the restriction of MAiD will only affect a small population of people who are both physically incapable of making decisions concerning bodily integrity, and their natural death is not reasonably foreseeable (*Truchon*, 2019 at para 529). Accordingly, the defendants contend that for the majority of people not within this limited category, there are no restrictions on their ability to exercise personal autonomy to end their lives without state intervention (*Truchon*, 2019 at para 530).

Section 7 Superior Court of Quebec Rationale

In response, the Court dismisses the Attorney General of Canada's argument regarding the violation of the right to life under s. 7 of the *Charter* on the grounds that requiring death to be reasonably foreseeable undoubtedly prevents individuals like Mr. Truchon and Ms. Gladu from seeking MAiD (*Truchon*, 2019 at para 520). Furthermore, referencing Ms. Gladu's intention to receive a medically assisted death in Switzerland and Mr. Truchon's attempts to voluntarily die of hunger and thirst, the provision clearly forces individuals to employ drastic and degrading manners in order to exercise desires to end their lives before physical capacity or immense suffering prevents them from doing so (*Truchon*, 2019 at para 521). As a result, the Court finds that the reasonably foreseeable provision places individuals, like the appellants, at a heightened risk of harm and death and, therefore, violates the right to life under s. 7 of the *Charter* (*Truchon*, 2019 at para 522).

Next, upon receiving arguments from both parties, the Court concludes that the reasonably foreseeable requirement additionally infringes upon the right to liberty and security of the person under s. 7 of the *Charter* (*Truchon*, 2019 at para 533). Baudouin J.S.C justifies her conclusion by dismissing the Attorney General of Canada's contention that only a small number of individuals do not have control of their physical integrity, for, in the absence of the reasonably

foreseeable requirement, individuals such as Mr. Truchon and Ms. Gladu would not be subject to the physical and psychological suffering that comes at the hands of the state (*Truchon*, 2019 at para 533). Nor would these same individuals be deprived of making the fundamental right to personal autonomy regarding medical decisions enshrined within s. 7 of the *Charter*.

Principles of Fundamental Justice.

After establishing that the requirement of natural death to be reasonably foreseeable engages the right to life, liberty, and security of the person under s. 7 of the *Charter*, the appellants must now demonstrate that the requirement is inconsistent with the principles of fundamental justice. Although s. 7 does not explicitly state the principles of fundamental justice, case law has identified necessary requirements of a law that imposes a violation on life, liberty, or security of the person. The Court recognizes the principles of arbitrariness, overbreadth, and grossly disproportionate as the three relevant principles of fundamental justice in this case (*Truchon*, 2019 at para 537). However, before beginning the analysis, it is essential for the court to first establish the objective of the impugned provision.

Objective.

The applicants argued that the objective of the legislation did not differ from the objective recognized in *Carter* [2015], to protect vulnerable persons from being induced to end their lives in a moment of weakness (*Truchon*, 2019 at para 550). However, the Attorney General of Canada submitted two supplementary objectives encompassing the amended legislation. In addition to the existing objective identified by *Carter* [2015], the purpose of s. 241.2(2)(d) of the *Criminal Code* is:

> **(1)** That it is important to affirm the inherent and equal value of every person's life and to avoid encouraging negative perceptions of the quality of life of persons who are elderly, ill or disabled; and

> **(2)** that suicide is a significant public health issue that can have lasting and harmful effects on individuals, families and communities. (*Truchon*, 2019 at para 551)

The Court, in response to the objectives submitted by the defendants, was unable to accept the two supplementary elements, concluding that they are overbroad and are primarily concerned with upholding social values (*Truchon*, 2019 at para 555). Expanding further, the Court draws from *RJR-MacDonald Inc.* [1995], that when identifying the objective, it is to be constrained to the infringing measure, as an overly broad objective has the potential to invalidate any further analysis (para 144). For that reason, the Court recognizes the infringing measure to be an exclusion of individuals who would otherwise be eligible for MAiD if not for the fact that their death is not reasonably foreseeable. Therefore, the Court concludes that the objective of s. 241.2(2)(d) of the *Criminal Code* is "to protect vulnerable persons who might be induced to end their lives in a moment of weakness, by preventing errors when assessing requests for medical assistance in dying" (*Truchon*, 2019 at para 556).

Arbitrariness.

A law is considered to be arbitrary if the state fails to establish a rational connection between the objective and the imposed limitations of the rights guaranteed under s. 7 of the *Charter*. Recognizing that because the objective of requiring natural death to be reasonably foreseeable is similar to the objective in *Carter* [2015], Baudouin J.S.C concluded that s. 241.2(2)(d) of the *Criminal Code* was not arbitrary (*Truchon*, 2019 at paras 566-567). The Court stated that the objective of protecting vulnerable populations ending their lives in moments of weakness is rationally connected to the reasonably foreseeable requirement (*Truchon*, 2019 at para 567). In addition, the Court acknowledges that requiring natural death is reasonably foreseeable has the effect of reducing the number of individuals accessing MAiD and thus minimizes the potential for errors in the assessments of eligibility (*Truchon*, 2019 at para 568).

Overbreadth.

The principle of overbreadth is defined as a law that, although rationally connected to its objective, imposes a burden on individuals' rights beyond the scope of the intended target and, therefore, imposes restrictions exceeding those necessary to the achievement of the law's objective (*Truchon*, 2019 at para 570). The Court concludes that the reasonably foreseeable provision is overly broad because it prevents individual's such as Mr. Truchon and Ms. Gladu who upon several expert examinations, have been found to meet all other eligibility criteria from accessing MAiD (*Truchon*, 2019 at para 556). Paralleling the *Carter* [2015] decision, Baudouin J.S.C finds that the requirement prevents individuals who are competent and fully informed about the end-of-life process from accessing MAiD and, as a result, imposes a restriction on individuals outside the objectives target of protecting vulnerable populations (*Truchon*, 2019 at paras 573-574).

Furthermore, the Court rejects the Attorney General's submission that the reasonably foreseeable provision is intended to protect vulnerable people, not based on their decision-making capacity, but to prevent the possibility of being induced to end their lives prematurely due to the stigmatization of increased dependence on others and increased suffering (*Truchon*, 2019 at para 575). The Court states on the contrary that the objective of the legislation is to allow people who meet the state-imposed criteria to access MAiD, and the restriction imposed by the reasonably foreseeable provision has the effect of forcing individuals to either continue enduring suffering or to end their own lives in a manner inconsistent with the value of personal dignity (*Truchon*, 2019 at para 576).

Grossly Disproportionate.

The final principle of fundamental justice prevents legislation from violating the right to life, liberty, or security of the person under s. 7 in a manner that is grossly disproportionate to the

law's objective. In order to determine if a law is grossly disproportionate, the Court must measure the negative effects independently from the impact on society and instead focus on the consequences of the restrictions imposed on the applicants alone (*Truchon*, 2019 at para 578).

The Attorney General argued that the law was not grossly disproportionate because all individuals considering MAiD will eventually meet the necessary eligibility requirements once they reach the final stage of their lives (*Truchon,* 2019, at para 580). In addition, the defendants claim that the law does not prevent individuals from making the choice to live or to die; instead, the only restriction imposed is preventing the state from assisting in their death until their natural death is deemed reasonably foreseeable (*Truchon*, 2019, at para 581).

In response, the Court rejected the Attorney General's claim by highlighting that the legislation prevents individuals like Mr. Truchon and Ms. Gladu from making fundamental choices regarding their end-of-life care (*Truchon*, 2019 at para 582). As a result, the Court acknowledges that the negative impact on the applicants far exceeds the objective of safeguarding the exploitation of vulnerable persons. Furthermore, the Court states that permitting such legislation, in essence, creates a state-imposed obligation to live, which is contrary to the common law right of an individual to refuse treatment found in *Ciarlariello v. Schacter* [1993] (para 63). The foundation of the *Carter* [2015] judgement was that an end-of-life regime shall not "require that people continue to live against their will until, after a given period, they naturally reach the stage of imminent death" (*Truchon*, 2019, at para 584). Therefore, the Court concludes that the burden created by requiring natural death to be reasonably foreseeable is grossly disproportionate to the law's objective (*Truchon*, 2019, at para 585).

Section 1 Analysis of Section 7

The Oakes analysis provides circumstances in which restrictions on an individual's rights and freedoms can be determined to be justifiable under s. 1 of the *Charter.* In order to demonstrate a justifiable infringement, the Attorney General must first establish that the limit is prescribed by law and that its objective is of pressing and substantial concern. Secondly, the restriction must be found to be proportional to its objective through the succession of three different tests. In the first test, the state must establish that the means chosen are rationally connected to its objective. Secondly, the impugned provision must be proven to be of minimal impairment. Lastly, a proportionality test must be completed, weighing the relative deleterious and salutary effects of the law (*Truchon*, 2019 at para 591).

Limit Prescribed by Law with a Pressing and Substantial Objective.

