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# Medical Assistance in Dying: the State of the Law in 2019

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# MEDICAL ASSISTANCE IN DYING: THE STATE OF THE LAW IN 2019



## I. Introduction

Since 2016, Canadians planning for end-of-life decisions have been able to consider the option of medical assistance in dying ("**MAiD**"). In British Columbia, every health authority offers assistance to residents looking to connect with practitioners prepared to provide this option.

Over twenty years after the *Rodriguez*[1] decision, the Supreme Court of Canada ruled unanimously in *Carter v. Canada (Attorney General)*,[2] that the absolute prohibition on the provision of medical assistance in dying unjustifiably infringed section 7 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") and issued the following declaration of invalidity:

> The appropriate remedy is therefore a declaration that section 241(b) and section 14 of the *Criminal Code* are void 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.[3]

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1 Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519.

2 2015 SCC 5 ("**Carter**").

3 2015 SCC 5 at para. 127.

The Court suspended the declaration of invalidity in order to provide the federal government with time to craft an appropriate legislative response. Subsequently, on June 17, 2016, the federal government enacted new legislation governing medical assistance in dying (the "**MAiD Legislation"**). Since its enactment, the most recently published data from the federal government indicates that, as of October 31, 2018, there have been 6,749 medically assisted deaths in Canada.[4]

This first part of this paper sets out the legal framework under the MAiD Legislation and touches on some of the limitations it prescribes in terms of eligibility for MAiD.

The second part of this paper addresses the current state of the law and highlights aspects of the MAiD Legislation that are likely to change based on recent and pending court decisions, the federal government's interim reports on MAiD, and the independent reviews it engaged to review specific types of requests for MAiD.

A particular focus of this paper will be two recent developments in the law arising from litigation in Quebec and British Columbia. The first is the Quebec decision in *Truchon,*[5] in which the court declared that the "reasonably foreseeable" requirement in the MAiD Legislation is unconstitutional, violating sections 7 and 15 of the *Charter*. In that case the Court suspended the declaration of invalidity for six months to provide the federal government time to respond; however, it is likely this decision will be appealed, so it may be some time before there is settled law on those issues. If the federal government does not appeal the Court's findings in *Truchon,* then the reasonably foreseeability requirement of the *Criminal Code* will no longer be a barrier to qualifying for MAiD in Quebec and would potentially be influential elsewhere, although not binding.

The second development concerns the constitutional challenge to the "reasonably foreseeable" requirement brought by Julie Lamb and the British Columbia Civil Liberties Association ("**BCCLA**"). Ms Lamb suffers from spinal muscular atrophy, and it was previously thought that she would not qualify for MAiD despite the degenerative nature of her condition on the basis that MAiD providers would not likely be able to make the finding that her death was "reasonably foreseeable".

The matter was scheduled to be heard in November of 2019, but was adjourned following the Attorney General of Canada furnishing expert evidence indicating that Ms. Lamb could likely qualify for MAiD by expressing a certain intent to stop preventive care and to refuse treatment for the inevitable ensuing infection. This development in the *Lamb* proceedings[6] indicates the federal government has adopted a broader policy definition of what constitutes a "reasonably foreseeable" death than was previously understood to be the case pursuant to the MAiD Legislation. This apparent broadening of the scope of who may access MAiD appears to be based, at least in part, on some degree of consensus being reached in the medical community in the three years since the MAiD Legislation was enacted as to the proper meaning of reasonably foreseeable natural death.

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4 Between December 10, 2015 and October 31, 2018, excluding medically assisted deaths in the territories and relying on the available data for Quebec.

5 Truchon c. Procureur général du Canada, 2019 QCCS 3792 ("**Truchon**").

6 Lamb v. Canada (Attorney General), 2017 BCSC 1802 and 2018 BCCA 266 ("**Lamb**").

# II. Medical Assistance in Dying Legislation

## A. Federal Regulation of Medical Assistance in Dying: the MAiD Framework

### 1. Definitions

The MAiD Legislation introduced a number of new definitions into the *Criminal Code*.

Section 241.1 of the *Criminal Code* defines the umbrella term ‘‘medical assistance in dying’’ as encompassing both:

(1) voluntary euthanasia (i.e., the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death); and

(2) assisted suicide (i.e., 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).

