

ASSURED THIS
ACCORDANCE
Pursuant to
CONFORMEMENT A
RULE/LA RÈGLE 28.02 (C)
THE ORDER OF Justice Callaghan
ORDONNANCE DU
DATED / FAIT LE Sep 26, 2024 ONTARIO
SUPERIOR COURT OF JUSTICE
H. Mentler
REGISTRAR
BETWEEN JUSTICE COUR D'ENHANCE DE JUSTICE

Court File No. CV-24-0072847-0000

K.C., KATHRIN MENTLER, INCLUSION CANADA,
INDIGENOUS DISABILITY CANADA/ THE BRITISH COLUMBIA ABORIGINAL
NETWORK ON DISABILITY SOCIETY, COUNCIL OF CANADIANS WITH
DISABILITIES, AND DISABLED WOMEN'S NETWORK OF CANADA,

Applicants

- and -

HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE
ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER Rule 14.05(3) of the Rules of Civil Procedure and the Canadian
Charter of Rights and Freedom, ss. 1, 7, 15 *Constitution Act, 1982*

FRESH AS AMENDED NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The claim
made by the Applicants appears on the following page.

THIS APPLICATION will come on for a hearing

- In writing
- In person
- By telephone conference
- By video conference

at the following location:

330 University Avenue, 5th Floor, Toronto ON, M5G 1R7

on a day to be set by the registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

SEP 25, 2024

Issued by

Averson

Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue
5th Floor
Toronto ON
M5G 1R7

TO: **HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED
BY THE ATTORNEY GENERAL OF CANADA**

Ontario Regional Office
Department of Justice Canada
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Respondent

APPLICATION

1. The Applicants make application for:

- (a) a declaration that section 241.2(3.1) of the *Criminal Code* (R.S.C., 1985, c. C-46) (“*Criminal Code*”) as amended and/or enacted by *Bill C-7 An act to amend the Criminal Code (medical assistance in dying)*, which received Royal Assent on March 17, 2021 and is now law (“**Bill C-7**”), violates section 7 and/or section 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), and is not reasonably justified in a free and democratic society, and is of no force and effect pursuant to s. 52(1) of *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the “*Constitution Act, 1982*”);
- (b) a declaration that sections 227, 241.2(2), 241.2(5.1)(b), 241.2(6), 241.3 and 245(2) of the *Criminal Code* violate section 7 and/or section 15(1) of the *Charter*, to the extent that they apply to any provision of medical assistance in dying (“**MAiD**”) under section 241.2 of the *Criminal Code* to persons whose natural death is not reasonably foreseeable, and are not reasonably justified in a free and democratic society, and are of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*;
- (c) the costs of this proceeding, plus all applicable taxes and pre- and post-judgment interest; and
- (d) such further and other relief as to this Honourable Court may seem just.

2. The grounds for the application are as follows.

The Applicants

3. Inclusion Canada (“**IC**”) is a registered charitable organization (registration no. 106842545 RR 0001), incorporated under the *Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23) (“*Canada Not-for-profit Corporations Act*”). IC is the national federation working to advance the full inclusion, dignity and human rights of people with an intellectual disability and their families. IC is dedicated to promoting full and meaningful participation in community life on an equal basis with others, supporting inclusion and ending discrimination on the basis of intellectual disability, respect for diversity and advancing human rights for all Canadians. This is done by sharing information, fostering leadership for inclusion, engaging community leaders and policy makers, seeking innovation and supporting research.

4. The Indigenous Disability Canada/British Columbia Aboriginal Network on Disability Society (“**IDC/BCANDS**”) is a not-for-profit and charitable society incorporated under the *Canada Not-for-profit Corporations Act*, whose primary purpose is to provide health resources and support services to address the needs of Indigenous peoples across Canada. IDC/BCANDS’ work includes coordinating and working with Indigenous and non-Indigenous health and disability related programs/services and professionals, and Indigenous, government and community-based agencies.

5. The Council of Canadians with Disabilities (“**CCD**”) is a national human rights organization of people with disabilities incorporated under the *Canada Not-for-profit Corporations Act*, whose primary purpose is to engage in advocacy work to achieve an inclusive and accessible Canada. CCD promotes the equality, autonomy and rights of persons living with all

types of disabilities by undertaking work related to law reform, policy development and rights advancement, including litigation.

6. DisAbled Women's Network Canada ("**DAWN**", and collectively with IC, IDC/BCANDS, and CCD, the "**Organizational Applicants**") is a not-for-profit organization incorporated under the *Canada Not-for-profit Corporations Act*, whose primary purpose is to advance the inclusion of women and girls with disabilities and Deaf women in Canada. DAWN focuses on community-based research, developing educational tools and curriculum, engaging in policy review and development, and advocacy efforts.

