

Medical Assistance in Dying (“MAID”) from a Regulator’s Perspective

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By and Alexandra Wilbee

The recent legalization of medical assistance in dying (also known by the abbreviation “MAID”) is one of the most radical and significant changes to the Canadian health care system in the last century.

On December 7, 2016, the Minister of Health and Long-Term Care in Ontario introduced Bill 84, the *Medical Assistance in Dying Statute Law Amendment Act, 2016*. If passed, Bill 84 will amend various provincial Acts in response to the federal legislation dealing with medical assistance in dying.

The federal legislation, Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, came into force on June 17, 2016. Bill C-14 created a federal legislative framework allowing for medical assistance in dying in Canada in certain circumstances.

Bill C-14 followed from the decision of the Supreme Court of Canada in *Carter v. Canada (Attorney General)*. The focus of that case was on physician-assisted death, where a physician provides or administers medication that intentionally brings about the patient’s death, at the request of the patient. Historically, pursuant to the *Criminal Code*, it has been a crime in Canada to assist another person to end their life. In the *Carter* case, the Supreme Court of Canada unanimously decided that these provisions of the *Criminal Code* should be “of no force or effect to the extent that 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.”¹ The Supreme Court of Canada suspended the effect of this ruling for a period of time, in order to allow time for the government to respond and amend the legislation accordingly.

Summary of Bill C-14

Generally, it remains a criminal offence to aid a person to die by suicide in Canada. However, Bill C-14 enacted exemptions to allow for MAID in Canada. As defined in Bill C-14, “medical assistance in dying” means:

- (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.

In terms of eligibility, 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.

A person has a “grievous and irremediable medical condition”, as defined in Bill C-14, 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.

Given the consequences of a decision to proceed with medical assistance in dying, the legislation includes a number of procedural safeguards that must be followed in order to be in compliance with the law and to be protected from criminal liability. These include the following:

- (a)?a written request for MAID;
- (b)?two independent witnesses to the request;
- (c) a second written opinion from another independent medical practitioner or nurse practitioner; and
- (d) a ten day waiting period between the request and the provision of MAID, unless “the person’s death, or the loss of their capacity to provide informed consent, is imminent”.

Role of Regulated Professionals in MAID

Despite the existence of this new legislation, regulated professionals who are asked about MAID may still be concerned about the potential for legal action against them. Bill C-14 provides for exemptions from criminal liability for medical practitioners, nurse practitioners, pharmacists, and other individuals who aid in providing a person with MAID, provided that it is carried out in accordance with the legislation. It should be noted that Bill C-14 specifically indicates 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.” For example, in practice, this may mean that a nurse practitioner in Ontario may not be in a position to fulfill the role contemplated in Bill C-14.

“For greater certainty”, Bill C-14 further provides that “no social worker, psychologist, psychiatrist, therapist, medical practitioner, nurse practitioner or other health care professional commits an offence if they provide information to a person on the lawful provision of medical assistance in dying.” While it is notable that this is not an exhaustive list of professions, this provision appears to be intended to clarify the legal distinction between providing information and “counselling” a person to die by suicide, as the latter remains a criminal offence.

In addition to the federal legislation, Bill 84, if passed, would offer immunity from civil actions and any other proceedings for damages “instituted against a physician or nurse practitioner or any other person assisting him or her for any act done or omitted in good faith in the performance or intended performance of medical assistance in dying.” However, as it is currently drafted, this would “not apply to an action or proceeding that is based upon the alleged negligence of a physician, nurse practitioner or other person.”

In any event, for those who remain reluctant to participate in MAID or who have conscientious objections, both the Supreme Court of Canada in *Carter v. Canada* and Bill C-14 have indicated that such a person is not compelled to provide or assisting in providing MAID directly. In practice, this may pose difficulties for access to MAID, such as for individuals who are in remote communities or confined to a particular institution. In Ontario, the Ministry of Health and Long-Term Care has established a toll free referral support line to help clinicians with referrals for patients requesting MAID.

MAID Statistics To Date

Given the legislation, medical assistance in dying is no longer merely a theoretical issue in Canada. MAID is an issue that many regulated professionals have already been faced with in their practices. Indeed, hundreds of Canadians in several provinces have been provided with legal MAID.² According to statistics provided by the Office of the Chief Coroner for Ontario, between June 17 and November 26, 2016, 135 Ontarians died by way of MAID, including 133 physician-administered deaths and 2 patient-administered deaths. The majority of these patients had cancer-related conditions, and others had ALS or other neurological conditions. Approximately half died in hospitals, and the rest died at home, including in residences for seniors or long term care facilities.

Role of Regulatory Bodies

The legislation directly affects medical practitioners, nurse practitioners, and other regulated professionals who are involved in the provision of MAID in practice. As a result, several regulatory colleges across the country have published policies or guidance for their members.

While the federal legislation was intended to address the issues raised by the Supreme Court of Canada in *Carter v. Canada*, there remain many unanswered questions to date. For example, what does “reasonably foreseeable” mean in practice? There are ongoing constitutional challenges to the legislation. The Council of Canadian Academies has been requested by the federal government to review the outstanding issues of access to MAID in cases involving mental illness as the sole underlying condition, mature minors (under 18 years of age), and advance directives; and those reports are not expected until 2018.

Going forward, professional self-regulatory bodies should endeavor to be in the best possible position to provide accurate and current answers to these difficult questions for their members and their professional responsibilities with respect to MAID. This will require ongoing monitoring of the developing legislative and regulatory framework for MAID in Canada, including the progress of the *Medical Assistance in Dying Statute Law Amendment Act* through the legislature in Ontario following the winter break.

For More Information or Inquiries

Alexandra Wilbee will be presenting on the topic of Medical Assistance in Dying at WeirFoulds LLP on the morning of Thursday, March 30, 2017. For more information or inquiries, please contact her at 416-619-6295 or awilbee@weirfoulds.com. To RSVP to this event, please contact events@weirfoulds.com.

[1] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 147.

[2] Kelly Grant, “Incomplete stats paint fuzzy picture of assisted-death impact in Canada”, *The Globe and Mail*, October 6, 2016.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.

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