

# UPDATE ON MEDICAL ASSISTANCE IN DYING (MAiD)

Manitoba Bar Association Elder Law Section December 21, 2020

Since the federal legislation was passed June 17, 2016:

Medical Assistance in Dying (MAiD) is available throughout Manitoba and is coordinated provincially by Shared Health. A provincial medical assistance in dying team is available to help patients access this service. Patients may speak with their health care provider or local health authority or directly contact the provincial MAiD team regarding accessing medical assistance in dying in their region. (from the Shared Health website)

But we expected challenges to the legislation. As a result of the decision in *Truchon v Attorney General*, 2018 QCCS 317, the federal government had (after two extensions) until December 18, 2020 to revise the law with regard to MAiD to conform with the ruling.

*drumroll.....*

On December 17, 2020, The Superior Court of Quebec granted the federal government a further extension, to February 26, 2021, on its deadline to come up with new legislation on MAiD.

That's it, that's the update, everyone collect their CLE points and go home.

# HOW DID WE GET HERE?

*Carter v. Canada (Attorney General)* 2015 SCC 5

- Ruled that section 14 and paragraph 241(b) of the *Criminal Code* were unconstitutional because they prohibited physicians from assisting in the consensual death of another person.
- insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. “Irremediable”, [they added]..., does not require the patient to undertake treatments that are not acceptable to the individual.” (para 127)

# GOVERNMENT RESPONSE TO *CARTER*

- Federal government established the External Panel on options for a Legislative Response to *Carter*.
- June 17, 2016 amendments to the *Criminal Code* came into effect pursuant to Bill C-14.

MAiD IS DEFINED IN SECTION 241.1 OF THE *CRIMINAL CODE* AS:

- (a) The administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death;  
or
- (b) The prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.

# Eligibility for medical assistance in dying

**241.2** (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

- (a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;
- (b) they are at least 18 years of age and capable of making decisions with respect to their health;
- (c) they have a grievous and irremediable medical condition;
- (d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and
- (e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.



# Grievous and irremediable medical condition

(2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(a) they have a serious and incurable illness, disease or disability;

(b) they are in 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) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

# COMPARISON OF *CARTER* DECISION WITH *CRIMINAL CODE* PROVISIONS

*Carter* did not use these limiting phrases:

- incurable
- advanced state of irreversible decline in capability
- reasonably foreseeable

## ISSUES NOT COVERED IN THE LEGISLATION AND LEFT TO BE DECIDED

- mature minors
- advance requests
- mental illness as sole underlying condition

## FURTHER COURT CHALLENGES

- Due to the fact the legislation included limitations that were not part of the *Carter* decision it was inevitable that there would be further challenges.
- *Truchon v Attorney General*, 2018 QCCS 317

## *Truchon v Attorney General*, 2018 QCCS 317

- Plaintiffs (Jean Truchon and Nicole Gladu) were seeking MAiD and met all the criteria except their deaths were not “reasonably foreseeable”.
- It was a challenge to both the federal legislation (which included the reasonably foreseeable provision) and the Quebec MAiD legislation (which required that a person be at the “end of life”).

- The argument was that the laws violated their Charter rights as the legislation was too restrictive.
- Justice Christine Baudouin found that “reasonably foreseeable” and “end of life” were in breach of the Charter and struck them down. She delayed the implementation of her decision to allow the governments time to comply. As indicated, we are now on the third extension.
- Neither the federal nor the Quebec governments appealed the decision
- Currently the *Truchon* decision is only applied in Quebec.

# BILL C-7 – AN ACT TO AMEND THE CRIMINAL CODE

- <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10875380>
- As with its previous legislation, the federal government is trying to strike a balance between a number of competing interests. The Justice Department website sets out those interests:
  - the autonomy of individuals who wish to seek MAiD
  - the protection of vulnerable individuals from being induced end their lives
  - the need to address suicide as a public health issue

# THE AMENDMENTS:

- Seek to allow MAiD in circumstances where death is not reasonably foreseeable. Now essentially two tracks. One where death is reasonably foreseeable and one where death is not reasonably foreseeable.
- Continues to prohibit MAiD where an individual's sole underlying medical condition is mental illness ("mental illness" is excluded from the definition of "serious and incurable illness, disease, or disability"). Allowed where mental illness is a co-morbidity.
- Reduces necessity of two witnesses to one.
- Removes 10 day waiting period.
- Final consent waiver.
- Advance request for failed self-administration.



# PREVIOUS SAFEGUARDS

## Safeguards

- (3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must
- (a) be of the opinion that the person meets all of the criteria set out in subsection (1);
  - (b) ensure that the person's request for medical assistance in dying was
    - (i) made in writing and signed and dated by the person or by another person under subsection (4), and
    - (ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;
  - (c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before two independent witnesses who then also signed and dated the request;
  - (d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

# PREVIOUS SAFEGUARDS

- (e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);
- (f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;
- (g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or — if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;
- (h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and
- (i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

# NOW TWO DIFFERENT SETS OF SAFEGUARDS

- One where death is reasonably foreseeable and one where death is not reasonably foreseeable.
- For “track 1” the previous safeguards remain in place with two changes
  - Only 1 witness is required for the person’s written request for MAiD
  - The 10 day waiting period is eliminated.

## WHERE DEATH IS NOT REASONABLY FORESEEABLE

Same safeguards with some added (or clarified) provisions:

- Minimum 90 day assessment period (which begins after the individual's suffering becomes intolerable)
- Extensive requirement to offer services and supports
- Second eligibility assessment by a practitioner with expertise in the condition causing the person's suffering

## NEXT STEP

- Bill C-7 did pass in the House of Commons and is currently before the Senate.
- Deadline for bringing the legislation in line with the *Truchon* decision is February 26, 2021.

## ISSUES STILL NOT COVERED IN THE LEGISLATION AND LEFT TO BE DECIDED

- mature minors
- advance requests where death is not yet reasonably foreseeable
- mental illness as sole underlying condition

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