7. K.C. is a 47-year-old transgender, non-binary, individual residing in southern Ontario. K.C. lives with both physical and mental disabilities. Their experience living with disability has informed their experiences in society generally, and specifically, within health care settings. Since Bill C-7 has become law, K.C.'s experience is that medical assistance in dying for persons whose natural death is not reasonably foreseeable, has caused them, and will continue to cause them, serious damage and harm.

8. Kathrin Mentler (collectively with K.C., the "**Individual Applicants**") is a 40-year-old woman residing in Vancouver, British Columbia. Ms. Mentler lives with chronic pain and has a history of depression and suicidality. In 2023, Ms. Mentler experienced an acute mental health crisis following a traumatic experience and attempted to access care at the Vancouver General Hospital. While there, a clinician advised her on MAiD and discussed MAiD in positive terms, even though she was seeking help to live and did not ask for information about how to die. Ms. Mentler's experience is that the availability of medical assistance in dying to persons whose natural death is not foreseeable has caused her and will continue to cause her, serious harm.

The Organizational Applicants Have Public Interest Standing

9. The Organizational Applicants' mandates are to promote the equality, autonomy, inclusion and rights of people living with disabilities in Canada. Several of the Organizational Applicants have been granted intervenor status in courts at all levels across Canada, and litigated issues in their own right.

10. This application concerns serious and justiciable issues related to the constitutionally entrenched rights to life, liberty, and security of the persons, the principles of fundamental justice and equality rights.

11. The Organizational Applicants have a real and continuing interest in representing and advocating for the rights of people with disabilities living in Canada. The issues raised in this application are directly connected to the Organizational Applicants' mandates and impact the civil liberties and human rights of individuals who are members of the Applicants' respective organizations and the Individual Applicants themselves.

12. Given the nature of the issues raised in this application, and the burden of litigation for individuals with grievous and irremediable disabilities who experience suicidality, the Organizational Applicants are uniquely suited to commence a claim. Therefore, this application is a reasonable and effective means to bring a case of public importance before this Honourable Court.

The Introduction of Medical Assistance in Dying in Canada

13. Historically, in Canada, administering a drug to assist another person to end their life constituted murder contrary to section 229(a)(i) of the *Criminal Code*, while providing those drugs

to an individual for the purpose of ending their life constituted aiding suicide under section 241(b). Section 14 of the *Criminal Code* further provides that no person can consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.

14. In 2015, the Supreme Court of Canada heard a challenge to sections 14 and 241(b) of the *Criminal Code: Carter v. Canada (Attorney General)*, 2015 SCC 5 (“*Carter*”). In *Carter*, the Court unanimously held that sections 14 and 241(b) of the *Criminal Code* were void insofar as they constituted an absolute prohibition on physician-assisted death for a competent adult person who: (1) clearly consented to the termination of life; and (2) had a grievous and irremediable medical condition (including an illness, disease, or disability) that caused enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The Court limited its judgment to the plaintiffs, each of whom had either died from euthanasia outside of Canada (and were represented by family members) or were at the end of their lives.

15. In 2016, in response to *Carter*, Parliament enacted *Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* (“**Bill C-14**”) which introduced MAiD in Canada.

16. Bill C-14 created exemptions to aiding suicide, administering a noxious thing, and culpable homicide offences for consenting adults with a “grievous and irremediable medical condition”, which required four criteria to all be met:

- (a) a serious and incurable illness, disease or disability;
- (b) an advanced state of irreversible decline in capability;

- (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; and
- (d) that the person's natural death be reasonably foreseeable ("**MAiD Track 1**").

17. A person with a grievous and irremediable medical condition is, by definition, a person with a disability. Accordingly, all persons eligible for MAiD Track 1 are persons with disabilities.

18. While all persons eligible for MAiD under Bill C-14 were persons with disabilities, the exemptions carved out were based on a distinction between those who were already at the end of their natural lives and were dying, and those who were not. This distinction ensured that: (1) persons with disabilities would be safeguarded against choosing a premature death and (2) suicide prevention initiatives would not be undermined.

Bill C-7 Repeals the Natural Foreseeability of Death Requirement

19. In 2019, the Quebec Superior Court in *Truchon c. Procureur général du Canada*, 2019 QCCS 3792 ("*Truchon*") held that the MAiD regime created by Bill C-14 violated sections 7 and 15 of the *Charter* and Quebec's *Act Respecting End-of-Life Care*, CQLR c S-32.0001 because the reasonable foreseeability of natural death requirement denied access to MAiD to disabled persons who were suffering intolerably but were not at the end of their lives.

20. In 2021, in response to *Truchon*, Parliament enacted Bill C-7 which amended the MAiD regime provided for by Bill C-14.