Section 241.1 of the *Criminal Code* defines a “medical practitioner” as a person who is entitled to practise medicine under the laws of a province and a “pharmacist” as a person who is entitled to practise pharmacy under the laws of a province. This section defines a “nurse practitioner” as a registered nurse who is entitled to practise as a nurse practitioner (or an equivalent designation) under the laws of a province who can autonomously make diagnoses, order and interpret diagnostic tests, prescribe substances and treat patients.

### 2. Criminal Exemptions

The MAiD Legislation exempts specified persons for criminal liability arising from the provision of medical assistance in dying.

#### a. Culpable Homicide

Pursuant to section 222(5) of the *Criminal Code*, a person commits culpable homicide when he or she causes the death of a human being:

(a) by means of an unlawful act;

(b) by criminal negligence;

(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or

(d) by wilfully frightening that human being, in the case of a child or sick person.

By virtue of section 14 of the *Criminal Code*, consent to death is not a defence to culpable homicide.

Sections 227(1) and (2) of the *Criminal Code* clarify that the following persons are exempt from liability for culpable homicide:

(1) A medical practitioner or nurse practitioner who provides a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code*.

(2) A person who assists a medical practitioner or nurse practitioner to provide a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code.*

Section 227(3) of the *Criminal Code* confirms that the exemptions described above apply even if the person invoking it has a reasonable but mistaken belief about any fact that is an element of the exemption.[7] For example, if a medical practitioner provides medical assistance in dying to a person who did not satisfy the eligibility criteria set out in section 241.2 of the *Criminal Code* (e.g. the person was not 18 years of age), the medical practitioner can still rely on the exemption from culpable homicide if they had a reasonable but mistaken belief that the person who received medical assistance in dying satisfied the eligibility criteria.

## b. Assisted Suicide

Pursuant to section 241(b) of the *Criminal Code*, it is an offence to aid a person to die by suicide. By virtue of section 14 of the *Criminal Code*, consent to death is not a defence to assisted suicide.

Sections 241(2) through (5.1) of the *Criminal Code* clarify that the following persons are exempt from liability under section 241(b) of the *Criminal Code:*

(1) A medical practitioner or nurse practitioner who provides a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code*.[8]

(2) A person who assists a medical practitioner or nurse practitioner to provide a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code.*[9] This includes any person (e.g. a social worker or health care professional) who provides the patient with information on the lawful provision of medical assistance in dying.[10]

(3) A pharmacist who dispenses a substance to a person other than a medical practitioner or nurse practitioner further to a prescription that is written by such a practitioner for the purpose of providing medical assistance in dying in accordance with section 241.2 of the *Criminal Code.*[11]

(4) A person who assists a patient to self-administer a substance as part of the provision of medical assistance in dying in accordance with section 241.2 of the *Criminal Code,* provided the patient has explicitly requested that person's assistance.[12]

Section 241(6) of the *Criminal Code* confirms that the exemptions described above apply even if the person invoking it has a reasonable but mistaken belief about any fact that is an element of the exemption.[13]

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7 *Criminal Code*, s. 227(3).

8 *Criminal Code*, s. 241(2).

9 *Criminal Code*, s. 241(3).

10 *Criminal Code*, s. 241(5.1).

11 *Criminal Code*, s. 241(4).

12 *Criminal Code*, s. 241(5).

## c. Administering a Noxious Thing

Pursuant to section 245(1) of the *Criminal Code*, it is an offence to administer, cause to be administered to any person, or cause any person to take, poison or any other destructive or noxious thing.

Section 245(2) of the *Criminal Code* clarifies that the following persons are exempt from criminal liability under section 245(1) of the *Criminal Code:*

(1) A medical practitioner or nurse practitioner who provides a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code*.[14]

(2) A person who assists a medical practitioner or nurse practitioner to provide a patient with medical assistance in dying in accordance with section 241.2 of the *Criminal Code.*[15]

## 3. Eligibility Criteria

The MAiD Legislation sets out detailed eligibility criteria for the receipt of medical assistance in dying.

Section 241.2(1) of the *Criminal Code* states that a person may only receive medical assistance in dying if they meet all of the following five 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;[16]

(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.