The Court found that the impugned provision is explicitly prescribed by law under 241.2(2)(d) of the *Criminal Code* (*Truchon*, 2019 at para 598). Furthermore, acknowledging the objective of protecting vulnerable persons from being induced to commit suicide in a moment of weakness, the Court contends that given the fact that death is a potential outcome, the law is of pressing and substantial concern (*Truchon*, 2019 at paras 599-601).

Proportionality.

Typically, the proportionality of a law is not rigid, as there are often several alternative measures to addressing a social ill and therefore, there can be no perfect solution to the issue. As a result, a court may allocate a degree of deference, which gives weight to the primary decision-maker as part of its review. In the present case, the Court finds that a degree of deference to Parliament is appropriate given that regulating the complex nature of medically assisted suicide previously underwent a detailed social and constitutional analysis, and the resulting legislation was within the margin of appreciation (*Truchon*, 2019 at paras 603-610).

Rational Connection.

Similar to the examination of arbitrariness, the Court must be persuaded that there is a rational connection between the infringement and the intended benefit (*Truchon*, 2019 at para 611). However, a rational connection analysis under s. 1 is centred on social concern rather than an individual burden and, therefore, calls for inferential reasoning in order for the Attorney General to establish a sufficient connection between the law's restriction and its objective (*Truchon*, 2019 at para 612). In their rationale, the Court draws from the decision in *Carter* [2015] to conclude that in circumstances where an action poses risks such as death, the prohibition of an activity is a rational mechanism for curtailing such risks (para 100). As a result, the Court concludes that prohibiting MAiD for individuals whose natural death is not reasonably foreseeable is a rational method of protecting or preventing at least some vulnerable persons from ending their lives in a moment of weakness (*Truchon*, 2019 at paras 614-615).

Minimal Impairment.

The minimal impairment analysis requires the government to establish that the enactment of the impugned provision is the least harmful measure in order to achieve its objective by demonstrating an absence of evidence pointing to less drastic means to achieve the same objective (*Truchon*, 2019 at paras 616-617). Upon reflection of the submitted evidence, The Court concluded that the Attorney General did not discharge the burden of proving the reasonably foreseeable provision to be of minimal impairment. The Court draws from evidence of the capability of physicians to reliably assess a patient's capacity, the presence of external pressure, and the identification of conditions where suffering cannot be mitigated by alternative measures deemed acceptable by the patient (*Truchon*, 2019 at para 619). In addition, the evidence submitted to the Court does not corroborate the potential for a slippery slope where an unreasonable increase in individuals accessing MAiD, especially vulnerable populations, will

take place in the absence of requiring natural death to be reasonably foreseeable (*Truchon*, 2019 at para 620). The Court closes by acknowledging that although every potential for error cannot be eradicated without an absolute prohibition on MAiD, the existing safeguards are effective in curtailing tangible risks and that the proportion of deaths attributed to MAiD since 2015 in Canada is comparable to other countries with similar end-of-life regimes (*Truchon*, 2019 at paras 623-624).

Proportionality of the Effects.

The final analysis is concerned with weighing the proportionality of the negative impact on protected rights against the beneficial effects within the context of public good (*Truchon*, 2019 at para 625). In their argument, the Attorney General acknowledges that the impugned provision may cause significant suffering for individuals whose natural death is not considered reasonably foreseeable. However, the Attorney General suggests that in comparison to the deleterious effects that existed under the previous absolute prohibition on MAiD, the negative impacts are substantially reduced by the fact that the reasonably foreseeable provision does not prohibit all individuals from exercising personal autonomy to end intolerable suffering (*Truchon*, 2019 at para 626). Furthermore, the Attorney General submits that the salutary effects prevail over any negative consequences because the restriction has the effect of affirming the intrinsic value of human life, regardless of disability or disease and therefore guarantees the protection of vulnerable people (*Truchon*, 2019 at para 627).

In response, the Court recognized that the reasonably foreseeable provision has a salutary effect of excluding suicidal people or those with a psychiatric condition who would not be eligible for MAiD from prematurely ending their lives (*Truchon*, 2019 at para 630). However, in the Court's opinion, the deleterious effects on individuals like Mr. Truchon and Ms. Gladu, whose irreversible condition is in an advanced state of decline and cause immense physical and

psychological suffering, are not superseded by the societal benefits as described by the Attorney General (*Truchon*, 2019 at para 631). The reasonably foreseeable requirement, in effect, deprives individuals of fundamental personal autonomy over medical decisions and implies a duty to live when doing so forces individuals like the applicants to live a life in a manner considered undignified (*Truchon*, 2019 at paras 632, 634). Above all, the reasonably foreseeable provision has the effect of compelling individuals to end their lives while they are still physically capable or to take drastic steps to inflict anguish upon themselves in order to meet the eligibility requirements of MAiD (*Truchon*, 2019 at para 633). Therefore, the Court finds that requiring natural death to be reasonably foreseeable has severe negative consequences on individuals like Mr. Truchon and Ms. Gladu and the social benefits of such a restriction fall far short of maintaining proportionality to the deleterious effects (*Truchon*, 2019 at para 637).

As a result, the Court concludes that because the impugned provision is not of minimal impairment and is grossly disproportionate to the objective of protecting vulnerable persons from committing suicide in a moment of weakness, s. 241.2(2)(d) of the *Criminal Code* violates s. 7 of the *Charter* and is not justifiable under s. 1 (*Truchon*, 2019 at para 638).

Section 15

Section 15 of the *Charter* states:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are

> disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (*Charter,* 1982, s. 15)

Following the decision in *Andrews v The Law Society of British Columbia* [1989], the interpretation of s. 15 of the *Charter* has evolved through case law. However, in subsequent judgements, the fundamental standard has remained constant in that s. 15 goes beyond the idea of similarities and differences and instead is concerned with recognizing human beings as "equally deserving of concern, respect and consideration" (*Andrews*, 1989, p. 171).

That being said, in order to determine an infringement of s. 15 of the *Charter*, the Court must consider the following two questions based on the submissions by the applicant:

> **a)** Does the law, on its face or in its impact, create a distinction based on enumerated or analogous grounds?; and
>
> **b)** If so, does the law impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage? (*Kahkewistahaw First Nation v. Taypotat*, 2015 at paras 19-20).

The first question the Court will address in s. 15 of the *Charter* concerns an analysis of the grounds on which the distinction is based, independent of any other substantive equality claims (*Truchon*, 2019 at para 644). The second question encompasses a contextual inquiry into what discriminatory effect results from the distinction based on the claimant's membership in an enumerated or analogous group (*Truchon*, 2019 at para 645).

Section 15 Arguments

The first part of the applicant's argument is concerned with establishing the presence of a distinction on enumerated or analogous grounds. The applicants submit that limiting MAiD based on the requirement of natural death being reasonably foreseeable creates a discriminatory

distinction based on physical disability (*Truchon*, 2019 at para 652). In essence, the applicant's argument is based on two separate distinctions. The first is that there is a distinct difference in access to MAiD based solely on whether or not their condition or disability classifies an individual as on the trajectory toward a natural death (*Truchon*, 2019 at para 652). The second is the distinction between individuals such as Mr. Truchon, who are deprived of the ability to legally commit suicide without assistance due to their physical disability and individuals who have the capacity to commit suicide legally (*Truchon*, 2019 at para 652). In regard to the second distinction, the applicants recognize the possibility that disabled persons may have access to limited methods to end their lives. However, the discriminatory distinction is nonetheless real since such limited methods carry a higher degree of risk or suffering that is not experienced by individuals without a similar physical disability (*Truchon*, 2019 at para 652).

In response, the Attorney General, although in acknowledgement of the perception of a distinction created by the reasonably foreseeable provision, offers three counterarguments to the applicant's claims. The Attorney General first claims that the distinction created by the impugned provision is not on the basis of health condition or disability but instead refers to a distinction based on the timeline in which MAiD becomes available, which is not an enumerated or analogous ground (*Truchon*, 2019 at para 653). Secondly, the defendants assert that the reasonably foreseeable provision does not exclude persons with severe physical disabilities (*Truchon*, 2019 at para 653). Lastly, the Attorney General argues that anyone who does not meet the eligibility requirements set out in MAiD is not forced to continue their lives as they have the choice to end their life through traditional suicide methods or by voluntarily stopping of eating or drinking (VESD) (*Truchon*, 2019 at para 653). In furthering the rationale for their third argument, the Attorney General states that the choice of suicide or VESD is available to all

Canadians who are not at the end of their lives. As a result, the defendants claim that the applicants are essentially requesting an easier method of ending their lives than would be available for other individuals whose natural death is not reasonably foreseeable (*Truchon*, 2019 at para 653).

