Written Submissions of

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to the Standing Committee on Legal and Constitutional Affairs

In view of its study on Bill C-7,
An Act to amend the Criminal Code
(medical assistance in dying)

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The objects of the British Columbia Civil Liberties Association ("BCCLA") include the defense and promotion of civil liberties and human rights in British Columbia and Canada.

In addition to the BCCLA's long-standing interest in matters of patients' rights and health policy, the BCCLA has been extensively involved in advocacy and education in respect to end of life choices, including MAID. The BCCLA was the institutional plaintiff in *Carter*, which successfully struck down ss. 241(b) and 14 of the *Criminal Code* as unjustifiably violating the *Charter*. One week after Bill C-14 was passed, the BCCLA challenged the new law on behalf of Julia Lamb. Joseph Arvay, QC, OC was lead counsel in both cases.

The BCCLA office is located on the traditional, ancestral, and unceded territory of the Coast Salish peoples – *Sḵwx̱wú7mes*h (Squamish), *Stó:lō and Səl̓ílwətaʔ/Selilwitulh* (Tsleil-Waututh), and *xʷməθkʷəy̓əm* (Musqueam) Nations (Vancouver, BC).

The BCCLA makes this acknowledgement understanding that the history of colonialism and ongoing oppression has led to glaring disparities in health care and health outcomes between Indigenous and non-Indigenous peoples. Any public health discussion – including a discussion about MAID – must recognize and transform this fundamental, ongoing injustice.

When Julia Lamb asked the BC Civil Liberties Association to represent her in her challenge to C-14, the MAID legislation currently in force, we were guided by the principles set out by the Supreme Court of Canada in *Carter v. Canad*a, 2015 SCC 5.

Julia believes – just like Gloria Taylor, Nicole Gladu and Jean Truchon, and many other Canadians who shared their personal stories with the Court in *Carter* – that they should be able to decide how much suffering they endure, based on their own values and beliefs.

It is worth rereading the first paragraph of the *Carter* decision, because it sets out what is at stake for sick and suffering people – and for physicians who provide compassionate health care:

> It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

This absolute prohibition on assistance in dying was what led Sue Rodriguez and then Gloria Taylor – and then Julia to ask, "Whose life is it anyway?" They are expressing their view of the fundamentally personal nature of the decision to hasten dying – and the fact that an

individual's choice in dying is critical to autonomy and dignity – and also to the value of compassion.

As Julia says, she stands in solidarity with disability rights groups and communities of people living with disabilities. She reminds us that the world impedes people living with disabilities. Julia is committed to working toward a society where people with disabilities live free of discrimination and have full access to education, health care, homes, jobs and civic engagement.

She also believes that, when all else fails – when medical treatments, pain management, comfort care, and hospice care that are available and tolerable to her are not enough to relieve extreme suffering – she should have the option to end her suffering painlessly and with compassion.

There are many aspects of Bill C-7 that are positive and respect the rights and serve the interests of Canadians.

The BCCLA largely supports Bill C-7, which is primarily intended to bring the law into compliance with *Truchon v. Canada*. Justice Baudouin struck down the provisions in the *Criminal Code* that allow medical assistance in dying only for those whose natural death is reasonably foreseeable. She ruled that the restrictions were unconstitutional because they unjustifiably violated the s. 7 (life, liberty and security of the person) and s. 15 (equality) provisions of the *Charter* of the two claimants in the case, Nicole Gladu, a 73-year-old with post polio syndrome, and Jean Truchon, a 51 year old with cerebral palsy.

<u>Removal of the requirement that a natural death has become "reasonably foreseeable" is constitutionally required</u>

Justice Baudouin's decision for the Quebec Superior Court is entirely legally consistent with the rulings of other courts which have determined that it is unconstitutional for the federal government to limit assistance in dying to persons who are at the end of life. These courts have squarely rejected the claim that the declaration in *Carter v. Canada* is limited to persons in the factual circumstances of specific individuals (Gloria Taylor, Kay Carter) involved in *Carter*. One such ruling was issued by a unanimous Alberta Court of Appeal (*Canada v. E.F.* 2016 ABCA 155, May 17, 2016). Another decision was issued by Justice Perell of the Ontario Superior Court of Justice (*I.J. v. Canada* 2016 ONSC 3380, May 24, 2016).

The removal of the requirement in the law that medical assistance in dying is only available to Canadians whose natural death has become "reasonably foreseeable" is about compassion and respecting Canadians' right to make personal choices based their own values and beliefs. It also reflects the reality that physicians and nurse practitioners do not interpret the vague and

confusing terms in the law as requiring patients to be near death – a fact that was endorsed by the government in legal filings.

Bill C 7 places strict limits on who can access the law and provides layers of safeguards. The law only applies to individuals who have grievous and irremediable medical conditions with no chance of cure or recovery (by means acceptable to them). The patient must clearly request to end their life. Furthermore, the ruling only applies to mentally competent adults with enduring and intolerable suffering. Two physicians or nurse practitioners examine the patient, review the medical files, and determine that they are fully informed and acting voluntarily. Physicians and nurse practitioners are highly trained and skilled at assessing decisional capacity – which is an inherent aspect of all physician/nurse practitioner patient interactions in all clinical contexts.

Dr. Jocelyn Downie has canvassed these positive aspects of the proposed legislation in her remarks to the Pre-study Committee and in other submissions to the Senate. The BCCLA endorses her submissions.

Significant clauses in Bill C-7 must be amended

Although the BCCLA largely supports Bill C-7, significant clauses are unconstitutional and/or must be amended.