Section 241.2(2) of the *Criminal Code* provides that a person must satisfy all of the following four criteria to have a "grievous and irremediable medical condition":

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

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13 *Criminal Code*, s. 241(6).

14 *Criminal Code*, s. 245(2)(a).

15 *Criminal Code*, s. 245(2)(b).

16 This requirement is intended to prevent foreigners from visiting Canada to obtain medical assistance in dying.

(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.

## 4. Procedural Safeguards

The MAiD Legislation sets out a number of procedures that must be followed during the provision of medical assistance in dying.

Section 241.2(3) of the *Criminal Code* states that, 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;

(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.

Sections 241.2(4) and (5) of the *Criminal Code* clarify the procedural requirement set out in section 241.2(3)(c) of the *Criminal Code*. These sections respectively provide that:

(1) If a patient requesting medical assistance in dying is physically unable to sign and date their request, another person may sign and date the request on the patient's behalf, provided the person is at least 18 years of age, understands the nature of the request for medical assistance in dying, and does not know or believe that they are a beneficiary under the will of the patient making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that patient's death.

(2) Any person who is at least 18 years of age and who understands the nature of the request for medical assistance in dying may witness a patient's request for medical assistance in dying, except if they:

(a) know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death;

(b) are an owner or operator of any health care facility at which the person making the request is being treated or any facility in which that person resides;

(c) are directly involved in providing health care services to the person making the request; or

(d) directly provide personal care to the person making the request.

Section 241.2(6) of the *Criminal Code* clarifies the procedural requirement set out in section 241.2(3)(f) of the *Criminal Code*. This section provides that the medical practitioner or nurse practitioner providing medical assistance in dying and the medical practitioner or nurse practitioner who provides the opinion referred to in section 241.2(3)(e) of the *Criminal Code* are independent if they:

(a) are not a mentor to the other practitioner or responsible for supervising their work;

(b) do not know or believe that they are a beneficiary under the will of the person making the request, or a recipient, in any other way, of a financial or other material benefit resulting from that person's death, other than standard compensation for their services relating to the request; and

(c) do not know or believe that they are connected to the other practitioner or to the person making the request in any other way that would affect their objectivity.

Section 241.2(7) of the *Criminal Code* states that medical assistance in dying must be provided with reasonable knowledge, care and skill and in accordance with any applicable provincial laws, rules or standards.

Section 241.2(8) of the *Criminal Code* requires a medical practitioner or nurse practitioner who obtains a substance from a pharmacist for the purpose of providing medical assistance in dying to provide prior notice to the pharmacist of the use to which the substance will be put.

## 5. New Criminal Offences

The MAiD Legislation introduced new criminal offences into the *Criminal Code*.

Section 241.3 of the *Criminal Code* sets out a new offence for **knowingly** failing to comply with the procedural requirements set out in sections 241.2(3)(b) through (i) and section 241.2(8) of the *Criminal Code*. A person guilty of an offence under section 241.3 is liable on conviction on indictment to a term of imprisonment of not more than 5 years or, on summary conviction, to a term of imprisonment of not more than 18 months.

Sections 241.4(1) and (2) of the *Criminal Code* set out new offences for:

(1) committing forgery in relation to a request for medical assistance in dying; and

(2) destroying a document that relates to a request for medical assistance in dying with intent to interfere with:

  (a) another person's access to medical assistance in dying;

  (b) the lawful assessment of a request for medical assistance in dying; or

  (c) another person invoking an exemption under any of subsections 227(1) or (2), 241(2) to (5) or 245(2) of the *Criminal Code*.

A person guilty of an offence under section 241.4(1) or (2) is liable on conviction on indictment to a term of imprisonment of not more than 5 years or, on summary conviction, to a term of imprisonment of not more than 18 months.

# III. Current State of the Law and Anticipated Changes

We previously predicted that a number of the eligibility and procedural requirements set out in sections 241.2(1) through (8) of the *Criminal Code* would be challenged on the grounds that they do not comply with the *Charter*, including the age requirement, the requirement that a person be in an advanced state of irreversible decline and that their death is reasonably foreseeable, and that the person be able to give present consent.

