

# RIGHTS, FREEDOMS, AND MEDICAL ASSISTANCE IN DYING

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**LIFE LIBERTY AND  
SECURITY OF THE PERSON**



 **UNIVERSITY OF ALBERTA**  
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# ROADMAP

## ➤ CHANGES TO THE REASONABLY FORESEEABLE NATURAL DEATH / END OF LIFE REQUIREMENTS

➤ *TRUCHON C. PROCUREUR GÉNÉRAL DU CANADA (2019)*

➤ *BILL C-7*

## ➤ THE LIMITS OF CONSCIENTIOUS OBJECTION (JUST A PREVIEW)

➤ *CHRISTIAN MEDICAL AND DENTAL SOCIETY OF CANADA  
V. COLLEGE OF PHYSICIANS AND SURGEONS OF  
ONTARIO (2018/2019)*

“Although the debate over the decriminalization of medical assistance in dying in Canada has already taken place, it is evident that this final act still prompts concern in many and continues to raise questions that remain unanswered”

“Court[s] must...determine the constitutional validity of the legislative requirements”

– BAUDOUIN J, SUPERIOR COURT OF QUEBEC

# THE EXCEPTION, NOT THE RULE

**ASSISTED DEATH** REMAINS ILLEGAL IN CANADA



# THE EXCEPTION, NOT THE RULE

MAID LEGISLATION CREATES EXCEPTIONS

STRICT COMPLIANCE REQUIRED TO AVOID  
PROSECUTION

# MAID: ELIGIBILITY CRITERIA

ONLY FOR ADULTS (18 AND ABOVE) ELIGIBLE FOR PUBLICLY FUNDED HEALTH SERVICES (INCLUDING DURING WAIT PERIOD)

SUFFERING FROM GRIEVOUS AND IRREMEDEIABLE MEDICAL  
CONDITION

GIVE FREE AND INFORMED CONSENT

# GRIEVOUS AND IRREMEDIAL

SERIOUS AND INCURABLE ILLNESS, DISEASE OR DISABILITY

ADVANCED STATE OF IRREVERSIBLE DECLINE

CAUSING ENDURING PHYSICAL AND PSYCHOLOGICAL  
SUFFERING THAT IS INTOLERABLE AND CANNOT BE RELIEVED  
UNDER CONDITIONS ACCEPTABLE TO PATIENT

NATURAL DEATH IS REASONABLY FORESEEABLE (DOES NOT  
DEPEND ON PROGNOSIS REGARDING LENGTH OF TIME)

# SAFEGUARDS

ASSESSMENT AND CONFIRMATION OF ELIGIBILITY

PROPER **INFORMED CONSENT**, DOCUMENTATION  
AND WITNESSING

**CONFIRMATION BY INDEPENDENT PHYSICIAN OR  
NURSE PRACTITIONER**



# SAFEGUARDS

REFLECTION PERIOD OF 10 DAYS (CAN BE SHORTENED)

REAFFIRMATION OF CONSENT AND OPPORTUNITY TO WITHDRAW IMMEDIATELY BEFORE MAID IS PROVIDED

# WHEN IS NATURAL DEATH REASONABLY FORESEEABLE?

ONLY THING WE KNOW IS THAT PROGNOSIS NEED  
NOT BE CONSIDERED

VAGUE AND DIFFICULT TO INTERPRET

*A.B. V. CANADA (ATTORNEY GENERAL)*  
(2017)

80-YEAR OLD WITH ADVANCED INCURABLE  
OSTEOARTHRITIS

IN “UNINTERRUPTED EXCRUCIATING PAIN”

HER PHYSICIANS DISAGREED ON WHETHER NATURAL  
DEATH WAS REASONABLY FORESEEABLE

PROVIDER DECLINED TO PROCEED FOR FEAR OF  
CRIMINAL PROSECUTION

*A.B. V. CANADA (ATTORNEY GENERAL)*  
*(2017)*

COURT RULED THAT DEATH NEED NOT BE IMMINENT  
TO BE DEALT WITH ON A CASE-BY-CASE BASIS  
RULING DID NOT PROVIDE CERTAINTY