The second part of the applicants' argument concerns identifying the effect of the distinction based on their physical disability. The applicants argue that the reasonably foreseeable provision reinstates a discriminatory distinction that had previously been invalidated in the *Carter* [2015] decision (*Truchon*, 2019 at para 666). As a result of this distinction that has been recreated by Parliament, individuals like Mr. Truchon and Ms. Gladu are forced to endure intolerable suffering. Furthermore, the appellants argue that the reasonably foreseeable provision magnifies the perpetual stereotype that the physically disabled lack the ability to exercise personal autonomy or the capacity to make informed decisions regarding their medical condition (*Truchon*, 2019 at para 666).

The Attorney General disputes the applicant’s claim by stating that the reasonably foreseeable provision is not discriminatory because it considers the situation and characteristics to establish a respectful interpretation of the value of human life for individuals like the applicants (*Truchon*, 2019 at para 667). In addition, the Attorney General states that the legislation in no way encourages stereotyping of disabled persons and instead claims that removing the impugned provision would, in effect, reinforce the stereotypes that the applicants have submitted (*Truchon*, 2019 at para 668). To support their claims, the Attorney General argues that removing the reasonably foreseeable provision would provide access to an easier and unprecedented method of suicide not available to other Canadians (*Truchon*, 2019 at para 668). As a result, relaxing the criteria for MAiD would spread a damaging narrative about the values

of human beings and concerns for the quality of life of persons facing disabilities (*Truchon*, 2019 at para 668).

Section 15 Superior Court of Quebec Rationale

For the reasons that follow, the Court was of the opinion that the reasonably foreseeable requirement creates a distinction on the basis of an individual's physical disability (*Truchon*, 2019 at para 654). The fact that individuals like Mr. Truchon and Ms. Gladu, who meet all other eligibility requirements, are prohibited from accessing MAiD constitutes discrimination that would otherwise be absent if not for their physical condition or disability (*Truchon*, 2019 at para 654). Furthermore, the Court is quick to reject the basis of the Attorney General's first two arguments that the reasonably foreseeable provision is not discriminatory because it excludes all persons who are not at the end of their life. In their reasoning, the Court attributes the Attorney General's arguments to be reliant upon the principle of formal equality, which had been scrutinized and rejected by both *Rodriguez* [1993] and *Carter* [2015] (*Truchon*, 2019 at para 647). In particular, Lamer C.J., dissenting in *Rodriguez* [1993], highlighted the flaws of formal equality and encouraged a substantive equality approach instead to prevent placing disadvantages on persons with individualistic disabilities not faced by the general public (paras 530-580).

That being said, the Court felt that the Attorney General's third argument regarding the alternatives for disabled persons to commit suicide needed to be addressed. In their opinion, the Court found the Attorney General's reference to VESD to be extremely distasteful, especially by encouraging individuals to endure the additional suffering that ensues from VESD as a precursor for MAiD eligibility (*Truchon*, 2019 at para 658). In a society where human dignity and empathy are fundamental, the Court finds that by advocating for alternative end-of-life measures, the

Attorney General is essentially persuading those who do not have the capacity to commit suicide to do it nonetheless, which is considered to be a criminal offence in Canada (*Truchon*, 2019 at para 658). On top of that, the Court highlights that by requiring an individual's natural death to be reasonably foreseeable, it forces individuals, such as Mr. Truchon, to receive assistance in ending his life from a third party, which is also a crime in Canada (*Truchon*, 2019 at para 660). Finally, the Court emphasizes its rejection of the idea that MAiD is equivalent to suicide, so by claiming the applicants are seeking access to an easier method of suicide, the Attorney General has erred in its interpretation. The underlying assumption of the applicant's requests for MAiD is not motivated by suicidal intentions but rather to have the law equally recognize and respect the autonomy of individuals faced with grievous and irremediable conditions, absent of state interference or whether their death is imminent (*Truchon*, 2019 at para 661).

Lastly, the Court highlights that the characterization of disabilities is boundless, and the impugned provision has the effect of creating additional distinctions based on the nature of disability or condition (*Truchon*, 2019 at para 662). For example, a person who has a serious and incurable disability but whose natural death is not reasonably foreseeable does not receive equal access to MAiD as an individual whose disability is every bit as serious but whose life is on the trajectory to death (*Truchon*, 2019 at para 663). Therefore, the Court affirms that the reasonably foreseeable provision creates a distinction based on enumerated or analogous circumstances that are grounded in discrimination against the applicant's physical disability or condition.

In the next step, the Court begins by supporting the rationale that individuals who are born with or later acquire physical disabilities undoubtedly face disadvantages not experienced by others (*Truchon*, 2019 at para 671). In addition, the Court also recognizes the stereotypes and prejudice regarding disabled persons that have been perpetuated by society (*Truchon*, 2019 at

para 671). Much of the prejudice, as referenced by the Court, revolves around the notion that disabled persons lack the capacity to make informed decisions concerning bodily integrity and, as a result, require state protection over their vulnerabilities (*Truchon*, 2019 at para 672). On top of that, the perception that physically disabled persons experience a diminished quality of life amplifies a problematic response by society that has resulted in the perception that disabled persons' desire to end their life is more reasonable than those not experiencing disability (*Truchon*, 2019 at para 672). As a result, the Court concludes that the reasonably foreseeable natural death requirement has the effect of contributing to the prejudice already experienced by individuals like Mr. Truchon and Ms. Gladu, who face distinct disadvantages on the sole basis of a physical disability (*Truchon*, 2019 at para 674).

Although having already been satisfied that the impugned provision imposes a burden or denies an advantage for the applicants, the Court goes on to criticize further Parliament's prioritization of the temporal connection with death over consideration for suffering and autonomy. Essentially, the Court finds that when an individual's natural death is not imminent, the state takes a rigorously paternalistic approach to MAiD, and it is not until an individual's natural death is reasonably foreseeable that the government respects the right to personal autonomy over end-of-life choices (*Truchon*, 2019 at para 678). As a result, the impugned provision has the potential of perpetuating further stereotyping of physically disabled individuals having an inability to consent to end-of-life choices at all moments of their lives (*Truchon*, 2019 at para 681). Thus, the Court concludes that s. 241.2(2)(d) of the *Criminal Code* infringes upon the fundamental rights of the applicants to equal representation and treatment under s. 15 of the *Charter* (*Truchon*, 2019 at para 683).

Section 1 Analysis of Section 15

Given the conclusion regarding the unjustifiable infringement of s. 7 under the *Charter*, the Court only briefly addressed a s. 1 analysis with respect to the violation of s. 15 of the *Charter.*

The Attorney General, while acknowledging that the population of disabled persons is not monolithic, argued that the reasonably foreseeable provision is necessary for the protection of vulnerable persons due to the fact that it is impossible to formulate legislation that is applicable to such a diversified group (*Truchon*, 2019 at para 686). Furthermore, the Attorney General suggests that removing the reasonably foreseeable provision would inevitably deprive the values of many other individuals, and thus there is no way to effectively balance the proportionality of salutary and deleterious benefits (*Truchon*, 2019 at para 687).

In response, the Court, while commending the state's objective of safeguarding vulnerable people from being induced to commit suicide in a moment of weakness, the underlying effect of the impugned provision undermines the autonomy of individuals such as Mr. Truchon and Ms. Gladu by denying access MAiD on the basis of their physical disability (*Truchon*, 2019 at paras 688-689).

For the reasons above, the Court finds that the reasonably foreseeable provision under s. 241.2(2)(d) of the *Criminal Code* does not discharge the burden of minimal impairment and proportionality and, therefore, finds the infringement of s. 15 of the *Charter* to be unjustifiable under s. 1 (*Truchon*, 2019 at para 690).

Section 26(3) of the Act respecting end-of-life care

In addition to the challenge of the federal statute, the applicants claim that the provincial legislation governing the end-of-life framework in Quebec under s. 26(3) of the *Act respecting*

end-of-life care infringes on their ss. 7 and 15 *Charter* rights by virtue of the same principles (*Truchon*, 2019 at para 691). The *Act respecting end-of-life care* at the time stated that in order to obtain medical aid in dying, a patient must "be at the end of life" (s. 26(3), 2014). The Court finds that the applicant's constitutional challenge of the provincial legislation to be less impactful than that of the federal statute. With that being said, the Court recognizes the s. 15 challenge to be the most burdensome of the two *Charter* infringements and, therefore, will address the applicant's claims through the application of the legal principles and reasoning relied upon in the federal statute examination, *mutatis mutandis*, to that of the provincial legislation (*Truchon*, 2019 at paras 691, 704).

Section 15 Arguments (Act respecting end-of-life care)

The applicants claim that the arguments submitted for the federal statute regarding discriminatory distinctions based on physical disability and age under s. 15 of the *Charter* are analogous and, therefore, apply to s. 26(3) of the *Act respecting end-of-life care* (*Truchon*, 2019 at para 691). In addition, the applicants highlight that they are not requesting the provincial legislation to be broadened but are seeking substantive equality. The applicants argue for the same respect and recognition of their dignity and fundamental right to exercise personal autonomy when it comes to end-of-life decisions (*Truchon*, 2019 at para 713).