We accept and endorse the two major areas of grave concern raised by Julia. To that end, the Bill should be amended in the following ways:

- The two-track system should be struck from the legislation because it forces additional, mandatory barriers on persons whose death is not “reasonably foreseeable”

- If the two-track system is retained:
    - the legislation should permit a waiver of final consent for people who would be considered subject to track 2.

The BCCLA’s other major area of concern is that Bill C-7 contains an *absolute prohibition* against permitting people whose sole underlying condition is "mental illness" from having the choice of medical assistance in dying. The prohibition applies to all persons suffering from a sole condition of "mental illness"– regardless of whether they are decisionally capable individuals.

<u>This absolute prohibition does not comply with the Supreme Court of Canada’s decision in *Carter v. Canada* and is therefore unconstitutional. In addition, the provision unjustifiably infringes s. 7 (the rights to life, liberty and security of the person) and s.15 (the right to equality) of the *Charter*.</u>

Carter set the "floor" and not the "ceiling" of what is constitutionally required to respect the rights of all Canadians. This means that while Parliament may extend the rights to physician assisted dying beyond what the Court required (for example, by permitting nurse practitioners to provide MAID and final consent waivers), it cannot restrict those rights.

Canada should support human rights in mental health care – but Bill C-7 has the opposite effect. It stigmatizes and abandons those suffering from mental health issues.

You have heard from many medical professionals, for example, Dr. Dembo and the Federation of Medical Regulatory Authorities of Canada, who have testified that the term "mental illness" is clinically unintelligible. There is no clinical or legally accepted meaning for the term.[1]

In the *Carter* proceedings, the plaintiffs challenged, and the court declared unconstitutional, the criminal law's absolute prohibition against physician-assisted dying. The law's prohibition was "absolute" because it did not permit patients the benefit of being individually assessed for eligibility for physician-assisted dying. It was "absolute" because it did not distinguish between those who were "vulnerable" and those who were entitled to choose for themselves.

The specific issue of whether those suffering from psychiatric conditions should be excluded from the declaration of invalidity was squarely before the Supreme Court of Canada in *Carter*.[2] The

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[1] A significant number of mental disorders that could be deemed "mental illness" that could be captured by the law, including, for example: Huntington's disease; anxiety, mood, psychotic, personality, addictions and eating disorders; chronic fatigue syndrome; Alzheimer's disease, and dementia.

[2] For example, at paragraph 114, the court discussed Canada's position regarding the risks associated with the decriminalization of physician assisted dying as follows:

> In [Canada's] view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

In the next paragraph the Court stated:

> The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all

Court rejected the government's argument that there is no reliable way to identify those who are vulnerable and those who are not. The court concluded, at paragraph 116, that "it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity."

Now the government asserts that the *Carter* decision does not apply to those with "mental illness."[3] These assertions rest on a particular interpretation of *Carter* – one that has been rejected multiple times by multiple courts.

In one such application, brought in 2016 by an applicant seeking assisted dying, the Attorney General of Canada argued that the scope of the *Carter* declaration, and therefore the *Carter* exemption relief, was limited to those with terminal illnesses and expressly precluded those with psychiatric conditions.

It lost that argument before the Court of Queen's Bench of Alberta and the Alberta Court of Appeal.[4] That legal challenge was brought by E.F., a woman who received MAID when a mental disorder was her sole underlying medical condition. The Alberta Court of Appeal unanimously rejected the AGC's argument that psychiatric conditions were excluded.[5]

The Attorney General then advanced the same argument that scope of the declaration in *Carter* was narrowly limited to a subset of persons before the Ontario Superior Court of Justice.[6] It lost there too - and, again, it did not appeal. It also lost the argument in *Truchon* – and again it did not appeal. Significantly, as it is something that Canada is uniquely able to do, Canada also did not refer the issue of the proper scope of *Carter* to the Supreme Court of

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> end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

[3] See for example: Department of Justice, "Charter Statement: *An Act to amend the Criminal Code (medical assistance in dying)* (C-7)," *Government of Canada*, October 21, 2020. https://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c7.html

[4] *Canada (Attorney General) v. E.F.*, 2016 ABCA 155.

[5] E.F. had conversion disorder, also known as functional neurological symptom disorder). The motions judge determined that although she suffered from a mental disorder, E.F. was capable of making an informed, voluntary request to receive physician assistance in dying and came within the criteria established by *Carter*.

[6] *I.J. v. Canada (Attorney General)*, 2016 ONSC 3380.

Canada for an opinion.[7] Instead it continues to press its argument in the court of public opinion and before Senators and Members of Parliament.

Historically, individuals with mental disorders have been assumed to lack capacity and they have endured significant injustice as a result. A blanket restriction on MAID for persons with mental disorders dismisses the magnitude of the suffering that some of these individuals experience.

We support appropriate procedural safeguards that would permit patients with mental health issues to access the law under certain strict and limited circumstances. These safeguards – including practice guidelines and standards for training – should be developed by clinicians and professional and regulatory bodies. These safeguards should not be regulated through the prohibitions and penal sanctions of the *Criminal Code*.

In short, the BCCLA supports the Canadian Bar Association, the Canadian Psychiatric Association, the Association québécoise pour le droit de mourir dans la dignité, Dying With Dignity Canada, Professor Jocelyn Downie, and Jean-Pierre Ménard in their collective call to strike Section 2.1 from C-7.

In 2016, the Senate recognized that the government's insistence that MAID should only be available to Canadians whose "near death was reasonably foreseeable" flew in the face of the *Carter* decision and was unconstitutional. We call on you to once again bravely recognize and uphold the rights and freedoms of all Canadians.

[7] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53