*TRUCHON V. PROCUREUR GENERAL DU  
CANADA (2019)*

*CHARTER CHALLENGE*

*THE CHARTER OF RIGHTS AND FREEDOMS IS PART OF THE  
CANADIAN CONSTITUTION*

*THE CHARTER APPLIES TO GOVERNMENT ACTION*

*COURTS INTERPRET THE CHARTER AND RESOLVE CHARTER  
DISPUTES*

*TRUCHON V. PROCUREUR GENERAL DU  
CANADA (2019)*

SECTION 7: RIGHT TO LIFE, LIBERTY AND SECURITY OF THE  
PERSON (PERSONAL SECURITY)

SECTION 15: EQUALITY BEFORE AND UNDER LAW AND EQUAL  
PROTECTION AND BENEFIT OF LAW

SECTION 1: LIMITS OR RESTRICTS PROTECTED RIGHTS AND  
FREEDOMS IN CIRCUMSTANCES THAT ARE “DEMONSTRABLY  
JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY”

*TRUCHON V. PROCUREUR GENERAL DU  
CANADA (2019)*

“THE COURT FINDS THAT THE STATUTORY PROVISION REQUIRING NATURAL DEATH BE REASONABLY FORESEEABLE **INFRINGES LIFE, LIBERTY AND SECURITY OF THE PERSON GUARANTEED BY SECTION 7 OF THE CHARTER** TO MR. JEAN TRUCHON AND MS. NICOLE GLADU, IN A MANNER INCONSISTENT WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE”

*TRUCHON V. PROCUREUR GENERAL DU  
CANADA (2019)*

PROVISION ALSO CREATES AN UNJUSTIFIABLE  
DISTINCTION BASED ON PHYSICAL DISABILITY AND  
THEREFORE **INFRINGES SECTION 15 OF THE  
CHARTER, WHICH GUARANTEES EQUAL TREATMENT  
BEFORE AND UNDER THE LAW**



*TRUCHON V. PROCUREUR GENERAL DU  
CANADA (2019)*

BOTH INFRINGEMENTS **NOT JUSTIFIED UNDER  
SECTION 1 OF THE CHARTER**, WHICH COVERS  
CIRCUMSTANCES IN WHICH PROTECTED RIGHTS AND  
FREEDOMS MAY NONETHELESS BE LIMITED OR  
RESTRICTED

# *TRUCHON: THE FACTS*

- ❖ **Jean Truchon:** 51-year old man with spastic cerebral palsy and tripareisis since birth, paralyzed except for left arm, with cognitive and mental function intact
  - ❖ Developed severe spinal stenosis and myelomalacia (a degenerative condition)
- ❖ **Nicole Gladu:** 73-year old woman affected by poliomyelitis at an early age, now with residual paralysis and severe scoliosis and deformation of spinal column
- ❖ Both met all criteria but the reasonably foreseeable natural death / end of life requirements

“Mr. Truchon is not suicidal. His desire to end his life appears considered and is an act of dignity in a situation of intolerable suffering... [His] testimony...was dignified and modest, while expressing undeniable and palpable suffering”

Ms. Gladu testified with “determination and courage”. She is “an intelligent woman, a fighter with determination that inspires admiration, esteem and respect. At times a little mischievous, she has displayed lucidity and courage throughout her life”

## *TRUCHON: SECTION 7*

IN WHAT WAY DOES THE NATURAL DEATH BE  
REASONABLY FORESEEABLE INFRINGE LIFE, LIBERTY  
AND SECURITY OF THE PERSON GUARANTEED BY  
SECTION 7 OF THE CHARTER?

# SECTION 7 (LAWYERS' VERSION)

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



TOO WORDY!

# SECTION 7 (THE PEOPLES' VERSION)

THE GOVERNMENT **CAN** TAKE AWAY YOUR **LIFE**,  
**LIBERTY** OR **PERSONAL SECURITY** SO LONG AS  
THEY **DON'T** VIOLATE SOMETHING CALLED  
**FUNDAMENTAL JUSTICE**

EVERYONE?