In response, the Attorney General of Quebec raises the same arguments as their federal counterpart regarding formal equality. The Attorney General of Quebec asserts that the applicants are treated in a consistent manner and have access to the same care that all individuals whose death is not imminent are afforded (*Truchon*, 2019 at para 706). In addition, the Attorney General of Quebec adds that because the end-of-life requirement is not based on a static personal characteristic and instead is concerned with an individual's evolving medical condition, the

legislation does not create a distinction based on enumerated or analogous grounds (*Truchon*, 2019 at para 706).

Section 15 Superior Court of Quebec Rationale (Act respecting end-of-life care)

Upon submission from both parties, the Court concludes, based on the ensuing reasoning, that the end-of-life criterion has the effect of creating a distinction based on the severity and incurable nature of an individual's condition (*Truchon*, 2019 at para 707). The Court finds that, like the reasonably foreseeable provision, the distinction is found within a limited but diverse population of persons with physical disabilities and cannot be measured by comparison of suffering from any one illness (*Truchon*, 2019 at para 707). Again, the Court references the inequity of individuals being entitled to medically assisted dying to relieve suffering who are at the end of their life opposed to those not having access to the same treatment who are suffering just as much due to a serious and incurable condition, but whose natural death is not imminent (*Truchon*, 2019 at para 707).

In addition, the Court highlights that the ultimate purpose of the applicant's contention is to have a recognized equal right to "last care" (*Truchon*, 2019 at para 711). As expressed by Minister Hivon when justifying the use of "care" in the definition of medical aid in dying under s. 26 of the *Act respecting end-of-life care,* the motivation to access assisted dying is not death but to relieve suffering (*Truchon*, 2019 at para 712). Accordingly, contrary to the Attorney General of Canada's position, the foundation of Quebec's end-of-life regime is the right to relieve their suffering, not the right to die because a patient is at the end of their life (*Truchon*, 2019 at para 711). Thus, the Court concludes that the discriminatory distinction based on physical disability created by s. 26(3) of the *Act respecting end-of-life care* has the effect of

denying applicants equal respect for autonomy and human dignity and, therefore, violates the *Charter* right to equality (*Truchon*, 2019 at paras 708, 718).

Section 1 Analysis of Section 15 (Act respecting end-of-life care)

Upon the Court's conclusion that s. 26(3) of the *Act respecting end-of-life care* infringes upon the applicants s. 15 equality rights enshrined within the *Charter,* the Attorney General of Quebec is tasked with establishing whether the violation can be justified under s. 1 of the *Charter*. The Attorney General of Canada begins by identifying the objective of the impugned legislation to be to ensure that individuals at the end of their lives are provided appropriate care that is respectful of their dignity and their autonomy (*Truchon*, 2019 at para 720). In addition, the Attorney General of Quebec submits that the end-of-life provision and medical aid in dying care are mutually inclusive. In essence, the Attorney General of Quebec argues that appropriate care under medical aid in dying is contingent upon an individual being at the end of life (*Truchon*, 2019 at para 720).

In response, the Court rejects the Attorney General of Quebec's reasoning that end-of-life and medical aid in dying are inseparable because the argument ignores the necessary requirement of suffering as part of the legislation's objective (*Truchon*, 2019 at para 724). The Court firmly states that "medical aid in dying is not care because it is provided at the end of life; it is care because it relieves the suffering of people at the end of life" (*Truchon*, 2019 at para 724). Therefore, the Court finds the objective of the impugned provincial legislation is ensuring end-of-life care through the recognition of dignity and autonomy (*Truchon*, 2019 at para 725).

Rational Connection.

After establishing the objective of s. 26(3) of the *Act respecting end-of-life care*, the Attorney General of Quebec must demonstrate there is a rational connection between the impugned provision and its intended social benefit. The Court briefly mentions its recognition

that ensuring a continuum of quality and appropriate care, including relief of suffering, is a rational precursor to the recognition of dignity and autonomy (*Truchon*, 2019 at para 724).

Minimal Impairment.

Following that, the Attorney General of Canada is tasked with establishing that the end-of-life provision minimally impairs the applicants' s. 15 equality rights. The Attorney General of Quebec, similar to Canada's argument, contends that due to the complex intricacies of regulating medical aid in dying, the Court is to award a high degree of deference (*Truchon*, 2019 at para 727).

The Court first applauded Quebec's legislators for having formulated an innovative regime regarding medical aid in dying prior to the national MAiD program after an exhaustive reflection and debate process. However, Quebec's failure to revise its existing provincial regulatory regime following the SCC's ruling in *Carter* [2015] makes the Court extremely hesitant to grant a great degree of deference (*Truchon*, 2019 at para 728). In 2015, the SCC encouraged Parliament and provincial bodies to respond, should they choose, to enact legislation consistent with the established principles and parameters found in the *Carter* [2015] decision (*Truchon*, 2019 at para 729). In the opinion of the Court, Quebec's decision to stand idly by as the legal framework evolved against the foundation of their provincial regulatory regime resulted in a failure to recognize the variable needs of individuals like Mr. Truchon and Ms. Gladu (*Truchon*, 2019 at para 730). Furthermore, paralleling the federal statute rationale, the Court finds that the imposition of the provincial legislation has led to individuals with rapidly deteriorating conditions suffering from severe and incurable illnesses to be denied access to measures that would relieve their enduring pain (*Truchon*, 2019 at para 730). Therefore, the Court concludes that the end-of-life requirement is neither minimally impairing nor proportional to its intended purpose, and as a result, the infringement of the applicant's s. 15 equality rights by

s. 26(3) of the *Act respecting end-of-life care* is not justifiable under s. 1 of the *Charter* (*Truchon*, 2019 at paras 731-732).

Remedy

In conclusion, the Court declares the provision requiring natural death to be reasonably foreseeable under s. 241.2(2)(d) of the *Criminal Code* infringes upon the applicant's protected rights to life, liberty and security of the person in a manner contrary to the principles of fundamental justice under s. 7 of the *Charter* (*Truchon*, 2019 at para 734). Furthermore, the Court finds the same to be true for the applicant's equality rights enshrined within s. 15 of the *Charter* (*Truchon*, 2019 at para 734). Subsequently, the Court concludes that neither the violation of the applicant's s. 7 nor s. 15 rights are justifiable under s. 1 of the *Charter* (*Truchon*, 2019 at para 734). In addition, the Court finds the requirement of s. 26(3) of the *Act respecting end-of-life care* that a patient be at the end of their life to be an infringement of the applicant's right to equality protected by s. 15 of the *Charter*, and consequently cannot be justified under s. 1 (*Truchon*, 2019 at para 735).

Pursuant to s. 52(1) of the Charter (1867), the Court declares s. 241.2(2)(d) of the *Criminal Code* and s. 26(3) of the *Act respecting end-of-life care* to be of no force or effect (*Truchon*, 2019 at para 736). However, given the variable remedial possibilities, the Court suspended the declaration of invalidity for a period of six months so legislators could amend the impugned provisions to be consistent with the rulings of this case (*Truchon*, 2019 at para 741). Lastly, the Court awarded legal costs in full to the applicants (*Truchon*, 2019 at paras 757-758).

Purposive Analysis of Section 7 and the Mental Illness Exclusion

Before delving into the purposive analysis, it is essential to note that as a result of Parliament extending the eligibility prohibition of MAiD for persons whose sole underlying

condition is a mental illness, this paper will approach the question of whether the exclusion under s. 241.2(2) of the *Criminal Code* is an infringement of s. 7 of the *Charter* using the existing legislative framework. Furthermore, we must highlight that the following constitutional analysis is not concerned with the moral or ethical implications of mental illness and MAiD. Mental illness, individual autonomy, and protecting people from ending their lives prematurely are topics of grave concern with both moral and ethical implications that will play a major role in the future of MAiD. However, this paper's sole concern is to establish whether provisions excluding mental illness as the sole underlying medical condition for access to MAiD is constitutional based on the available legislative framework within the legal landscape.

In beginning a purposive analysis of prohibiting mental illness as the sole underlying condition in access to MAiD, as Justice Dickson stated in *Hunter v Southam Inc*. [1984], it is first necessary to outline the nature of the interests that the rights or freedoms that the *Charter* section sets out to protect. In this case, s. 7 of the *Charter* states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (*Charter*, 1982, s. 7). For the purposes of this research paper, an analysis of whether the rights under s. 7 are deprived by prohibiting individuals whose sole underlying condition for access to MAiD is a mental illness will remain relatively brief as both the right to life and the right to liberty and security of the person were examined in great detail in both the *Carter* [2015] and the *Truchon* [2019] judgements.

