Roundtables on Medical Assistance in Dying: Discussion Paper
January 2020

1. Background

In 2016, the federal government tabled Bill C-14 to make amendments to the *Criminal Code* to allow physicians and nurse practitioners to provide medical assistance in dying (MAID) in accordance with specified eligibility criteria and safeguards (Annex A). The law, as adopted by Parliament, limits eligibility to competent adults whose "natural death was reasonably foreseeable" and put safeguards in place to protect vulnerable persons. In 2015, Quebec also enacted a comprehensive MAID regime under its *End-of-Life Care Act*.

During the debate on Bill C-14, many Canadians and parliamentarians voiced their support for a more expansive regime, including extending eligibility to persons who were not nearing the end of life, and allowing advance requests for MAID.

Given the complexity of some of the issues raised and uncertainty around how such a regime could be implemented, the Government of Canada committed to further study on three complex types of requests (i.e., requests by mature minors, advance requests, and requests where a mental illness is the sole underlying condition). The Council of Canadian Academies was selected to undertake independent reviews on these issues, which were finalized in December 2018. The reports and a summary are available on the CCA's website. Parliament also committed to review the law after five years (by Summer 2020).

Implementation of MAID in Canada

Since the implementation of the legislation, more than 6,700 cases of MAID have been reported, which represents slightly over 1% of all deaths in Canada. By comparison, the percentage of MAID related deaths in other permissive regimes range from 0.3% of all deaths (in the United States where patients must be at the end of life and only self-administration is permitted) to 4.6% (in Benelux countries where eligibility is based on suffering rather than proximity to death and clinician administered MAID is permitted).

In Canada, the average age of persons receiving MAID is approximately 72, with men and women equally represented. Since the implementation of the regime, cancer has consistently been identified as the most frequent underlying medical condition for MAID cases, followed by neurological conditions and cardiovascular and respiratory conditions. The profile of persons receiving MAID is consistent with what one would expect in a regime where eligibility is limited to persons nearing the end of life, and does not raise concerns about abuse of the system. More detailed data on requests for, and cases of, MAID is currently being collected through Health Canada's MAID monitoring system which was implemented in November 2018 (Health Canada's *Fourth Interim Report on Medical Assistance in Dying in Canada*).

Evolution of MAID in Canada

On September 11, 2019, the Superior Court of Québec found in *Truchon v. Attorney General of Canada* that the "reasonable foreseeability of natural death" requirement in the federal

legislation and the "end-of-life" requirement contained in Quebec's legislation are unconstitutional. The remaining criteria are unchanged (i.e., a person must have a serious and incurable illness, disease or disability, be in an advanced state of irreversible decline, and experience unbearable physical or mental suffering that cannot be alleviated under conditions considered acceptable by the individual). Details are in Annex A.

These criteria continue to be valid until the decision comes into effect on March 11, 2020. This ruling only applies in the province of Québec, which means that the "reasonable foreseeability of death" criterion will remain in effect in other provinces and territories until such time as federal law is amended. A synopsis of the decision may be found in the meeting package.

Alongside calls to expand the availability of MAID, there has been considerable public support expressed for removing the requirement for final consent immediately before MAID and for allowing advanced requests for this procedure. In November 2019, the Quebec government released an expert report examining the question of permitting advance requests for MAID, and it has committed to launching all-party public hearings in early 2020 on the issues examined in the report.

While the parliamentary review of the legislation will provide an opportunity to undertake a comprehensive review of all aspects of the legislation, the Government of Canada has committed to responding to the Truchon decision before the March 11 deadline by expanding eligibility for MAID beyond persons nearing the end of life.