YES, EVERYONE WHO IS PRESENT IN CANADA  
(INCLUDING REFUGEES AND IMMIGRANTS) **BUT NOT**  
**CORPORATIONS AND FETUSES**



# HOW MOST OF US THINK SECTION 7 WORKS



SECTION 7 DOES NOT CREATE **ABSOLUTE RIGHTS**



# HOW SECTION 7 REALLY WORKS



OKAY, BUT HOW DID  
THEY DO IT?



# SECTION 7 TOYS

LIFE

LIBERTY

PERSONAL SECURITY  
(BODILY INTEGRITY)

LIFE

GOVERNMENT ACTION CANNOT CAUSE DEATH

OR INCREASE THE RISK OF DEATH,  
DIRECTLY OR INDIRECTLY

*UNLESS IF DONE IN A WAY THAT JIVES WITH  
FUNDAMENTAL JUSTICE*

EXAMPLES: DEATH PENALTY; FORCING PATIENTS TO  
WAIT TOO LONG FOR MEDICAL CARE

# LIFE AS INTERPRETED IN *CARTER*

THE LAW INCREASES THE RISK THAT  
SOMEONE WILL TAKE HER OWN LIFE

BEFORE SHE GETS TO A POINT WHERE SHE  
HAS TO SEEK HELP TO DIE

# LIFE AS INTERPRETED IN *TRUCHON*

NATURAL DEATH REQUIREMENT HAS THE SAME  
EFFECT

MIGHT FORCE A PERSON TO TAKE THEIR OWN  
LIFE PREMATURELY FOR FEAR OF LOSING  
ABILITY TO DO SO LATER

# LIBERTY

GOVERNMENT CANNOT PHYSICALLY RESTRAIN YOU

OR DEPRIVE YOU OF PERSONAL AUTONOMY (THE RIGHT TO MAKE FUNDAMENTAL PERSONAL CHOICES)



*UNLESS IF DONE IN A WAY THAT  
JIVES WITH FUNDAMENTAL JUSTICE*

EXAMPLES: IMPRISONMENT;  
FORCED MEDICAL TREATMENT

# LIBERTY

NATURAL DEATH REQUIREMENT PREVENTS  
APPLICANTS FROM EXERCISING AUTONOMY THAT  
REFLECTS THEIR VALUE AND DIGNITY



# PERSONAL SECURITY

GOVERNMENT ACTION CANNOT (*UNLESS FUNDAMENTAL JUSTICE*):

- NEGATIVELY AFFECT YOUR HEALTH AND SAFETY
- DEPRIVE YOU OF CONTROL OVER YOUR BODY
- CAUSE YOU PHYSICAL OR PSYCHOLOGICAL SUFFERING