The Right to Life

Previously, the right to life under s. 7 of the *Charter* was strictly concerned with protecting individuals from state-imposed actions that presented a threat of death. However, in *Carter* [2015], the SCC concluded that the right to life is no longer concerned with strictly

preserving human life at all costs (para 63). Instead, its purpose is rooted in recognizing and respecting an individual's decision about their end-of-life choices. Otherwise, by defining the right to life as a right not to die would, in effect, create a duty to live. In addition to the rejection that the right to life is engaged only in the threat of death, Cory J., in his dissenting opinion in *Rodriguez* [1993] stated that because "dying is an integral part of living" (p. 630), the right to life protects the freedom of an individual to end their life in a dignified manner. Furthermore, in dissent at the Court of Appeal, Finch C.J.B.C. emphasized the need to adopt a qualitative approach to the right to life and accepted that the life interest "protects more than physical existence" (paras 84-89, as cited in *Carter*, 2015 at para 60). In his view, the right to life is profoundly concerned with how the individual values their life and that when a person's life is rendered valueless through the diminishment of positive qualities they once appreciated, then end-of-life decisions should be intimately respected (para 86, as cited in *Carter*, 2015 at para 60).

Therefore, it can be reasonably concluded that prohibiting an individual from accessing MAiD whose sole underlying condition is a mental illness evidently engages the right to life. For the reasons set out in *Carter* [2015] and *Truchon* [2019], s. 241.2(2) of the *Criminal Code* has the potential to force individuals to take hasty steps to end their lives prematurely in fear of prolonging the individual's intolerable suffering. Subsequently, the prohibition of mental illness as the sole underlying condition exposes individuals to a heightened risk of pain, suffering, and lasting injury by encouraging individuals to pursue alternative measures to end their lives.

The Right to Liberty and Security of the Person

After establishing that the right to life is engaged by prohibiting mental illness as the sole underlying condition, identifying the underlying purpose of the right to liberty and security of the person is next. In reference to *Blencoe v British Columbia (Human Rights Commission)* [2000],

the Court found that the right to liberty protects "the right to make fundamental personal choices free from states interference" (para 54, as cited in *Carter,* 2015 at para 64). Furthermore, in *Rodriguez* [1993], Sopinka J. drew from *Morgentaler* [1988] to conclude that the right to security of the person encompasses personal autonomy concerning "control over one's bodily integrity free from state interference" (pp. 587-588). Although liberty and security of the person represent two distinct rights under s. 7 of the *Charter*, for the purposes of this paper, will be considered in unison with one another. Therefore, the purpose of the right to liberty and security of the person is to restrict any unreasonable state interference with an individual's physical or psychological integrity, especially in the case where state-imposed action causes physical or psychological suffering (*Carter,* 2015 at para 64).

Again, like the decisions set out by *Carter* [2015] and *Truchon* [2019], restricting an individual's decision to access MAiD on the basis of legislation prohibiting mental illness as the sole underlying condition clearly constitutes state-imposed interference on a decision regarding personal medical matters. The law has long protected an individual's right to "make decisions about their bodily integrity" (*A.C. v Manitoba (Director of Child and Family Services),* 2009 at para 39) and the notion that medical self-determination is not superseded by severe risks such as death (*Fleming v Reid,* 1991). Otherwise, the constitutional right to refuse or withdraw from lifesaving treatment established in *Ciarlariello v Schacter* [1993] would be undermined. Lastly, prohibiting access to MAiD on the basis of a mental illness has the potential to inflict intolerable suffering for individuals who meet all other MAiD eligibility requirements and, therefore, encourages individuals to opt for alternative measures inconsistent with their personal dignity to relieve suffering.

Principles of Fundamental Justice

Once it has been established that the rights protected under s. 7 of the *Charter* have been infringed upon; the legislation must be analyzed within the context of the principles of fundamental justice set out in the case law. However, the first step in establishing whether the impugned provision operates in a manner consistent with the principles of fundamental justice is to identify the legislative objective.

Objective

Due to the fact that the exclusion of mental illness as the sole underlying condition in access to MAiD has been extended until 2027, deciphering the objective of s. 241.2(2) of the *Criminal Code* requires a degree of speculation and reliance on previous judgements. Therefore, the objective to protect vulnerable persons from being induced to end their lives in a moment of weakness, which was set out by *Carter* [2015] and later confirmed by *Truchon* [2019], can be accepted. However, the Government of Canada's response to the *Truchon* [2019] decision set forth by Bill C-7 (formally Bill C-14) sets out supplementary legislative objectives. In the preamble of the proposed legislation, Parliament contends that the objective of Bill C-7 also includes:

> **(1)** respecting the autonomy of persons who are eligible to receive MAiD; and
>
> **(2)** the recognition of suicide as a significant public health issue. (Bill C-7, *An act to amend the Criminal Code (medical assistance in dying)*, 2nd Sess, 43rd Parl, 2021, preamble (as passed by the House of Commons 17 March 2021))

For the purposes of this analysis, only the second legislative objective will be considered, as the first proposed objective is more concerned with the arguments set forth in the analysis of the right to liberty and security of the person.

The contention that the objective of s. 241.2(2) of the *Criminal Code* is the "recognition of suicide as a significant public health issue" (Bill C-7, preamble) is one that cannot be accepted. In reference to *Carter* [2015], an impugned provision that is more concerned with affirming social values rather than a description of the specific legislative objective is one that cannot be recognized (at para. 76). Furthermore, in *RJR-MacDonald Inc.* [1995], the Court warns against defining legislation "too broadly" as it has the potential to immunize the impugned provision from any subsequent *Charter* challenges (para 144, as cited in *Carter*, 2015 at para 77). Lastly, it was recognized in *Bedford* [2013] that the legislative objective must be explicitly defined for the purposes of the intended target (para 131).

In the case at hand, recognizing suicide as a significant public health issue is an area that is more appropriately addressed by the public healthcare system and through educational campaigns. Instead, as documented by the Council of Canadian Academies (CCA), a prohibition of MAiD for those suffering only from mental illness is an appropriate safeguard due to knowledge gaps and a lack of unanimous agreeance among clinicians regarding assessment and trajectories of mental health (2018, p. 189). As a result, s. 241.2(2) of the *Criminal Code* is not concerned with recognizing suicide as a significant public health issue, as this definition goes beyond the scope of its intention. Instead, the objective of s. 241.2(2) is to protect vulnerable persons who might be induced to end their lives in a moment of weakness, by preventing errors when assessing requests for medical assistance in dying (*Truchon,* 2019 at para 556).

Arbitrariness

Now that the objective of s. 241.2(2) of the *Criminal Code* has been identified, the next step is to determine whether the impugned provision is arbitrary in nature. As Bedford [2013]

determined, a law is said to be arbitrary if there is no rational connection between the objective of the legislation and the limitations placed on the rights and freedoms in question (para 111).

The analysis of whether s. 241.2(2) of the *Criminal Code* is arbitrary will remain brief as a prohibition on MAiD has been recognized as a rational measure in achieving the legislative objective in *Rodriguez* [1993], *Carter* [2015], and *Truchon* [2019]. Nevertheless, prohibiting individuals from accessing MAiD whose sole underlying medical condition is a mental illness will evidently protect populations whose mental health condition leaves the person in a vulnerable state. Furthermore, prohibition is an effective safeguard in preventing assessment errors by precluding all individuals, regardless of their mental illness diagnosis, from accessing MAiD. Moreover, as pointed out in the report by the CCA (2018), unlike detecting errors of under-inclusion in an individual's future state, "it will never be possible to know whether the person who received MAiD might have improved" (p. 151). Therefore, it can be said that the prohibition of MAiD for those whose sole medical condition is a mental illness is not arbitrary.

Overbreadth

Next, the impugned provision must be evaluated for whether it is overly broad in so far as it restricts individuals outside the scope of the intended target that is necessary to achieve the legislative objective (Truchon, 2019, at para 570).

First, in the defense of the state, Canada can argue that the prohibition under s. 241.2(2) of the *Criminal Code* only restricts access to MAiD for those whose sole underlying condition is mental illness. There is certainly no limitation on an individual who possesses a mental illness as long as they meet all other eligibility requirements, including their condition qualifies as a serious and incurable illness, disease or disability under s. 241.2(2)(a) of the *Criminal Code*. Furthermore, the state may reference the trial court in *Carter* (2012), where Justice Lynn Smith

contends that it is “problematic to conflate decision-making by grievously and irremediably ill persons about the timing of their deaths with decision-making about suicide by persons who are mentally ill” (para 814). In addition, the defendants may put forward that in both *Carter* [2015] and *Truchon* [2019], as well as the decision at the Alberta Court of Appeal (*Canada (Attorney General) v E.F.,* 2016), did not address the constitutionality of a legislative exemption for mental illness as the sole underlying condition to MAiD. Lastly, the state may pursue a similar position to that found in *Carter* [2015], where it was argued that it is difficult to conclusively identify and measure degrees of vulnerability and, therefore, a prohibition is not overbroad (para 87).