Key issues for discussion

There are three key areas where the Government is currently seeking the views of Canadians: changes to eligibility criteria; modified and/or additional safeguards; and, final consent and advanced requests.

a) Eligibility criteria

Currently, MAID is limited to people whose natural death is reasonably foreseeable (RFND). If the requirement for RFND is removed, this means that people with severe but not necessarily life-threatening conditions (e.g., advanced multiple sclerosis or rheumatoid arthritis, cerebral palsy) could be eligible for MAID if they meet all the other requirements set out above. This may also include people suffering from severe and persistent mental illness, or those with both a mental illness and a serious physical condition, if they meet all other requirements.

In their reports, the CCA identified a number of potential implications and considerations associated with extending MAID eligibility to some populations. These include challenges in assessing a patient's capacity to make decisions (which can be confounded by the individual's medical condition or social circumstances) and differences of opinion between the individual and the practitioner regarding the seriousness of the condition or the reasonableness of available treatment options.

Questions for consideration

- In your view, once eligibility is no longer limited to those whose death is reasonably foreseeable, are the remaining eligibility criteria a reasonable basis for determining eligibility?
- Would these criteria provide sufficient protection for persons who may be vulnerable to pressure or societal norms suggesting their life has lesser value? If not, how would you recommend they be modified or replaced or complemented by something different?
    - Do you think removal of the RFND provision will change the interpretation of the requirement that someone be in an advanced state of irreversible decline ? Do you think that this criterion should be modified, removed or replaced with something different?
    - *For practitioners:* in your practice, how have you interpreted the "grievous and irremediable" eligibility criteria when making decisions about eligibility?
- Are there particular populations you feel may be at greater risk? What is the nature of that risk?
- How would expanding eligibility for MAID affect the clinical practice of MAID assessors or providers?
- Are there any health care system impacts associated with expanding eligibility? What are they?

b) Safeguards

MAID has aspects that fall under both federal and provincial jurisdiction. While federal legislation establishes certain MAID eligibility criteria and safeguards that apply throughout Canada as a matter of criminal law, provinces and territories (and health authorities and regulators under their jurisdiction) are responsible for the policies and processes that guide the administration of MAID within the health care system.

When the law was designed, a number of safeguards were included to protect people from being pressured or coerced into considering MAID by individuals (family, health care provicders or others) or by social or economic circumstances. The safeguards are also intended to ensure that Canadians are able to make informed decisions about MAID and end-of-life care. The removal of RFND may create new risks for different populations as they consider whether they want MAID.

In your responses, please consider the two key mechanisms for the mitigation of any risks to population groups who may become eligible as a result of removing RFND: (1) legislative safeguards under the *Criminal Code* and (2) resources within the health care system that build upon the standards of good medical practice currently used by practitioners in the application of MAID and regulatory oversight.

Questions for consideration

- In your opinion, how effective are the existing safeguards (listed in Annex A) at enabling access to MAID while protecting those who may be vulnerable?

- Annex B lists safeguards that are used in other permissive regimes around the world. Would any of these safeguards serve to mitigate possible risks associated with an expanded MAID regime?
    - Which, if any, do you see as being most effective/applicable in the context of an expanded Canadian regime?
    - In your view, which (if any) of the listed safeguards should be mandated through criminal legislation and which (if any) should be implemented within the health care system through standards of good medical practice and regulatory or professional oversight?
- In your opinion are there some safeguards that should only be applied in particular circumstances or to vulnerable populations?
- Can you suggest any additional safeguards that might address concerns associated with protection of vulnerable persons?
- Do you have any concerns with the practical implementation of any of the suggested safeguards?
- Are there circumstances where it would be inappropriate for a provider to raise or discuss MAID with a patient?

c) Advance requests and other issues

The federal legislation requires that a person who has been found eligible for MAID give their final consent immediately before receiving MAID. This safeguard allows practitioners to confirm that a person has not changed their mind, but it also prohibits practitioners from providing MAID if a person is not able to provide consent at the time of administration.

The CCA report on advance requests explored the risks and benefits and highlighted the ethical complexities associated with the practice.