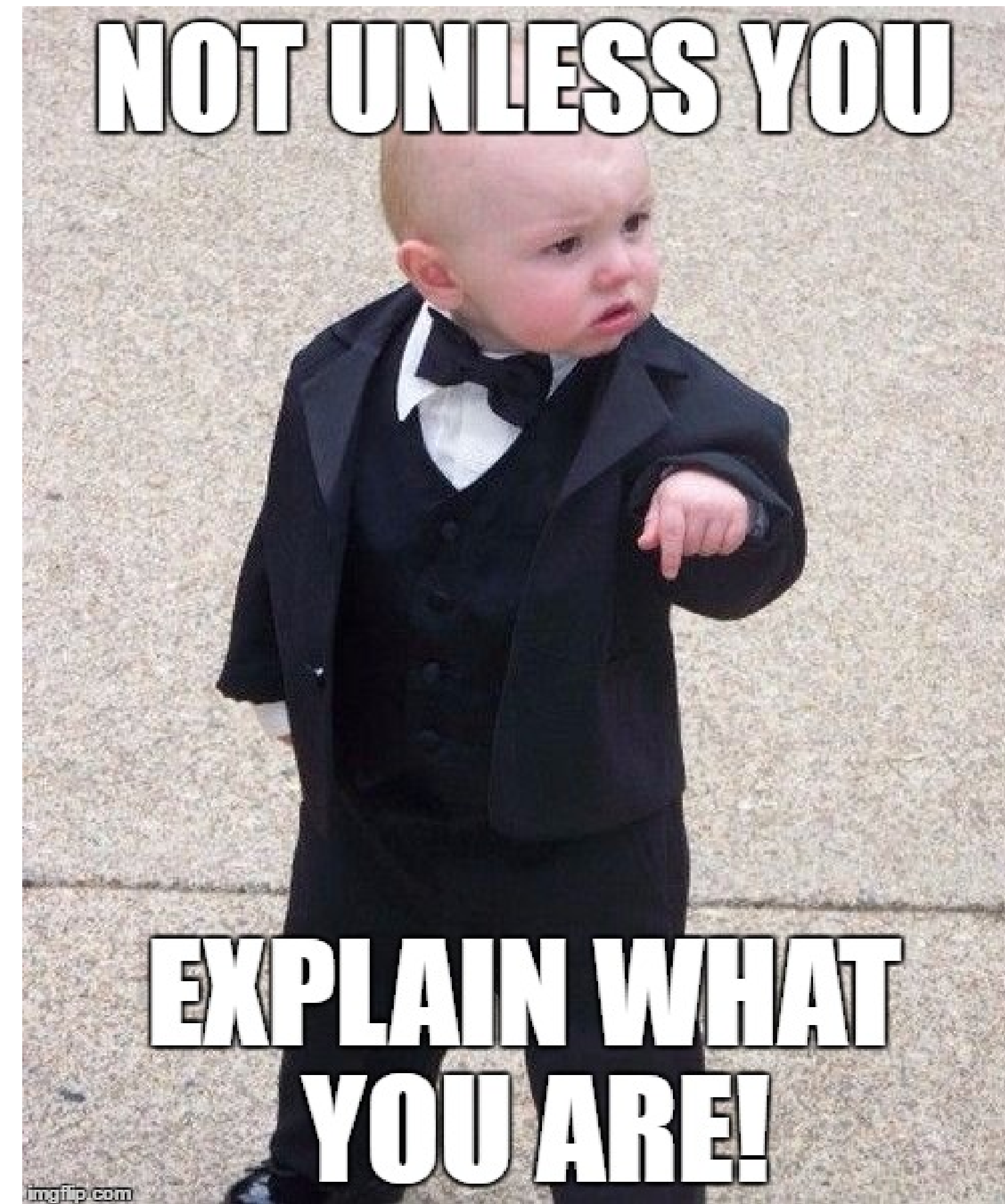
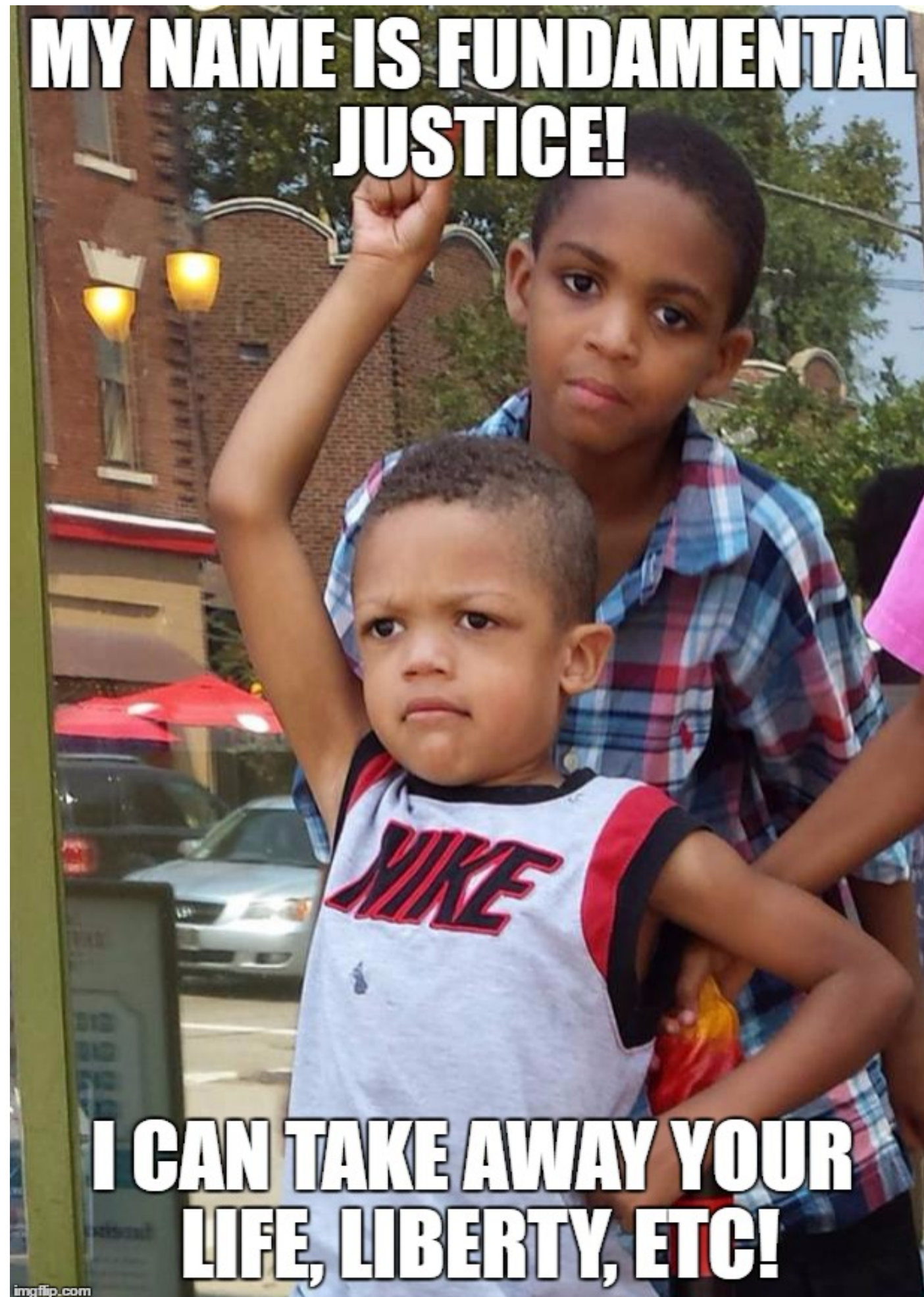
EXAMPLES: PHYSICAL DISCIPLINE OF CHILDREN; LAWS RESTRICTING ABORTION