On the other hand, the appellants may argue that following the *Criminal Code* amendments that no longer require an individual's natural death to be reasonably foreseeable, the impugned provision may restrict persons who meet all eligibility requirements where natural death is not reasonably foreseeable and, therefore, extends beyond the scope of the intended target. For example, as stated by the Canadian Psychological Association, “a mental disorder does not *ipso facto* indicate that an individual is not competent to make a MAiD decision” (Mikail et al., 2018, p. 10). Moreover, the Court of King’s Bench recently adjudicated and allowed a 27-year-old woman who was diagnosed with autism spectrum disorder to access MAiD (*W. V. v M. V.*, 2024 at paras 5, 45). In his reasoning, Justice Colin Feasby acknowledges the applicant's physical suffering as a result of her psychological diagnosis by finding that the two medical practitioners who found the applicant to meet the eligibility requirements for MAiD outweighed the one practitioner who deemed the applicant ineligible (*W. V. v M. V.*, 2024 at paras 63-66). Furthermore, in reference to *Morgentaler* [1988] an infringement of the right to life, liberty and security of the person under s. 7 of the *Charter* includes state action causing both physical and psychological suffering (p. 173). As a result, the applicants contend that failure to

classify a mental illness as a serious and incurable illness, disease or disability under s. 241.2(2)(a) of the *Criminal Code* imposes or prolongs physical and psychological suffering. Thus, the appellants argue mental illness exclusion is overly broad and is inconsistent with the fundamental principle of justice.

After providing arguments for both parties, it is now critical to decipher whether s. 241.2(2) of the *Criminal Code* is overly broad. Unfortunately, due to the extension of the temporary exclusion of mental illness as the sole underlying medical condition for access to MAiD, much of the analysis relies upon the existing legislative framework. However, reports submitted to Parliament on behalf of medical professionals and lobbyists have provided some insight into the constitutionality of the mental illness exemption.

To begin, it is important to address the existing case law cited by both parties. In reference to the state's claim that there has yet to be a constitutional analysis of the exclusion of mental illness and that in both *Carter* [2015] and *Truchon* [2019], neither judgement addressed mental illness specifically. This argument cannot be accepted as it is stated in *Carter* [2015], the scope of the declaration of invalidity pertains to only the factual circumstances of the case at hand, and the Court makes "no pronouncement on other situations where physician-assisted dying may be sought" (para 127). On the other hand, the appellant raising *W. V. v M. V.* (2024) certainly provides valuable insight into the intersection of the existing MAiD framework and mental illness. However, the case lacks contextual application to a constitutional analysis. Although *W. V. v M. V.* (2024) establishes that MAiD can be accessed by reason of mental illness, the judgement rendered relied upon an inability of the Court to review a MAiD application. Per *Fleming v Reid* (1991), *A.B. v Canada (Attorney General)* [2017] and *Sorenson v Swinemar* [2020], the balance of harms weighs in favour of the applicant, and therefore a judicial inquiry

into the MAiD application and assessment was dismissed (as cited in *W. V. v M. V.,* 2024 at para 152).

Next, the state's argument that identifying what constitutes a vulnerable person cannot be accepted. As was established by *Carter* [2015], by stating that prohibition is needed because "every person is potentially vulnerable" (par. 87) is erroneous. In reference to *Bedford* [2013], when the line between what constitutes vulnerable and non-vulnerable is blurry, a provision that broadly encompasses all individuals is not justifiable (paras 143-144).

However, a significant area of discrepancy in this case persists instead with a lack of comprehensive definition regarding the expression "grievous and irremediable medical condition" as part of the MAiD eligibility requirements under s. 241.2(1) of the *Criminal Code*. As it stands, there is little legal precedence dictating the classification of "grievous and irremediable" aside from three statutory components. According to s. 241.2(2) of the *Criminal Code*, the expression "grievous and irremediable medical condition" consists of: an incurable illness, disease or disability, an advanced state of irreversible decline in capability, and enduring and intolerable suffering. The main issue here is concern with the application of 'irremediable' within the context of a mental illness through the existing definitions of 'incurable' and "irreversible." Currently, the Model Practice Standard of MAiD provides definitions of 'incurable' and 'irreversible:'

> **9.5.2** 'Incurable' means there are no reasonable treatments remaining where reasonable is determined by the clinician and person together exploring the recognized, available, and potentially effective treatments in light of the person's overall state of health, beliefs, values, and goals of care; and

> **9.6.4** ‘Irreversible’ means there are no reasonable interventions remaining where reasonable is determined by the clinician and person together exploring the recognized, available, and potentially effective interventions in light of the person's overall state of health, beliefs, values, and goals of care. (MAiD Practice Standards Task Group, 2023, p. 11)

Although these definitions provide some insight into the classification of the above terms, evidence from Parliamentary committees and expert reviews has expressed significant concern regarding the certainty of assessing the irremediability of a mental illness. In their third report, the Special Joint Committee on Medical Assistance in Dying (2024) indicated that it is difficult, “if not impossible,” to reliably predict the long-term prognosis of a person suffering from a mental illness (p. 12). Moreover, in the Final Report of the Expert Panel on MAiD and Mental Illness (2022), the panel indicated a number of conflicting interpretations expressed by psychiatrists and researchers concerning ‘incurability’ and ‘irreversibility,’ reflecting the subjective nature of the terms (p. 40).

With that being said, establishing ‘incurability’ and ‘irreversibility’ through an evaluation of the evolutions and response to previous interventions is not seldom. The Netherlands and Belgium, which both permit medically assisted dying for mental disorders, employ similar practices. Moreover, expert evidence brought forth at the trial court in *Carter* [2012] indicated that abuse of vulnerable populations has not surfaced (para 684).

Nevertheless, the lack of consensus among medical practitioners regarding the requirement of a person’s condition to be ‘irremediable’ under s. 241.2(1) of the *Criminal Code* indicates the inadequacy of the existing legislative framework. More specifically, there is a significant need to advance a more exhaustive understanding or overall reformulation regarding

‘incurable’ and ‘irreversible’ under s. 241.2(2) of the *Criminal Code.* As a result, the ambiguity of ‘irremediable’ under s. 241.2(2) of the *Criminal Code* poses a significant risk for under-inclusion. Subsequently, there is the risk of over-inclusion for individuals whose condition would have improved in the future. Therefore, the Court cannot accept an argument from the state that the mental illness exclusion only imposes a burden on those accessing MAiD whose sole underlying condition is a mental illness if the existing framework is incompatible in assessing mental disorders with certainty. Furthermore, achieving the legislation’s objective of protecting vulnerable persons from being induced to commit suicide in a moment of weakness through an absolute exclusion of access to MAiD for those whose sole underlying condition is a mental illness has the potential to be applied inconsistently with such vague terminology. As a result, the eligibility criteria for MAiD requiring an individual's condition to be ‘irremediable’ under s. 241.2(1) of the *Criminal Code* is overly broad insofar as definitions regarding ‘incurability’ and ‘irreversibility’ remain ambiguous in their application to mental illness, and therefore, the impugned provision is inconsistent with the principles of fundamental justice under s. 7 of the *Charter*.

Gross Disproportionality

The last principle of fundamental justice is concerned with evaluating whether an exclusion of mental illness as the sole underlying condition exceeds what is reasonably required in order to achieve the objective of protecting vulnerable persons from being induced to commit suicide in a moment of weakness. However, it will be unnecessary to provide a full analysis of whether the impugned provision is grossly disproportionate due to the finding that it is overly broad and, therefore, inconsistent with the principles of fundamental justice.

Section 1 Analysis

Once the impugned provision has been found to infringe upon the rights and freedoms protected under the *Charter,* the next step of a purposive analysis is to evaluate whether the infringement can be saved by s. 1 of the *Charter.* Although the protection of rights and freedoms enshrined within the *Charter* is crucial in maintaining a free and democratic society, s. 1 affects a balance between individual liberties and the interests of society by setting reasonable limits to the *Charter.* As was discussed in the landmark MAiD cases earlier, the test for whether an infringement can be justified under s. 1 was developed by *Oakes* [1986] and remains an essential component of the *Charter*. The Oakes analysis consists of two parts that require the state to first establish that the impugned provision is prescribed by law and is of pressing and substantial concern. Secondly, the state must prove that the law is proportional to its objective by succeeding in the rational connection test, the minimal impairment test, and the proportional test.

Limit Prescribed by Law with a Pressing and Substantial Objective.

To begin, there is no doubt that the limitations of individual rights are prescribed by s. 241.2 of the *Criminal Code.* Secondly, although the analysis of s. 7 and s. 1 of the *Charter* remain independent, the legislative objective remains unchanged. Therefore, the objective of s. 241.2(2) is protecting vulnerable persons from being induced to commit suicide in a moment of weakness. Similar to the decisions of *Carter* [2015] and *Truchon* [2019], legislation that seeks to prevent or reduce individuals from ending their lives prematurely is evidently pressing and substantial. Although considerable safeguards exist within the MAiD regime, protecting vulnerable populations from harm or death remains of pressing and substantial concern.