The MAiD Legislation itself included obligations for the federal government to initiate independent reviews on particular issues relating to MAiD that were outside the scope of the MAiD Legislation, including requests by mature minors, advance directives, and requests where mental illness is the sole underlying medical condition. On December 13, 2016, the federal government engaged the Council of Canadian Academies ("**CCA**") to conduct these reviews, and on December 12, 2018, final reports on these reviews were tabled in Parliament. However, the reports merely synthesized evidence on the three issues in order to inform further debate and potential legislative action; no concrete recommendations were made.

The MAiD Legislation also required that the federal government review the legislation by 2021. It is not clear yet what exactly the mandate of the committee tasked with that review will be or what its recommendations will be, in particular since there may be a change in government before this takes place; however, based on recent outcomes in court challenges to the MAiD Legislation and issues that have arisen since its enactment, in addition to the CCA reports, there are some key issues that will likely be considered.

## A. A "Reasonably Foreseeable" Natural Death

Since the MAiD Legislation was introduced, critics have argued that the requirement that natural death be reasonably foreseeable[17] for individuals to be eligible for MAiD was overly restrictive and inconsistent with the Supreme Court of Canada's decision in *Carter*, which did not include a requirement that eligible persons be near death or suffering from terminal illnesses. Rather the Supreme Court of Canada suggested an arguably more permissive approach that would make it available for competent adults with "grievous and irremediable" medical conditions that caused enduring suffering they find intolerable.

There were also concerns about the proper interpretation of this requirement and whether MAiD assessors and providers would be reluctant to or struggle to properly apply it in practice. That was the subject of the 2017 Ontario superior court decision, *A.B. v Canada (Attorney General).*[18]

In *A.B.,* two physicians agreed that A.B.'s death was reasonably foreseeable and that she met the eligibility requirements for MAiD. However, one physician was unwilling to assist A.B. with MAiD despite his view that her death was reasonably foreseeable from a "medical point of view" because he was concerned that term in the statute was vague and he was unwilling to risk overstepping the bounds for permissible MAiD.[19]

In light of this dilemma, the court clarified the meaning of the expression "natural death has become reasonably foreseeable" so that physicians would know how to comply with the law.[20] Among other things, the court stated that "that natural death need not be imminent and that what is a reasonably foreseeable death is a person-specific medical question to be made without necessarily making, but not necessarily precluding, a prognosis of the remaining lifespan".[21]

With respect to the meaning of "natural death", the court went on to state "that the foreseeability [sic] of the death must be connected to natural causes, which is to say about causes associated with the functioning or malfunctioning of the human body" and that "the natural death need not be connected to a particular terminal disease or condition and rather is

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17 *Criminal Code*. s. 241.2(2)(d).

18 *A.B. v Canada (Attorney General)*, 2017 ONSC 3759

19 *Ibid* at para. 61.

20 *Ibid* at para. 75.

21 *Ibid* at para. 79.

connected to all of a particular person's medical circumstances."[22] It "encompasses, on a case-by-case basis, a person who is on a trajectory toward death because" that person:

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

(b) is in an advanced state of irreversible decline in capability; and

(c) is enduring physical or psychological suffering that is intolerable and that cannot be relieved under conditions that they consider acceptable.[23]

The court confirmed that there may be cases where there is doubt as to whether they meet the eligibility criteria, but the case of A.B., which involved "an almost 80 year old woman in an advanced state of incurable, irreversible, worsening illness with excruciating pain and no quality of life", clearly fell within the ambit of the federal legislation. A major emphasis of the court's decision was the expertise of physicians to determine whether the eligibility criteria are satisfied, including whether an individual's natural death is reasonably foreseeable, and the caution that this is a task for medical practitioners, not a task for the court.[24]

Following *A.B.*, in December 2018, the College of Physicians and Surgeons of Nova Scotia, in its "Professional Standard Regarding Medical Assistance in Dying", adopted the court in *A.B.*'s definition of reasonably foreseeable natural death and advised that "natural death will be reasonably foreseeable if a medical nurse of practitioner is of the opinion that a patient's natural death will be sufficiently soon **or** that the patient's cause of natural death has become predictable".[25] In British Columbia, the College of Physicians and Surgeons ("**CPSBC**") PSBC's Practice Standard states that a prognosis as to the specific length of time an individual has remaining in his or her life is not necessary to satisfy the reasonably foreseeable death requirement.[26]

In September of 2019 there were significant developments in two separate constitutional challenges which had been brought in relation to this aspect of the MAiD legislation, one in Quebec and one in British Columbia.