# PERSONAL SECURITY

DIRECTLY INTERFERES WITH THEIR ABILITY TO  
CONTROL PHYSICAL INTEGRITY

# FUNDAMENTAL JUSTICE!



# FUNDAMENTAL JUSTICE

NO PRECISE MEANING

HOW AND WHY THE GOVERNMENT DOES THINGS IN  
A LEGAL SYSTEM LIKE OURS

SO, BASICALLY WHAT THE JUDGE ATE FOR  
BREAKFAST THIS MORNING, RIGHT?



# FUNDAMENTAL JUSTICE

ESSENTIAL ELEMENTS OF OUR SYSTEM OF JUSTICE

SOMETHING THAT STRIKES THE **RIGHT BALANCE**  
BETWEEN PERSONAL AND SOCIETAL INTERESTS

SOMETHING THAT IS GENERALLY ACCEPTED BY  
REASONABLE PEOPLE

SOMETHING THAT IS PART OF OUR LEGAL HISTORY  
AND TRADITIONS

# FUNDAMENTAL JUSTICE

MUST BE A LEGAL PRINCIPLE

MUST BE SUPPORTED BY SIGNIFICANT SOCIETAL  
CONSENSUS

MUST BE SOMETHING WE CAN IDENTIFY AND APPLY

# HOW CAN WE TELL IF GOVERNMENT HAS VIOLATED FUNDAMENTAL JUSTICE?



# VIOLETIONS OF FUNDAMENTAL JUSTICE

GOVERNMENT ACTION THAT CANNOT FULFILL ITS  
OWN OBJECTIVES

IT DOES NOT ACTUALLY SERVE THE PUBLIC  
INTEREST IT IS SEEKING TO PROTECT

IT IS ARBITRARY  
(HEAD DOES NOT CONNECT TO TAIL)