Questions for consideration

- Imagine that a person makes a request for MAID, is found to be eligible, and is awaiting the procedure. A few weeks before the procedure, the person loses the capacity to make health care decisions, and can not provide final consent immediately before the procedure. In your opinion, should a physician or nurse practitioner be allowed to provide MAID to a person in these circumstances?

Imagine that a person is diagnosed with a medical illness that will, over time, affect their decision-making capacity, such as Alzheimer's disease. The person prepares a document that says they consent to receive MAID if specific circumstances arise at a later date, after they no longer are able to consent.

- In your opinion, should a physician or nurse practitioner be allowed to provide MAID to a person in this situation once the circumstances in their document have arisen and they otherwise meet the MAID criteria, even if they can no longer consent?
- Would your opinion be different if the person was in an end of life situation?

- Do you have any suggestions regarding how an advance request could be operationalized in each of the abovementioned scenarios?
    - For example, what would be the prompt to provide MAID? A date specified by the individual? Agreement that the conditions outlined by the individual have been met? Other?
    - Should there be other parameters that should be considered, such as renewal of the advance request after a prescribed period of time, witnesses, requirements for substitute decision makers, etc?
- Do you have any additional comments that have not been covered in the discussion so far?

Background documents

Hyperlinks

- Bill C-14 - *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)* (2016)
- Quebec's *Act respecting end of life care* (2015)
- Findings from the *CCA Expert Panel on Medical Assistance in Dying* (2018)
- Health Canada's *Fourth Interim Report on Medical Assistance in Dying in Can*ada (2019)
- Quebec Superior Court Decision *Truchon v. Attorney General of Canada* (2019)
- Québec report on advance requests – *L'aide médicale à mourir pour les personnes en situation d'inaptitude : le juste équilibre entre le droit à l'autodétermination, la compassion et la prudence* (2019)

Attached

Summary of Supreme Court of Canada Decision *Carter V. Canada* (2015)
Summary of Truchon decision
EN translation of QC report recommendations on Advance Requests

ANNEX A

MAID Eligibility Criteria and Safeguards in the *Criminal Code*

Eligibility Criteria	**Safeguards**

The person must:
• Be 18 years of age or older;
• Be eligible for publicly funded health care services in Canada;
• Have the capacity to make health care decisions;
• Make a voluntary request that is not the result of external pressure;
• Provide informed consent after having been informed of all available options to relieve their suffering, including palliative care;
• Have a "grievous and irremediable medical condition" defined as:
  ○ Having a ***serious and incurable*** illness, disease or disability;
  ○ Being in an ***advanced state of irreversible decline*** in capability;
  ○ Experiencing ***intolerable physical or psychological suffering*** that cannot be relieved under conditions that the person considers acceptable; and,
  ○ The ***natural death*** of the person must have become ***reasonably foreseeable***, taking into account all medical circumstances, without requiring a prognosis.
	• Request for MAID must be in writing after the person is informed that they have a grievous and irremediable condition;
	• Written request must be witnessed and signed by 2 independent witnesses;
	• 2 independent medical practitioners must confirm that all eligibility criteria have been met;
	• Main medical practitioner must confirm that the request has been made freely, without undue influence;
	• 10-day reflection period must elapse before MAID is provided unless death or loss of capacity imminent;
	• Person must be informed of the right to withdraw consent at any time;
	• Person must be given an opportunity to withdraw consent and must expressly confirm consent immediately before MAID is provided;
	• If the person has difficulty communicating, all necessary measures must be taken by the doctor or nurse practitioner to provide a reliable means by which the person may understand the information provided to them and communicate their decision.