The Quebec challenge, *Truchon,*[27] was brought by two plaintiffs. The first plaintiff, Mr. Truchon (age 51), had spastic cerebral palsy, with gradual weakening of his legs and right arm. His left arm became paralyzed in 2012 and he testified to wanting to die since then. The second plaintiff, Ms. Gladu (age 73), contracted polio when she was four, leaving her with a paralyzed left side and scoliosis. Her condition started to worsen in 1992, weakening her bones and muscles. She testified to now living in constant pain, and having trouble breathing and moving. Both plaintiffs had the capacity to consent and suffered from serious and incurable conditions

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22 *Ibid* at para 81.

23 *Ibid* at para. 83.

24 *Ibid* at para. 88.

25 College of Physicians and Surgeons of Nova Scotia, "Professional Standard Regarding Medical Assistance in Dying", December 14, 2018 at 5.

26 College of Physicians of Surgeons of British Columbia, Practice Standard "Medical Assistance in Dying", effective June 6, 2019, last updated June 20, 2019.

27 *Truchon c. Procureur général du Canada,* 2019 QCCS 3792.

that caused them enduring suffering that they found intolerable, but neither Ms. Gladu nor Mr. Truchon satisfied the reasonable foreseeability of natural death requirement.

The Quebec court held that denying either of them access to assisted dying because they did not satisfy the reasonable foreseeability requirement was causing them to endure harsh physical and psychological suffering and that Parliament's imposition of this requirement was not consistent with the Supreme Court of Canada's decision in *Carter* as that decision did not impose a temporal restriction on the availability of MAiD.

In an unofficial translation, the Quebec court stated:

> The foundation of *Carter* is intended to enable persons, capable of doing so, to put an end to intolerable suffering when they know that they have a serious and incurable disease, that they no longer have any hope for improvement and that they are helpless to the advanced and irreversible decline of their capacities. The teaching of the Supreme Court is not intended to keep alive and against their will, people who, after a while, will naturally arrive at the stage of an imminent death where they can seek medical assistance in dying at the end of unnecessary suffering and at the price of the complete negation of their dignity.

The court in *Truchon* was critical of what it considered to be Parliament's "paternalistic view" of the plaintiffs, and the implication that, because of their disabilities, they could not give valid consent to MAiD because their autonomy was "necessarily compromised by their vulnerability"[28], finding that the full autonomy of persons like the plaintiffs "must be exercisable not only at the end of life but also at any time during their life, even if it means death, when the other eligibility requirements for medical assistance in dying are met".[29]

In view of its findings, the court declared the reasonable foreseeability of natural death requirement to be unconstitutional contravening both sections 7 and 15 of the *Charter*, and suspended the declaration of invalidity for a period of six months from the date of the decision, September 11, 2019, to give Parliament an opportunity to respond. At the time this paper was prepared, the federal government had not yet filed an appeal.

Shortly after the Quebec decision was rendered, the *Lamb* constitutional challenge also made an advance. Ms. Lamb sought an adjournment of her case before the Supreme Court of British Columbia after the Attorney General of Canada submitted expert evidence which confirmed that she would be eligible for MAiD. This opinion flowed from the apparent consensus in the medical community that death does not have to be imminent to be considered reasonably foreseeable for the purposes of the MAiD legislation.

Ms. Lamb is a young woman (age 28) with spinal muscular atrophy, a degenerative neuromuscular condition that results in weakness and wasting of her voluntary muscles. The Attorney General of Canada's expert medical opinion confirmed that, due to the nature of Ms. Lamb's condition, to meet the reasonably foreseeable natural death requirement, all she would need to do was to express certain intent to stop preventive care and to refuse treatment for the infection that would inevitably ensue due to her condition.

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28 2019 QCCS 3792 at para. 680.

29 2019 QCCS 3792 at para. 682.