21. Critically, Bill C-7 removed the criterion of reasonable foreseeability of natural death for a grievous and irremediable medical condition (previously, section 241.2(2)(d) of the *Criminal Code*). As a result, the MAiD regime, as amended by Bill C-7, is no longer restricted to persons at the end of their natural lives (“**MAiD Track 2**”). The exemptions carved out by MAiD Track 2 are based on a distinction between those who are disabled and those who are not. In contrast, the distinction between those who are eligible for MAiD Track 1, is based on a distinction between those who are dying (their natural death is reasonably foreseeable) and those who are not dying.

22. Bill C-7 decriminalized murder, aiding suicide and administering a noxious thing for many persons with disabilities if performed according to the criteria of the *Criminal Code*.

23. Bill C-7 only created exemptions for aiding suicide, administering a noxious thing and murder for people who are disabled. Persons who are experiencing intolerable suffering but who are not disabled, are not eligible for MAiD Track 2. MAiD Track 2 is exclusively offered to persons with disabilities.

24. Bill C-7’s MAiD Track 2 increases the risk that persons with a disability will be induced to end their lives as a response to suffering. Medical and nurse practitioners are presenting the ending-of-life as a form of medical treatment for people who are disabled. Bill C-7 does not require that treatment options be exhausted before accessing MAiD, which makes choosing death easier. MAiD is portrayed as a no-fail, painless way to alleviate suffering which may incentivize death over other options. Ultimately, this increases the risk that people with disabilities will choose death rather than other solutions for their intolerable suffering. Death should not be a solution for disabled people who experience intolerable suffering but are otherwise not at the end of their lives.

25. By transforming death into a form of medical treatment for persons with disabilities, Parliament has legitimized the idea that death is an appropriate response to feeling like, or being perceived to be, a burden on the health-care system or one's family, and that it is an appropriate response to other suffering reported by persons with disabilities as motivating their wish to die, including loss of dignity or loss of the ability for meaningful activities or activities of daily living.

26. People with disabilities often deal with socioeconomic disadvantage, inadequate housing, institutionalization, social isolation, and other forms of marginalization. Understandably, these problems can lead to intolerable suffering for persons with disabilities, just as they can lead to intolerable suffering for people without disabilities. The difference is that persons with grievous and irremediable medical conditions may now access MAiD Track 2 as a solution to those problems. People without a disability may not choose death. Death as a valid and reasonable solution to suffering is uniquely validated and normalized for persons with disabilities (and only persons with disabilities).

27. Bill C-7 fundamentally changes the relationship between a patient with disabilities, and their medical or nurse practitioners and other care providers. It can undermine the trust a person should have in their service providers. Death is presented as a form of medical treatment but only because they have a disability. Individuals with disabilities have been and continue to be discouraged from accessing health-care services or from disclosing suffering for fear that their provider will recommend death as a solution. Further, a health-care provider communicating to a person with a disability that the person could or should consider MAiD, and that death is an option for their suffering, can shape that person's perceptions of their value, dignity and the degree to which they are, or are perceived to be, a burden. An offer of MAiD also communicates that their circumstances are hopeless and that the health care and other systems do not value their lives, and

cannot be relied upon to save or support them. MAiD Track 2 thus narrows the range of options that are available, or that persons with disabilities may perceive as available, for dealing with suffering they are finding intolerable.

28. Bill C-7 has led and/or will lead to a discrepancy in the level of care offered to a person with a disability, and one without. Individuals without a disability will be offered certain supports to treat, or otherwise manage, their condition. By contrast, individuals with a disability will also be offered the chance to die; this may lead to a medical or nurse practitioner not pursuing all possible supports or the person with a disability dying by MAiD because MAiD is easier, more accessible, more available, or more affordable.

Bill C-7 Violates Section 15 of the Charter

29. Section 15(1) of the *Charter* provides that 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 disability.

30. Bill C-7's addition of MAiD Track 2 violates the section 15(1) guarantee for persons with disabilities by making an explicit distinction based on the enumerated ground of disability. Bill C-7 makes an explicit distinction based on a subset of people with disabilities. In addition, or in the alternative, Bill C-7 has a disproportionate adverse impact on persons with disabilities.

31. MAiD Track 2 is not offered to other people who are suffering intolerably, but rather, it is exclusively offered to persons with disabilities. Bill C-7 did not limit the criminal law protections against murder, aiding suicide and administering a noxious thing for any person experiencing intolerable suffering who does not have a disability.

32. Moreover, Bill C-7's addition of MAiD Track 2 imposes a burden and denies a benefit in a manner that has the effect of reinforcing, perpetuating, and exacerbating the disadvantages faced by persons with disabilities. Bill C-7's MAiD Track 2 makes access to state assisted death exclusively available for people with disabilities, thereby reinforcing existing stigmatization and devaluing the lives of people with disabilities.