ANNEX B
Select safeguards from other permissive regimes

a) Longer reflection period (more than the current reflection period of 10 days) before MAID can be provided

b) MAID is available when the practitioner agrees with the patient that reasonable treatments and options to relieve the unbearable suffering have been tried

c) Mandatory psychological or psychiatric assessment to evaluate the person's capacity to consent to MAID

d) Ensure that the person is aware of all the means available to relieve their suffering, including health and social support services (counseling, disability support, palliative care)

e) Mandatory consultation with an expert in the person's medical condition and circumstances (gerontologist, psychiatrist, social worker)

f) Retrospective review of all MAID cases by a committee to verify that the eligibility criteria and safeguards were satisfied

g) Training/tools to assist medical practitioners to asses areas of potential vulnerability, for instance, assess capacity, prognosis and voluntariness of the MAID request; what, if any, resources currently exist that could be used to assess vulnerability?

h) Encourage involvement of family members/loved ones unless the person refuses

FOR INFORMATION

CASE SUMMARY

Carter v Canada, 2015 SCC 5, [2015] 1 S.C.R. 331

In *Carter*, the Supreme Court of Canada (the "Court") held that the criminal laws prohibiting assistance in dying limited the rights to life, liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in a manner that was not demonstrably justified under section 1 of the Charter. The *Criminal Code* provisions at issue were paragraph 241(b), which prohibits assisting suicide, and section 14, which provides that no person may consent to death being inflicted on them.

Life, Liberty and Security of the Person

Consistent with its earlier *Rodriguez* decision, the Court held that the laws prohibiting physician-assisted dying interfere with the liberty and security of the person of individuals who have a grievous and irremediable medical condition. They interfere with liberty by constraining the ability of such individuals to make decisions concerning their bodily integrity and medical care, and with security of the person by leaving such individuals to endure intolerable suffering. The Court also held that the laws deprive some people of life by forcing them to take their own lives prematurely for fear that they would be incapable of doing so when they reached a point where their suffering was intolerable.

Principles of Fundamental Justice – section 7

In order to comply with section 7 of the *Charter*, a deprivation of life, liberty or security of the person must accord with the principles of fundamental justice. The principles at issue in *Carter* were those against arbitrariness, overbreadth and gross disproportionality. An arbitrary law is one that "exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law." An overbroad law is one that may be rational in general but denies the rights of some individuals in a way that bears no relation to the legislative purpose. A grossly disproportionate law is one that, while it may further the legislative objective, has negative effects on life, liberty or security of the person that are so extreme as to be "totally out of sync" with the object of the law.

The Court held that the prohibition on assistance in dying is not arbitrary because it "clearly helps achieve" the legislative objective of protecting vulnerable persons from being induced to die by suicide at a moment of weakness. However, the prohibition was found to be overbroad because it applies to individuals who are not vulnerable, thereby denying the rights of some people in a way that bears no relation to the purpose of the law. The Court found it unnecessary

to decide the issue of gross disproportionality in view of its conclusion that the prohibition is overbroad.

Section 1

Limitations of *Charter* protections are constitutional if they are reasonable and demonstrably justified pursuant to section 1 of the *Charter*. The Court concluded that the section 7 limitation was not justified. Although the Court accepted that the absolute prohibition on assistance in dying furthers a pressing and substantial objective, it concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error and that the absolute prohibition goes farther than reasonably necessary to achieve the legislative purpose.

Remedy

The Court explained that the appropriate remedy was:

"a declaration that s. 241(b) and s. 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."(para 127)

The Court went on to specify that the scope of the declaration was "intended to respond to the factual circumstances in this case" and to highlight that it was making "no pronouncement on other situations where physician-assisted dying may be sought." The factual circumstances that were the focus of the Court's analysis were those of Gloria Taylor, who suffered from amyotrophic lateral sclerosis (ALS), a fatal neurodegenerative disease. The Court noted elsewhere in the judgment that assistance in dying in other situations, such as for "minors or persons with psychiatric disorders or minor medical conditions" would not fall within the parameters suggested in its reasons.