Proportionality of the Law

Before diving into the tests that establish whether a law is proportional to its objective, it is important first to recognize that it is essential to show the legislature the appropriate degree of deference when it comes to complex social issues. As the primary decision-maker, a high degree of deference shown to Parliament is certainly appropriate in the case at hand. Unlike the decision by the trial judge in *Carter* [2012], where the Court found that while deference shall be awarded to Parliament, it should be reduced by the fact that the absolute prohibition did not constitute a "complex regulatory response" (para 1180), the present case encompasses a much more complex concern. This is due to the fact that mental illness as part of MAiD is a novel issue and, given the short time frame provided to Parliament to conduct reviews regarding mental illness as the sole underlying medical condition, a high degree of deference should, therefore, be shown to Parliament.

Rational Connection

The first step in deciphering the proportionality of the law requires the state to establish that the exclusion of mental illness as the sole underlying condition is rationally connected to the objective of protecting vulnerable persons from being induced to commit suicide in a moment of weakness. Per *RJR-MacDonald Inc.* [1995], the connection between the infringement and the objective must be analyzed "on the basis of reason or logic" (para 153). In both *Carter* [2015] and *Truchon* [2019], the Court found that in situations like MAiD that involve the risk of harm or death, prohibition is a logical preventative measure (para 100; para 615). The same applies in the present case, where preventing an individual's access to MAiD, where mental illness is the sole underlying condition, is a rational method to protect vulnerable persons from being induced to commit suicide in a moment of weakness. This is especially true of individuals experiencing mental health issues and was the leading factor in the development of evidence-based safeguards

to protect individuals “who may be subject to coercion or abuse” by the Vulnerable Persons Standard (2017) in response to the Carter [2015] decision. Thus, the state has discharged the burden of establishing a rational connection between the mental illness conclusion and the legislative objective of protecting vulnerable populations.

Minimal Impairment

The next test in evaluating the proportionality of the law is the minimal impairment analysis, where the state must establish that the limitation imposed is confined only to what is necessary to achieve the legislative objective while providing evidence that there are less drastic alternatives. Given the following evidence that was submitted as part of the Parliamentary and independent expert reviews on mental illness and MAiD, it can be concluded that the state has failed to prove that an absolute exclusion on mental illness as the sole underlying condition is of minimal impairment.

Before addressing the evidence of less harmful alternatives, it is important to recognize that there remains a knowledge gap and a lack of consensus among medical practitioners regarding the consistency of assessment regarding the heterogeneous nature of mental illness. However, as previously mentioned, without the advancement of research regarding MAiD and mental illness, individuals will continue to experience intolerable suffering as a result of their condition that could otherwise be alleviated through exercising medical autonomy regarding their end-of-life choices. Therefore, an exhaustive analysis of the legal implications is crucial in order to begin the process of developing amended legislation that addresses the concerns arising from a constitutional challenge.

One significant challenge for policymakers is the fact that there is little to no direct Canadian evidence published regarding mental illness and MAiD. However, evidence submitted from both Belgium and the Netherlands, which decriminalized medically assisted suicide over

two decades ago, has collected essential data providing proof of an effective end-of-life system that incorporates psychiatric conditions. Of course, it is important to take into account the cultural and societal differences between Benelux countries, such as Belgium and the Netherlands, compared to Canada. Nevertheless, Canada shares many similarities with the Benelux countries, such as medical vocabulary, scientific reasoning, and evidence-based policies (CCA, 2018, p. 112). Not to mention much of Canada's existing MAiD framework, including procedural safeguards that parallel those of Belgium and the Netherlands. The Expert Panel on MAiD and Mental Illness (2022) highlights that the Netherlands utilizes similar assessment procedures, including comparable terminology to 'incurable' and 'irreversible' that are found in s. 241.2(2) of the *Criminal Code*. Furthermore, data collected from Belgium and the Netherlands report that medically assisted suicides for psychiatric conditions account for only one to two percent of all assisted suicides (CCA, 2018, p. 110). Lastly, the Special Joint Committee on Medical Assistance in Dying (2024) presented evidence from the Netherlands that reported only five to ten percent of psychiatric related medically assisted suicides are granted (p. 48).

In contrast, similar to the arguments set forth by the Attorney General in *Carter* [2015], the state may argue that expansion of MAiD will lead to abuse of the program and result in a significant spike in total applications (para. 114). Moreover, like in *Carter* [2015], the state may make the slippery slope argument resulting from the expansion of MAiD, devaluing the sanctity of human life. As a result, it would be necessary to maintain existing legislation and relevant safeguards in order to uphold the objective of protecting vulnerable persons.

Upon considering evidence from both parties, it cannot be accepted that without the exclusion of mental illness as the sole underlying medical condition, MAiD would see the exploitation of vulnerable populations. Nor, based on the evidence provided, would Canada see an

alarming spike in individuals opting to use MAiD. Although a total exclusion of mental illness from MAiD is the only system that prevents all possible errors, similar safeguards utilized in Belgium and the Netherlands provide evidence of alternative, less impactful measures than a total exclusion. Lastly, per *Chaoulli* [2005], the government cannot discharge its burden by citing adverse impacts on the public, and therefore, the fear of a slippery slope and its potential to symbolize Canada's acceptance of euthanasia is not sufficient (para 68). Thus, the exclusion of mental illness as the sole underlying condition from MAiD is not minimally impairing, considering evidence of the success of less harmful alternatives in protecting vulnerable persons from being induced to commit suicide in a moment of weakness.

Proportionality of the Effects

The final stage of the Oakes analysis weighs the adverse effects of the impugned provision on the individual's rights against the beneficial effects of the law in terms of public good. However, given the conclusion that the exclusion of mental illness as the sole underlying condition in access to MAiD under s. 241.2(2) of the *Criminal Code* is not minimally impairing*;* it is unnecessary to pursue this step.

Remedy

Upon completion of the purposive analysis on the exclusion of mental illness as the sole underlying medical condition based on the existing MAiD framework, it can be concluded that s. 241.2(2) of the *Criminal Code* infringes upon the right to life, liberty and security of the persons under s. 7 of the *Charter.* Furthermore, the exclusion of mental illness cannot be saved by s. 1 of the *Charter*.

Lastly, while much of the purposive analysis is based on evaluating the existing MAiD legislation with the hypothetical situation that the mental illness exclusion would remain, the

analysis provided awareness of the limitations of the existing end-of-life framework in Canada. Furthermore, the information gained from this paper provides insight into the need to evolve MAiD legislation in a manner that can be more consistently applicable to mental illness. Although the MAiD statutes will likely receive significant amendments in the future, the findings from this purposive analysis indicate only one avenue for a constitutional challenge if Parliament does not approach mental illness and MAiD with extreme rigour and caution.

Recommendations

The final component of this research paper will consider all of the information gained throughout the research process to provide recommendations surrounding the future of the end-of-life regime within Canada. Although a number of issues came to fruition throughout this paper, the insight gained from the purposive analysis, combined with perspectives provided by the independent Parliamentary and expert reviews, uncovered one major concern within the existing legislative framework that impedes the prospect of deeming those whose sole underlying condition is a mental illness eligible for MAiD in Canada.

The following discussion will begin by exploring the need for an advanced interpretation of "grievous and irremediable medical condition" that is found within s. 241.2(1) of the *Criminal Code.* Next, recommendations will be provided on how the existing eligibility requirements can be supplemented to be more inclusive of mental illnesses. Lastly, this paper will make predictions regarding the future of MAiD, forecasting that a drastic advancement in the prognoses of psychiatric conditions is needed before mental illness as the sole underlying condition can be implemented within Canada's medical system.

Interpretation of Irremediable

Throughout the purposive analysis, it became apparent that there would be difficulty in an accurate application of the term 'irremediable' regarding mental disorders. As mentioned, a "grievous and irremediable medical condition" is defined by three components under s. 241.2(2) of the *Criminal Code*: an incurable illness, disease or disability; an advanced state of irreversible decline in capability; and enduring and intolerable suffering. Although the components are recognized individually, the interdependency of all three elements is the basis from which the expression 'irremediable' derives. Despite this, it is the requirement for a person's condition to be 'incurable' and 'irreversible' that will pose the most challenges for medical practitioners when it comes to mental illness assessments under MAiD. For instance, the report conducted by the Expert Panel on MAiD (2022) indicated that the application of 'incurable' and 'irreversible' as diagnostic terminology is highly uncommon in clinical practice regarding mental illness (p. 40). Furthermore, according to the Canadian Psychiatric Association, there is no definitive threshold within the mental health field for when mental illnesses should be considered 'irremediable' (CCA, 2018, p. 153). Therefore, it is clear that in order to maintain a balance between autonomy and the protection of vulnerable persons, 'incurable' and 'irreversible' must evolve into terms that encompass the heterogeneous nature of mental illness.

