

Brief

Bill C-7/

An Act to amend the Criminal Code
(medical assistance in dying)

AUGUST 17, 2020

FRENCH VERSION ALSO AVAILABLE



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INTRODUCTION

The Collège des médecins (hereinafter "the Collège") would like to thank you for allowing it to present its comments on Bill C-7.

We understand that Parliament's decision to introduce this Bill is in response to the ruling handed down by the Superior Court of Quebec on September 11, 2019 in the matter of *Truchon v. Attorney General of Canada*,¹ which found the "end of life" criterion (*Act respecting end-of-life care*²) and the "reasonably foreseeable natural death" criterion (*Criminal Code*³) for access to medical aid in dying (hereinafter "MAID") to be unconstitutional. The Court then gave both levels of government six months to amend their legislation accordingly.

The Collège recognizes that the amendments proposed in the Bill are the result of consultations conducted in early 2020 with Canadian citizens, experts, practitioners, stakeholders and Indigenous groups in the provinces and territories.

The amendments to the *Criminal Code* under the Bill are primarily aimed at:

- > expanding the eligibility of persons who request MAID to those whose natural death is not reasonably foreseeable, while providing additional safeguards for such persons;
- > authorizing, under certain conditions, the provision of MAID to a dying person who has lost the capacity to consent at the agreed time of provision;
- > allowing for the collection of additional monitoring data regarding requests for MAID and its provision;
- > prohibiting the provision of MAID to a person whose sole underlying medical condition is a mental illness.

The Collège supports Parliament in its efforts to make amendments to the *Criminal Code*, but would like, for Quebec, better harmonization between the *Act respecting end-of-life care* and the *Criminal Code*.

Parliament intends to proceed with the relaxation of the legal eligibility criteria for MAID and the Collège welcomes several of these initiatives. However, the legislator intends to retain the notion of "reasonably foreseeable natural death" and to introduce different safeguards depending on the foreseeability of the death of the person requesting MAID. The Collège, concerned with ensuring that the legal framework does not undermine good medical practice, has serious reservations in this regard.

In addition, we wonder what the legislator means by the "preliminary assessments" that clinicians will be required to testify to for the purposes of monitoring MAID.

¹ (S.C., 2019-09-11), 2019 QCCS 3792.

² *Act respecting end-of-life care*, CQLR, c. S-32.0001.

³ *Criminal Code*, (R.S.C. (1985), c. C-46).

Finally, the Collège takes note of the legislator's decision to exclude eligibility for MAID for a person suffering from a mental illness and proposes to participate in the deliberations.

Foreseeability of death

In conjunction with the Superior Court of Quebec ruling, the Bill provides for the repeal of the provision in the *Criminal Code*⁴ requiring that the natural death of a person requesting MAID be "reasonably foreseeable [...] without a prognosis necessarily having been made". Thus anyone who meets the other legal criteria is eligible for MAID.

However, the Bill sets out different safeguards, depending on whether the natural death of the person requesting MAID is foreseeable or not.

The Collège questions the relevance of this distinction.

1) Period between a request for MAID and its provision

In view of the additional suffering imposed by the 10-day period for many of those who, at the end of life, request MAID, the Collège welcomes its outright abolition in the Bill (s. 1(5) of the Bill).

However, doubting its basis, the Collège questions the measure proposed in the Bill for people whose natural death is not reasonably foreseeable and which imposes a 90-day period on them. We note that this period is much longer than the maximum 30-day period in other countries that allow euthanasia for people who are not expected to die in the near future.

Rather than a fixed period, the Collège suggests that a "reasonable period of time that takes the evolution of the person's condition into account" be established, in the same spirit and the same logic of care as in s. 29(1)(c) of the *Act respecting end-of-life care*,⁵ which has been in force in Quebec since December 2015.

2) Confirmation that the criteria have been met by two physicians (one with expertise in the person's condition)

The Collège supports the inclusion of such a requirement in the legislation (s. 1(7) of the Bill regarding the addition of subsection (3.1)(e)) for the assessment of the clinical condition of all persons requesting MAID, regardless of the foreseeability of their death. This expertise requirement has been encouraged in Quebec since 2015, in the practice guide on MAID⁶ published by the Collège and the other professional orders concerned, since it is in keeping with proper medical practice.

⁴ Supra, note 3, s. 241.2(2)(d).

⁵ Supra, note 2, s. 29(1)(c).

⁶ COLLÈGE DES MÉDECINS DU QUÉBEC, et al. (2018). *Medical aid in dying: Practice guide and pharmacological guidelines*, CMQ, Montreal, p. 35.

3) Clarification of informed consent

The measures set out in paragraphs (g) and (h) of the new subsection (3.1) of section 241.2 of the *Criminal Code* are implicit in the ethical obligations of physicians, regardless of the type of care or treatment provided, and are an integral part of the process of obtaining free and informed consent.