The Court suspended the declaration of invalidity for 12 months to give Parliament and provincial legislatures time to respond. It acknowledged that the legislative response would likely involve a "complex regulatory regime" and that Parliament "faces a difficult task" in balancing the competing social interests of those who might be at risk in a permissive regime against those who seek assistance in dying. It also suggested that a high degree of deference would be owed to the regime ultimately adopted by Parliament.

On January 15, 2016, the Court granted a four-month extension of the suspension, with the result that the declaration of invalidity would take effect on June 6, 2016.

CASE SUMMARY[1]

Truchon c. Procureur général du Canada, 2019 QCCS 3792

On September 11, 2019, the Superior Court of Quebec struck down one of the eligibility requirements for accessing medical assistance in dying (MAID) in Canada, the requirement that the person's natural death must be reasonably foreseeable (RFND).

Both plaintiffs had been refused MAID under the Quebec end-of-life care legislation as they were deemed not to be "at the end of life". They also did not meet the *Criminal Code* requirements regarding MAID as the ends of their lives were not "reasonably foreseeable".

Section 7 of the Charter - Life, Liberty and Security of the Person

The Court ruled that the RFND requirement violated section 7, which protects against deprivations of life, liberty and security of the person that do not accord with the principles of fundamental justice. The Court determined that the sole objective of the RFND requirement in the *Criminal Code* is to protect vulnerable persons who might be induced to end their lives in moments of weakness. Two other legislative objectives put forward by the Attorney General of Canada--the affirmation of the inherent and equal value of every person's life and the importance of preventing suicide – are statements of social values, rather than objectives of the law.

First, the requirement gives rise to a deprivation of section 7 interests by denying all non-dying persons from accessing MAID, and by forcing some people (who would otherwise seek MAID) into prolonging their lives of suffering or resorting to death by other degrading or violent means. Second, the eligibility requirement was not in accordance with the principles of fundamental justice because it was overbroad and disproportionate to its purpose of protecting vulnerable persons.

Finally, the Court ruled that the reasonable foreseeability of death requirement could not be justified by section 1 of the *Charter*, which permits reasonable limits on Charter rights in furtherance of important state objectives. The Court concluded that the RFND requirement was not justified under section 1 because the impact on the plaintiffs' rights went further than necessary to protect vulnerable groups and because the other eligibility criteria for MAID were sufficient to protect vulnerable people. The Court accepted evidence that physicians are able to assess their patients' capacity; they can identify signs of ambivalence, mental problems that could affect a patient's decision-making process, or cases of abuse or coercion.

Section 15 of the Charter -- Equality Rights

The next ruling was that the RFND requirement violated the equality guarantee in section 15. The Court held that the requirement creates a distinction between people with different types of disabilities based on whether their disability is associated with a decline toward death or not, as

[1] The full text of the judgement, translated into English, is available at: https://www.canlii.org/en/qc/qccs/doc/2019/2019qccs3792/2019qccs3792.html?resultIndex=10

well as a distinction between able-bodied individuals and individuals who, by virtue of their disability, are not able to die by suicide without assistance. The Court held that the distinction is discriminatory because it is based on a stereotype that persons with disabilities are incapable of making the "right decisions" concerning their bodies and their lives, and are thus unable to fully consent to MAID. The Court found that doctors can distinguish between a suicidal patient and a patient who seeks MAID and that there are many substantial differences between suicide and MAID.

It also found that vulnerability must be assessed on an individual basis and not in regard to a group of "vulnerable people". The Court accepted evidence that physicians are able to assess risk factors of vulnerability and the capacity of the patient to understand and consent to MAID. The Court found that the RFND requirement was not proportional to the objective of protecting society and was more than a minimal limit on equality rights and therefore not justified under section 1.

Remedy

The RFND provision in the *Criminal Code* and the end of life requirement in the Quebec legislation were declared invalid. The Court suspended its declaration for six months from the date of judgment, that is, until March 11, 2020. In addition, the plaintiffs were granted an exemption to be considered for MAID even though they did not meet the current RFND or end of life requirements.