33. Bill C-7's MAiD Track 2 also increases the risk that persons with disabilities will be induced to end their lives as a response to suffering. This is a risk that Parliament has exclusively imposed on persons with disabilities. Persons without disabilities who decide to end their lives will be offered suicide prevention efforts to discourage them from doing so. Persons with disabilities are being offered or may be offered MAiD Track 2.

34. Moreover, Bill C-7 has further imposed a disadvantage solely on persons with disabilities by fundamentally changing the relationship between patient and medical practitioner. There is an increased risk that a medical practitioner will advise death for a person's disabilities, and ultimately compromise the trust between persons with disabilities and their physicians.

35. Because of the intersecting systemic inequalities faced by, among others, women, Indigenous, trans and non-binary people with disabilities, these persons with disabilities who experience multiple inequalities are at enhanced risk of not having the supports they need to live without intolerable suffering. They are therefore at an enhanced risk of dying prematurely through MAiD Track 2.

36. The violations of section 15(1) do not constitute reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.

Bill C-7 Violates Section 7 of the Charter

37. Section 7 of the *Charter* provides that the state cannot deny a person's right to life, liberty, or security of the person, except in accordance with the principles of fundamental justice.

38. Bill C-7's addition of MAiD Track 2 deprives a person with a disability of their life and security interests as it increases the risk that such persons will end their lives prematurely. Such deprivations are not in accordance with the principles of fundamental justice because they are grossly disproportionate and overbroad. In the alternative, Bill C-7 is unconstitutional in its purpose by offering the solution of death to persons who are not otherwise dying, on the basis that they are disabled.

39. Providing MAiD to persons with disabilities outside of the end-of-life context directly increases the risk of death of disabled persons. But for Bill C-7's MAiD Track 2, medical and nurse practitioners would not help persons with disabilities whose natural death is not otherwise foreseeable die, as it would constitute the crime of aiding suicide, administering a noxious thing and/or murder under the *Criminal Code*. Persons with disabilities who would not have contemplated or attempted suicide may choose MAiD because it is presented as an accessible, pain-free, and unfailing path to ending one's own life.

40. The increased risk of death of disabled persons created by Bill C-7's MAiD Track 2 also threatens the security of the person, which includes physical and psychological integrity. Physical security of the person is impacted by denying persons the protection provided by the criminal laws against murder, administering a noxious thing and aiding suicide. Psychological security of the person is impacted by presenting persons with disabilities in need of support with the option of MAiD.

41. Gross disproportionality applies to laws whose *effects* are so disproportionate that they cannot be supported. Gross disproportionality applies where the seriousness of the deprivation is out of sync with the objective of the law.

42. A law that allows people with disabilities to access state-funded death in circumstances where they cannot access state-funded supports they need to make their suffering tolerable is grossly disproportionate. There is no deprivation that is more serious and more irrevocable than causing someone who is not otherwise dying to die.

43. Expanding the MAiD regime to include persons who are not at the end of their natural lives is overbroad. It is contrary to the principles of fundamental justice because it normalizes death as a response to the intolerable suffering experienced by some people with disabilities. Alternatively, the purpose of the expansion of the MAiD regime to include people not at the end of their lives is unconstitutional because it devalues the lives of people with disabilities and impacts their experience of the health-care system.

44. The violations of section 7 are not justified. If there is a pressing and substantial objective to expand MAiD to persons whose natural death is not foreseeable, MAiD Track 2 is not proportional to this objective. MAiD Track 2 is not minimally impairing.

45. The following statutory provisions will be relied on:

- (a) Sections 1, 7, 15(1), 24(1), 52, of 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;
- (b) Rule 14.05(3) of the *Rules of Civil Procedure*;

(c) Sections 227, 241.2(2), 241.2(3.1), 241.2(5.1)(b), 241.2(6), 241.3 and 245(2) of the *Criminal Code*; and

(d) Such further and other grounds as the lawyers may advise and this Honourable Court may permit.

46. The following international conventions will be relied on:

(a) The UN *Convention on the Rights of Persons with Disabilities*.

47. The following documentary evidence will be used at the hearing of the application:

(a) the Affidavit of K.C. affirmed September 24, 2024;

(b) the Affidavit of Kathrin Mentler affirmed September 22, 2024;

(c) the Affidavit of Bonnie Brayton, on behalf of DAWN affirmed May 30, 2024;

(d) the Affidavit of Krista Carr, on behalf of IC affirmed September 23, 2024;

(e) the Affidavit of Heather Walkus, on behalf of CCD affirmed September 12, 2024;

(f) the Affidavit of Neil Belanger, on behalf of IDC/BCANDS affirmed September 22, 2024; and

(g) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

September 25, 2024

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