It had been previously thought that individuals like Ms. Lamb seeking access to MAiD would need to actually refuse such treatment to qualify. The government's reliance on this opinion provided further clarity on the breadth of the expression reasonably foreseeable natural death and confirmed that the demonstration of clear intent to take steps to make natural death predictable, without requiring individuals to actually take those drastic steps, would be sufficient.

Despite these recent developments, the federal government's position on the MAiD legislation has and continues to be that it passed legislation which "struck the right balance between personal autonomy for those seeking access to medically assisted dying and protecting the vulnerable". It is clear from the recent developments in *Truchon* and *Lamb* that any legislative action on the MAiD scheme may need to strike a different balance with respect to personal autonomy in order to pass the courts' scrutiny and the courts' interpretation of what is required by the *Charter*.

## B. Advance Requests

Another area in which MAiD Legislation is expected to evolve is with respect to advance requests or advance directives for MAiD. This was expressly excluded in the MAiD Legislation so that the federal government could consider the issue more closely with the benefit of further evidence. There have yet to be any developments on this issue, however the CCA report does provide some indication of the concerns that will drive any legislative action that may come.

The legislation requires that a medical practitioner must, immediately before providing MAiD, give "the person an opportunity to withdraw their request and ensure that the person gives express consent to receive" MAiD.[30]

Critics have argued this requirement is unduly restrictive in that it prevents individuals who otherwise qualify for MAiD from being able to delay medical assistance to a time of their choosing if there is a risk they will lose their capacity to consent.

The report acknowledges that the waiting period between a determination of eligibility and actual assisted death can be stressful for those concerned that they may lose their capacity in their interim. It also recognizes that the current state of the law may result in individuals scheduling MAiD earlier than they would have otherwise chosen to because of concerns that the option would not be available when they wanted it.

The report also reflects concerns that palliative care options in Canada are inadequate and that many facing significant conditions or living with significant disabilities may make advance directives for MAiD due to a lack of sufficient support to reduce suffering in their daily lives or lack of adequate end-of-life care. It further enumerates the difficulties with ensuring proper safeguards around advance directives and identifies difficult questions that would need to be answered, including how far in advance can someone make the request for MAiD and whether this could be done before the other preconditions for eligibility were met.

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30 *Criminal Code,* s. 241.2(3)(h).

As noted, the report did not provide any recommendations, though it did discuss particular safeguards that could reduce some of the concerns associated with advance requests for MAiD, which include registering advance requests, imposing a requirement to reaffirm advance requests or limit the time that they would be legally valid, and providing professional support for persons creating advance requests, as well as other oversight.

Shortly after the CCA report on advance requests was tabled, on February 6, 2019, a video by Audrey Parker advocating for an "assessed and approved" amendment to the MAiD Legislation was released. The video was released posthumously on the four-year anniversary of the *Carter* decision. Ms. Parker had terminal cancer and died with medical assistance on November 1, 2018. In the video she indicates she chose to cut her life shorter than might have been necessary because she wanted to retain the ability to make the choice of how she died, and was worried about losing the requisite capacity to make that decision later. She had discovered her cancer was moving to the lining of her brain, which meant she could lose her mental capacity and therefore ability to invoke MAiD.

The Audrey Parker proposal is that the MAiD Legislation be amended to allow for advance requests for persons who met all the preconditions for eligibility, such that they could be "assessed and approved" and have their wishes for MAiD be respected even if they subsequently lost their mental capacity to consent.

The federal government has responded publically to the video confirming it is not, at this time, prepared to re-open the MAiD Legislation; however, it will continue to review how the MAiD Legislation is being applied in practice.

## C. Mental Illness as the Sole Condition

Another issue that was left expressly vague in the scope of the MAiD Legislation was whether MAiD should be prohibited or made available to persons where the sole underlying condition is a mental illness. This too was the subject of an independent review by the CCA, which opted to use the language of "mental disorder", a term it stated is more consistent with current clinical and legal practice, rather than the term "mental illness" which is the expression that has been used by the federal government.