In addition, in Quebec, section 29(1)(b) of the *Act respecting end-of-life care*⁷ expressly provides that, before providing MAID, a physician must make sure "that the request is an informed one, in particular by informing the patient of the prognosis for the illness and of other therapeutic possibilities and their consequences".

The Collège supports the addition of such a requirement in the *Criminal Code* for all persons requesting MAID, regardless of the foreseeability of their death.

4) Waiver of final consent

The Bill provides for the possibility for a physician to provide MAID to a person without giving them the opportunity to withdraw their request and without ensuring that they expressly consent to receiving MAID (s. 1(7) of the Bill regarding the addition of subsection (3.2)). However, several requirements must be met in order to override the safeguard provided for in s. 241.2(3)(h) of the *Criminal Code*.⁸

The Collège welcomes this initiative, which makes it possible to relieve, in accordance with their wishes, a person who is suffering intolerably. However, we regret that this option to waive consent is not provided for all persons whose request for MAID is approved and who risk losing their capacity to consent just prior to the agreed time of its provision. We recommend that, unless they demonstrate their refusal, any person whose request for MAID has been approved and who meets the specific requirements of the new subsection (3.2) may waive their final consent, regardless of the foreseeability of their death.

5) Countersignature of the request for MAID by one independent witness

The Collège supports the replacement of subsection (3)(c) of s. 241.2 of the *Criminal Code*, which provided for the signature of two independent witnesses on the MAID request form, by a new subsection that now requires the signature of only one witness. We also support the substance of subsection (3.1)(c) of s. 241.2.

We consider that one independent witness is indeed sufficient to date and sign the MAID request form, regardless of the foreseeability of the person's death. The current requirement for two witnesses represents an unnecessary hardship for the person requesting MAID and a greater risk to their privacy.

⁷ Supra, note 2, s. 29(1)(b).

⁸ Supra, note 3, s. 241.2(3)(h).

In summary, the Collège recommends the removal of the reference to "reasonably foreseeable natural death" and the introduction of the same safeguards, regardless of the foreseeability of the death of the person requesting MAID.

In particular, we recommend:

- > that the 90-day period set out in the new subsection (3.1)(i) of section 241.2 of the *Criminal Code* be replaced by a reasonable period that takes the evolution of the person's condition into account;
- > that, unless they demonstrate their refusal, any person whose request for MAID has been approved and who meets the specific requirements of s. 241.2(3.2) may waive their final consent.

In particular, we support:

- > enshrining in law the requirement for confirmation that the criteria have been met by two physicians, one with expertise in the person's condition;
- > the addition of specific requirements in the legislation to ensure the person's request is an informed one;
- > an amendment to the *Criminal Code* that requires only the signature of a single witness to the request for MAID.

Preliminary assessments

The Bill provides that, unless exempted, any person who has the responsibility to carry out “preliminary assessments of whether a person meets the criteria” for MAID must provide the information required by the regulations made under subsection (3) of section 241.31 of the *Criminal Code*⁹ to the recipient designated in those regulations.

This notion of “preliminary assessments” is not defined in the *Criminal Code* or the *Regulations for the Monitoring of Medical Assistance in Dying*.¹⁰

The Collège therefore asks that the *Criminal Code* be more specific, especially in view of the sanctions provided for against a clinician who knowingly fails to comply with the requirement to provide such information.

The Collège recommends that the “preliminary assessments of whether a person meets the criteria” for MAID be defined and their definition added to the *Criminal Code* or in a regulation.

Mental illness

Under the Bill, a person whose sole underlying medical condition is a mental illness is not eligible for MAID. The Collège takes note of this.

As Parliament intends to take the time to consult and deliberate at greater length, we remain available to contribute, as needed, to the process of exploring the issue further.

⁹ Supra, note 3, s. 241.31(3).

¹⁰ (SOR/2018-166).

CONCLUSION

In summary, the Collège supports several amendments made to the *Criminal Code* by Bill C-7 which, more appropriate to the experiences of people who are suffering and the clinicians who accompany them, allow for better respect of their wishes and dignity.

Concerned with ensuring that the legal framework does not undermine good medical practice, the Collège nevertheless has serious reservations about both the end and the means of putting variable safeguards in place depending on the foreseeability of the death of the person requesting MAID.

The Collège recommends the removal of the notion of "reasonably foreseeable natural death" and the introduction of the same safeguards for everyone, regardless of the foreseeability of death.

In addition, we wonder what the legislator means by the "preliminary assessments" that clinicians will be required to testify to for the purposes of monitoring MAID.

Finally, we remain available to contribute to further reflection on the eligibility of persons with a mental illness for MAID.