Incurable

The major problem with requiring a mental illness to be 'incurable' is that many mental disorders can be managed, or risks of complications can be reduced without the person's condition being considered cured. Conversely, many persons whose symptoms have not been reduced following multiple treatment attempts are deemed "treatment-resistant," yet again, the condition may not be clinically labelled as 'incurable' (CCA, 2018, p. 154). Whereas the

prognosis for physical disorders is typically more reliable, a definitive prognosis for psychological disorders is much more challenging, as demonstrated by Dr. Gaind's testimony to the Special Joint Committee on Medical Assistance in Dying (2024) that "clinicians' predictions are wrong over half the time" (p. 12). Therefore, establishing a concrete set of rules defining the threshold for 'incurability' may not be possible. As a result, medical practitioners' assessments on whether a person's condition classifies as 'incurable' will lack objectivity and result from a case-by-case basis.

However, that does not mean that the ambiguous nature of mental illness assessments cannot be improved. In regard to MAiD and mental illness as the sole underlying medical condition, assessors can formulate more reliable evaluations on 'incurability' if the following considerations are incorporated into MAiD assessments:

(a) the number of treatments the patient has undergone;

(b) outcomes resulting from each individual treatment type;

(c) the duration of illness, disease, or disability; and

(d) the severity of the illness, disease, or disability.

The above recommendations regarding the evolution and response to treatments are already in use in Belgium and the Netherlands. Furthermore, incorporating components from the Model Practice Standard for MAiD (2023), including exploring treatment options through the clinician's collaboration and recognizing the patient's beliefs and values, remains imperative to preserving individual autonomy.

Irreversible

Moving on to the existing requirement that an applicant's condition be in an advanced state of 'irreversible decline,' many of the same diagnostic issues prevalent with 'incurability'

correspond to ‘irreversible.’ However, the Canadian Medical Protective Association (2017) notes that there is an ongoing debate concerning whether the ‘irreversible’ decline should be assessed based solely on physical deterioration or whether the interpretation should encompass a broader spectrum, including mental capability (as cited in CCA, 2018, p. 155). Others have proposed a more inclusive interpretation, stating that ‘irreversible’ should include physical and cognitive functions and sudden and gradual losses of capability (Downie & Chandler, 2018, p. 23). Furthermore, it has also been suggested that ‘irreversible decline’ should include socioeconomic hardships (CCA, 2018, p. 155). Nevertheless, the issue remains with adapting the term ‘irreversible’ into an expression that promotes certainty in its application to mental illness.

The issue of ‘irreversible’ decline lacking a definitive interpretation is particularly relevant for those whose sole underlying condition is a mental illness, as many people requesting MAiD may not be experiencing physical declines at all. Furthermore, the symptoms of many mental disorders differ in their duration, and as a result, a decline in capability may only be temporary. Therefore, establishing clarity regarding the criterion for ‘irreversible’ is paramount to protecting vulnerable persons from being induced to commit suicide in a moment of weakness.

Despite a lack of consensus among Canadian clinicians’ regarding the interpretation of ‘irreversible’ within the context of clinical practice, measures can still be adopted to curtail erroneous prognoses, and the existing MAiD framework has already addressed this issue to some degree. For example, a study conducted in Belgium and the Netherlands found that although 80% of assessors agreed there was no reasonable prospect of improvement, in almost all cases of disagreement among the assessors, medically assisted suicide was administered without

resolving the dispute (Kim et al., 2016). In contrast, MAiD in Canada requires two independent assessors to agree that the eligibility criteria are met under s. 241.2(3) of the *Criminal Code*.

Nevertheless, the safeguards under the existing legislation are in no way exhaustive, and MAiD assessors can establish more consistency by implementing the following considerations into determining 'irreversibility':

(a) reference the degree of resistance to interventions intended to improve function;

(b) the number of rehabilitative and/or supportive measures that have been conducted;

(c) outcomes of all interventions; and

(d) timeline of the patient's suspected decline.

Again, as mentioned in the discussion of 'incurability,' incorporation of the Model Practice Standard for MAiD (2023) is imperative in exploring reasonable interventions that recognize the overall state of health while respecting the patient's values and goals of care.

Closing Thoughts

Although the proposed recommendations for the future of MAiD and mental illness as the sole underlying condition offer a glimpse of hope of establishing compatibility between 'irremediable' and mental illness, there remains a significant knowledge gap. In fact, the Centre for Addiction and Mental Health (2017) goes as far as to suggest that "there is not enough evidence available in the mental health field at this time for clinicians to ascertain whether a particular individual has an irremediable mental illness." A number of other organizations, including the Canadian Mental Health Association (2017, as cited in CCA, 2018, p. 154), the Canadian Association for Community Living (2017, as cited in CCA, 2018, p. 154), and the Ontario Shores Centre for Mental Health Sciences (2017, as cited in CCA, 2018, p. 154) are just

a few of the groups lacking confidence in the ability to decipher whether a mental illness can be considered ‘irremediable’.

With that aside, there are others who believe that some mental illnesses can be identified as ‘irremediable’ following studies that have shown evidence of some persons who do not respond to treatment (von Fuchs, 2017; Dembo et al., 2018). However, in order to effectively identify a person’s condition as treatment-resistant, the Special Joint Committee on Medical Assistance in Dying (2024) heard from many experts stating there would need to be an extensive history of failed treatment in order to justify clinical classification of ‘irremediable’ and nevertheless much of the assessment will inevitably rely upon “hunches and guesswork that could be wildly inaccurate” (pp. 13, 43). In addition, placing a person through prolonged treatment and intervention measures in order to classify their condition as ‘irremediable’ is counterintuitive to the MAiD’s objective of relieving intolerable suffering and recognizing the right to medical autonomy regarding end-of-life decisions.

In the end, the consensus among researchers and medical professionals shows significant hesitancy against allowing those whose sole underlying condition is a mental illness access to MAiD. Therefore, as the researcher, I concur with the warnings delivered by all those who participated in the Parliamentary committees and independent expert reviews that called for extending the exclusion of mental illness from MAID, as Canada is simply unprepared.

Conclusion

The exploration of MAiD, through the case law and existing legislative framework, has revealed several striking transformations prevalent in societal and legal understandings. To start, from when the concept of physician-assisted death was first brought to the forefront of the legal landscape to the decriminalization and development of the MAiD program in Canada, the

aftermath has shown two things for certain. First, MAiD has come a long way over the last 30 years, from upholding the blanket prohibition on medically assisted death in *Rodriguez* [1993] to the unanimous reversal of the absolute prohibition by the Court in *Carter* [2015] and, most recently, the expansion of MAiD for those whose natural death is not reasonably foreseeable following *Truchon* [2019]. Secondly, not only has society's perspective evolved regarding what it means to protect the value of human life, but so has the interpretation of the rights and freedoms under s. 7 of the *Charter.* No longer does life, liberty and security of the person symbolize the need to preserve life at all costs, but now, it represents the right of a person to exercise individual autonomy to die in a dignified manner.

Subsequently, the prospect of implementing MAiD eligibility for those whose sole underlying condition is a mental illness has given rise to a polarizing debate. After examining the implications of mental illness as the sole underlying condition on s. 7 of the *Charter,* the findings from the purposive analysis revealed that the exclusion of mental illness infringed upon the right to life, liberty and security of the person and subsequently was not justifiable under s. 1 of the *Charter*. Although a reasonable person could come to a different interpretation, the conclusion that an exclusion based on s. 241.2(2) of the *Criminal Code* is overly broad highlights the need for Parliament to revise the legislation in a manner that is more applicable to mental illnesses, with particular attention paid to the 'irremediable' requirement. While the purposive analysis in this paper relied upon the existing MAiD statutes and the hypothetical scenario that the mental illness exclusion would remain in the future, the findings suggest Parliament must approach MAiD and mental illness with extreme caution.

That said, it is essential to highlight that legislation found to be unconstitutional does not *ipso facto* indicate that it should be permitted. This is underscored by the overwhelming

opposition from medical professionals against granting eligibility for MAiD to those whose sole underlying medical condition is a mental illness. Testimony from Parliamentary and independent expert committees revealed a lack of consensus among medical practitioners on the ability to reliably assess psychiatric conditions with a high degree of certainty.

In the end, the findings from this paper point to there being a considerable knowledge gap regarding consistent assessment in a field where the conditions are extremely heterogeneous. Therefore, it will be crucial for future research, especially from within Canada, to determine whether a system exists that can improve certainty in mental illness assessments. Moreover, there is likely to be significant skepticism regarding whether protecting vulnerable people from being induced to commit suicide in a moment of weakness and permitting MAiD for those whose sole underlying medical condition is a mental illness can coexist. Nevertheless, it has become apparent that Canada's medical system, in its current state, is not prepared to implement a program where eligibility for MAiD can be determined where the sole underlying medical condition is a mental illness.

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