The CCA confirmed that under the current MAiD Legislation, people with a mental disorder as their sole underlying medical condition are not excluded from MAID, but that it is unlikely those people would satisfy all of the current eligibility criteria for MAiD. Moreover, the CCA stated that some mental disorders are "serious and incurable", that some may be associated with an advanced state of irreversible decline, and that some can produce enduring and intolerable suffering. However, in most cases where mental disorder is the sole underlying medical condition, the requirement that death be reasonably foreseeable is unlikely to be met.

The CCA noted that the challenge around determining whether to make MAiD available or prohibit it in these cases is how to appropriately balance two risks: ending the life of a person with a mental disorder whose condition could have improved and who would have regained the desire to live, and denying it to a person whose condition would not have improved and who would continue to live with intolerable suffering.

There is also a concern that certain mental disorders can impair a person's ability to rationally reflect on the intolerability and irremediability of their own suffering. The CCA noted that the eligibility criteria in Canada's MAiD Legislation includes an individual's personal assessment of intolerable suffering, and that if it were to make MAiD available to persons suffering from a mental disorder as the sole underlying medical condition, it would be the most permissive jurisdiction with respect to how relief of suffering is evaluated.

The CCA reflected mixed opinions as to whether making MAiD available in these cases would reduce mental health stigma by demonstrating that those with mental disorders have capacity, their suffering is serious, and that their right to self-determination should be respected, or whether it would increase mental stigma by bolstering the belief that those with mental disorders have intolerable lives that are not worth living and are hopeless. They disagreed on whether differential treatment of people with mental disorders is permissible due to unique characteristics of mental disorders as compared to physical disorders, or discriminatory. Ultimately, the CCA provided no recommendations concerning how to strike an appropriate balance between the tensions of respecting autonomy and protecting against vulnerability in these cases.

If MAiD were to be expressly expanded for individuals with mental disorders as the sole underlying medical condition, the CCA suggested several potential safeguards, including psychiatric consultation, multi-disciplinary evaluation, a committee, tribunal or judicial approval process, longer minimum waiting periods between the request for and administration of MAiD, and mandatory reporting and review of cases. However, in offering these options as potential safeguards, the CCA noted that to impose such safeguards for only those with mental disorders as the sole underlying medical conditions, it would need to be demonstrated that this differential treatment was warranted and protecting against risks not faced by those seeking MAiD for physical disorders. It indicated a lack of consensus on this issue.

## D. Faith-Based Institutions and Conscientious Objection

A live issue since the enactment of the MAiD Legislation has been how it would affect faith-based institutions in practice.

Section 241.2(9) of the *Criminal Code* confirms that nothing in section 241.2 of the *Criminal Code* compels an individual to provide or assist in providing medical assistance in dying. This provision was added to the MAiD Legislation by the House of Commons Standing Committee on Justice and Human Rights at the same time as the amendment to the preamble to recognize that everyone has freedom of conscience and religion under section 2 of the *Charter* and that nothing in section 241.2 of the *Criminal Code* affects those freedoms.

The CPSBC Practice Standards recognize the need to strike a balance between patient autonomy and the right of British Columbia's medical practitioners to conscientiously object and abstain from providing medical assistance in dying on the basis of their personal values and beliefs. In a clear attempt to seek a middle ground between patient autonomy and physician rights, the CPSBC Practice Standards state that medical practitioners who conscientiously object to medical assistance in dying are not required to make a formal referral on behalf of their

patients seeking medical assistance in dying; however, they have an overriding duty of care which requires them to provide an effective transfer of care.[31]

Although an effective transfer of care, according to the CPSBC, does not mandate formal referrals, medical practitioners are expected to give their patients sufficient information and assistance to permit them to make informed choices about their care, including advising them that other medical practitioners may be available to them and/or directing them to another agency or health authority.[32]

Similarly, denominational health care facilities are not required to provide MAiD. In BC, for example, the government's agreement with denominational health facilities provides that a denominational facility does not have to provide care inconsistent with its religious mission. Most such facilities have developed procedures to respond to requests for MAiD from their patients or residents.

At this stage, the practices around MAiD with respect to conscientious objectors and faith-based institutions in British Columbia have not been challenged. However, the Ontario Court of Appeal issued a decision in May concerning the requirements on a physician who objects to administering MAiD.[33] While this decision is not binding on practitioners or the courts in British Columbia, some of the commentary in the decision may be relevant if similar concerns are raised in the British Columbia courts.

