CHRISTIAN LEGAL FELLOWSHIP | ALLIANCE DES CHRÉTIENS EN DROIT

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LAWYERS' OPEN LETTER TO PARLIAMENT

A CALL TO AFFIRM THE EQUALITY AND DIGNITY OF EVERY LIFE

"Canadians with mental illness deserve the most accessible and effective life-affirming supports, not a suggestion that the solution to their suffering is to terminate their lives. Any legislative adoption of such a message would be profoundly harmful, and inherently ableist."

Dear Members of Parliament and Senators:

We, the undersigned lawyers and law students, write to urge you to permanently halt the planned expansion of MAID for mental illness in Canada.

We commend and thank the government for listening to the concerns of medical, legal, and disability experts in concluding that a state-sponsored, medically-administered death should not be offered in Canada as a "solution" to mental illness at this time. However, the issue goes beyond Canadian healthcare's preparedness or whether it could ever be "ready" to offer MAID for mental illness, in that such a practice is intrinsically harmful and discriminatory, and should never be entrenched in Canadian law.

Canadians with mental illness deserve the most accessible and effective life-affirming supports, not a suggestion that the solution to their suffering is to terminate their lives. Any legislative adoption of such a message would be profoundly harmful, and inherently ableist.

We do not suggest that those seeking to legalize MAID for mental illness intend to send such a message, but unintentional discrimination is still discrimination, and any Charter analysis will ultimately be concerned with the effects, not just the *motives*, of the law.

Here, the law's effect is to treat Canadians with certain mental and physical disabilities differently than everyone else. Canadians who are not disabled are guaranteed, without exception, the absolute protection of the law from a premature death, and an unremitting societal commitment to end any *suffering* they may experience, but never their *lives*. However, Canadians with physical and mental disabilities – those with a "grievous and irremediable medical condition" – do not enjoy the same, unequivocal protections. Instead, these Canadians are told that an appropriate terminus of their suffering – and *theirs only* – might be a state-sponsored, medically-initiated death.

We therefore share and echo the concerns that have been raised by legal scholars, health care professionals, the disability community, and human rights experts – concerns that apply not just to MAID for mental illness, but to any form of disability-related termination of life (i.e. "track two MAID").

Some have suggested that Parliament has no other choice but to expand MAID for mental illness because it has been mandated by the courts, and is a constitutional right. However, as detailed in a letter by over 30 law professors, in a peer-reviewed law journal, in legal submissions to the AMAD committee, and by representatives of the Department of Justice, this is not accurate.

No Canadian court has adjudicated this issue, let alone ruled that Parliament must legalize state-sponsored death for mental disorders and that the provinces must subsequently offer it through their respective healthcare systems. Neither *Carter* nor *Truchon* involved plaintiffs with a psychiatric condition. In *Carter*, the Supreme Court expressly stated that "euthanasia for minors or persons with psychiatric disorders" would "not fall within the parameters suggested in these reasons" (para. 111). And while the Alberta Court of Appeal in *EF* opined that psychiatric conditions were not necessarily excluded from the scope of *Carter*'s declaration, that was not a Charter challenge and did not involve any new constitutional analysis.

Even if courts had opined on the matter, however, Parliament would still have the constitutional prerogative to wrestle with the pertinent evidence, human rights concerns, and complex policy considerations. Parliament ultimately retains the responsibility to craft a complex regulatory regime – one guided by the courts' rulings, but which need not "slavishly conform" to them. As the Supreme Court of Canada itself affirmed:

> "[It] does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. **To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy**." (*R. v. Mills*, para. 55, emphasis added)

Of course, courts may then have the opportunity to re-assess the constitutionality of legislation, but the point is this: rather than basing life-and-death decisions on speculative claims about how a court *might* rule, Parliament has the moral and constitutional responsibility to *itself* assess the evidence and determine which legal protections are reasonable, necessary, and demonstrably justified in a free and democratic society. Parliament has a role – indeed a duty – to reach its own conclusions on the Charter.

In this context, the government must take notice that many specialists and clinicians have consistently stated that, when it comes to mental illness, they can not determine with reasonable confidence whether an individual case is irremediable. They have noted the absence of "evidence from anywhere in the world that supports being able to identify irremediability in individual cases of mental illness" (p. 12).

This lack of medical consensus, among other concerns, led Québec's Select Committee to recommend "that access to medical aid in dying not be extended to persons whose only medical condition is a mental disorder" – a recommendation adopted by the National Assembly and now reflected in Québec's *Act respecting end of life care* (s. 26). Indeed, how can the law endorse the irrevocable termination of life as a "permanent solution" to what can never be ruled out as a treatable condition?

Parliament must also consider specific concerns unique to the mental health context, including the fact that, in some cases, a person's "desire to die could be a symptom of their condition" (p. 68), as could their perception of intolerable suffering – suffering which could potentially "be addressed clinically despite their view that it is irremediable" (p. 79).

Ultimately, a premature death should never be promoted as a medical "solution" to all kinds of suffering, and certainly not as a more *accessible* solution than life-affirming treatment and support. We are concerned that Canada's current MAID regime is already failing in this regard. We therefore reiterate the concerns previously raised by 147 member organizations and allies of the disability rights community, and call on the government to not only permanently cancel the planned expansion of MAID for mental illness, but also to take the necessary steps to repeal Bill C-7's expansion of MAID for Canadians with disabilities who are not dying or near death (an expansion based on the *Truchon* trial decision, which was not appealed, nor reviewed by a higher court).

In its place, we urge the government to prioritize mental health and disability supports that respect everyone's fundamental right to medical assistance in *living*.

Thank you for your consideration of these concerns. We would welcome the opportunity to discuss these matters with you further, or provide any other assistance you may find helpful.

Sincerely,

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Endorsements:

List of lawyer/law student endorsements submitted to MPs and Senators and available, with additional names updated on a rolling basis, at www.christianlegalfellowship.org