OBJECTIVE IS TO PROTECT VULNERABLE PERSONS IN  
MOMENT OF WEAKNESS – NOT ARBITRARY

# VIOLETATIONS OF FUNDAMENTAL JUSTICE

GOVERNMENT ACTION GOES TOO FAR

IT TAKES AWAY MORE THAN IT NEEDS TO  
ACCOMPLISH ITS PURPOSE

IT IS OVERBROAD

THE REQUIREMENT IS OVERBROAD BECAUSE IT DENIES  
ACCESS TO PERSONS *WHO ARE NOT VULNERABLE*



# VIOLETIONS OF FUNDAMENTAL JUSTICE

GOVERNMENT ACTION THAT DOES SOMETHING  
THAT IS NOT IN THE INTEREST OF THE STATE  
OR DOES SO IN A MANNER THAT IS TOO EXTREME

IT IS GROSSLY DISPROPORTIONATE TO A  
LEGITIMATE STATE INTEREST OR TO THE  
OBJECTIVE OF THE LAW

THE HARM TO RIGHTS OUTWEIGHS THE BENEFIT  
TO SOCIETY

GROSSLY DISPROPORTIONATE?

YES, BECAUSE IT FORCES PEOPLE TO CONTINUE LIVING IN INTOLERABLE PAIN, AGAINST THEIR WILL

THIS IS WHAT *CARTER* SOUGHT TO PREVENT

# VIOLETATIONS OF FUNDAMENTAL JUSTICE

LAW THAT IS **VAGUE**

THOSE SUBJECT TO IT CANNOT MAKE HEADS OR  
TAILS OF IT

NO CLEAR STANDARDS FOR ENFORCEMENT

# BILL C-7: PROPOSED AMENDMENTS

INTRODUCED FEBRUARY 24, 2020

REASONABLY FORESEEABLE NATURAL DEATH  
PROVISION REPEALED (*WELL, SORT OF*)