The subject of the Ontario Court of Appeal decision was a challenge to the policies of the Ontario College of Physicians and Surgeons ("**CPSO**") which required physicians objecting to providing certain medical procedures or pharmaceuticals on the basis of religion or conscience, including MAiD, to make an "effective referral", meaning a referral "made in good faith, to a non-objecting, available, and accessible physician, other health-care professional, or agency."[34] It was argued the effective referral requirements infringed on sections 2(a) and 15 of the *Charter*. The Court of Appeal affirmed the lower court's determination that the policies did infringe on freedom of religion, but that the infringement was a justifiable reasonable limit under s. 1 of the *Charter*.

The Court of Appeal reiterated the evidence of the objecting practitioners that providing a patient with an effective referral for procedures to which they object would be the same as performing the procedure themselves and make them equally complicit.[35] It affirmed the lower court's finding that being compelled to provide an effective referral would be requiring them to abandon their practice area in the face of prosecution for failing to do so.[36] The Ontario Court

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31 College of Physicians and Surgeons of British Columbia, "Practice Standard: Medical Assistance in Dying", June 6, 2016 (revised June 20, 2019) at 6.

32 College of Physicians and Surgeons of British Columbia, "Medical Assistance in Dying FAQs", Februrary 28, 2019 at 1-2.

33 *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393.

34 2019 ONCA 393 at para. 2.

35 2019 ONCA 393 at para. 68.

36 at para. 79.

of Appeal rejected the CPSO's argument that this interference was no more than "trivial or insubstantial", however affirmed the lower court's finding that the CPSO had demonstrated this interference was a reasonable limit. The court identified that the pressing and substantial objective of the effective referral requirement was "the facilitation of equitable [patient] access to [health care] services"[37] finding that physicians are "gatekeepers" in a publicly-funded health care system and have duties not to abandon their patients and to put the interests of their patients ahead of their own.[38]

The Ontario Court of Appeal commented on the specific vulnerability of patients seeking MAiD, which it described as "self-evident"[39], and found that a "generalized information" or "self-referral" model, by which physicians could provide patients with information concerning resources that would enable that patient to find a non-objecting physician, though more minimally impairing, did not respond to the realities of the vulnerable patient population accessing the services and therefore would not achieve the objective of equitable access to health care. As "patient navigators" the court found that physicians were required to facilitate an appropriate transfer of their patients to another physician, in particular due to their vulnerability.[40]

The court affirmed that the policies represented a compromise between the patients' interests and the physicians' *Charter*-protected religious freedom, stating that the default expectation is that a physician would personally provide their patient with all clinically appropriate services or would provide a formal referral.[41] The effective referral policy struck an appropriate balance.

It is not clear what implications, if any, the Ontario Court of Appeal decision will have on similar issues in British Columbia. The CPSBC's Practice Standards and Guidelines do not appear to require as much as is required by the CPSO's effective referral policy. However, the court did confirm that a formal referral is not required,[42] which accords with the current expectations of the CPSBC.

Nonetheless, as the scope of MAiD Legislation evolves, which is likely given the recent developments and continued pressure to address issues like advance requests and mental disorder as the sole underlying medical condition, it is likely that conscientious objection to MAiD will continue to be a battleground.

As is apparent in the case of Dr. Ellen Weibe, who was cleared of wrongdoing by the CPSBC in July 2019 for providing MAiD to a resident of a faith-based institution in direct contravention of its policy against MAiD on its site, there continue to be complicated questions that will need to be addressed with respect to how to effectively reconcile conflicts between individuals' access to MAiD and institutions and individuals' religious freedoms. It is presently unclear what, if any, recourse a faith-based institution may have in the face of a physician who complies with the

37 *Ibid* at para. 101.

38 *Ibid* at para. 102.

39 *Ibid* at para. 138.

40 *Ibid* at para. 160.

41 *Ibid* at para. 187.

42 *Ibid* at para. 26.

requirements of the MAiD Legislation but contravenes their policy against the administration of MAiD on its site. Whether a faith-based institution can enforce policies against the provision of MAiD is an open question in light of the outcome of the case of Dr. Weibe.