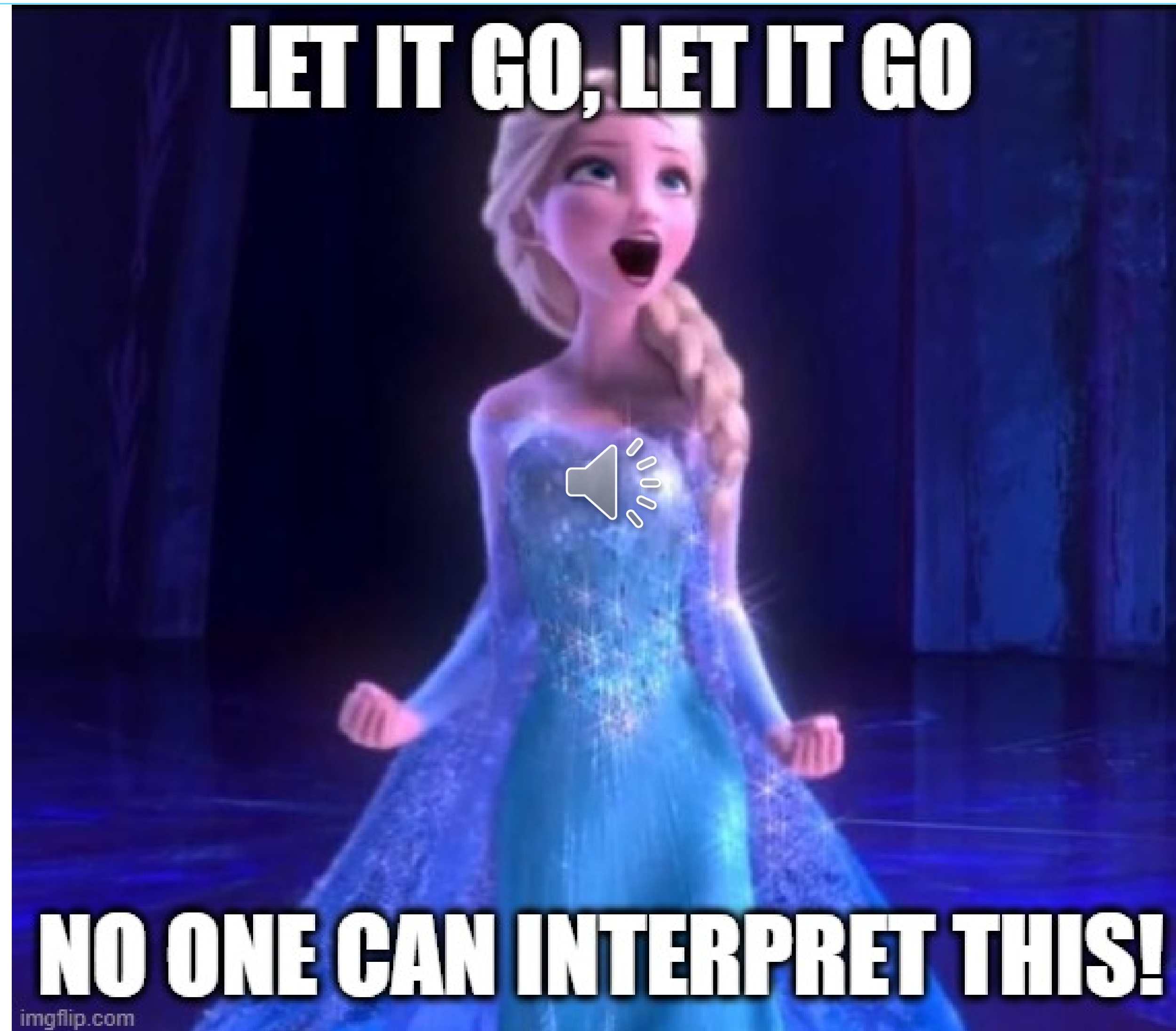
IT'S ALL ABOUT THE **SAFEGUARDS**

# BILL C-7: PROPOSED AMENDMENTS

IF YOUR NATURAL DEATH IS NOT REASONABLY  
FORESEEABLE, **NEW AND STRENGTHENED**  
**SAFEGUARDS** APPLY

IF YOUR NATURAL DEATH IS REASONABLY  
FORESEEABLE, **EXISTING AND EASED SAFEGUARDS**  
APPLY

# BILL C-7: PROPOSED AMENDMENTS



**EXISTING AND EASED SAFEGUARDS (*WHERE  
NATURAL DEATH IS REASONABLY FORESEEABLE*)**

10-DAY REFLECTION PERIOD REMOVED

FINAL CONSENT REQUIREMENT CAN BE WAIVED IF  
THERE IS A RISK OF LOSS OF DECISION-MAKING  
CAPACITY

PAID PROFESSIONAL PERSONAL OR HEALTHCARE  
WORKER CAN BE INDEPENDENT WITNESS

**NEW AND STRENGTHENED SAFEGUARDS (*WHERE  
NATURAL DEATH NOT REASONABLY FORESEEABLE*)**

ONE OF THE CLINICIANS INVOLVED IN PROCEDURE MUST  
BE AN EXPERT IN THE MEDICAL CONDITION IMPLICATED

INFORMATION AND DISCUSSION REGARDING ALTERNATIVE  
MEANS OF ALLEVIATING SUFFERING

ELIGIBILITY ASSESSMENTS MUST TAKE A MINIMUM OF 90  
DAYS, UNLESS ASSESSMENTS HAVE BEEN COMPLETED  
AND LOSS OF CAPACITY IS IMMINENT

FINAL CONSENT MUST BE PROVIDED BEFORE  
ADMINISTRATION OF MAID



# THE LIMITS OF CONSCIENTIOUS OBJECTION: A PREVIEW

CPSO POLICY REQUIRING PHYSICIANS TO PROVIDE  
AN “EFFECTIVE REFERRAL” TO ANOTHER PROVIDER

REFERRAL MADE IN GOOD FAITH, TO A NON-  
OBJECTING, AVAILABLE, AND ACCESSIBLE  
PHYSICIAN, NURSE PRACTITIONER OR AGENCY

“[T]he impugned policies...represent a compromise. They strike a reasonable balance between patients’ interests and physicians’ *Charter*-protected religious freedom. **In short, they are reasonable limits prescribed by law that are demonstrably justified in a free and democratic society.**”

QUESTIONS?